

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Respondent

Respondent.

DECISION and REMAND ORDER

Complaint No. C02050006

Dated: February 12, 2007

Registered representative failed to provide fully on-the-record testimony requested by NASD staff. Held, Hearing Panel's findings of liability affirmed. Sanctions vacated and case remanded to determine appropriate sanctions.

Appearances

For the Complainant: Jacqueline D. Whelan, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: I. Reza Garakhani, Esq.

Decision

Respondent appeals a Hearing Panel decision, pursuant to NASD Procedural Rule 9311. After a thorough review of the record, we affirm the Hearing Panel's findings that Respondent failed to answer certain questions posed by NASD staff during an on-the-record investigative interview, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. We vacate, however, the sanctions imposed by the Hearing Panel and remand this matter for a determination of appropriate sanctions.

I. Background

A. Employment History

Respondent entered the securities industry in 1995. He was associated with Firm A as a general securities representative from 1996, until 2001. He was next associated with another member firm as a general securities representative from January until April 2002. Finally, Respondent was associated with a third member firm as a general securities representative from April 2002 until March 2003. Respondent is not presently associated with any NASD member.

B. Procedural Background

In a single-cause complaint, the Department of Enforcement (“Enforcement”) charged Respondent with misconduct in violation of NASD rules. The complaint alleged that Respondent failed to answer certain questions posed to him by NASD staff during an on-the-record investigative interview, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent filed an answer in which he denied having engaged in any misconduct and requested a hearing.

Pursuant to NASD Procedural Rule 9264, Enforcement filed a motion seeking summary disposition with respect to both liability and sanctions for the misconduct alleged in Enforcement’s complaint. Consistent with the requirements of Procedural Rule 9264(d), Enforcement’s motion was supported by a statement of undisputed facts, a memorandum of points and authorities, and the declaration of the NASD investigator that conducted Respondent’s investigative interview. Respondent filed a response in opposition to Enforcement’s summary disposition motion that was supported by a counter-statement of facts in dispute, a memorandum of points and authorities, and a declaration executed by Respondent.

By order, the Hearing Panel granted Enforcement’s motion for summary disposition. The Hearing Panel set forth the bases for its order in a decision. The Hearing Panel concluded that there existed no genuine issues of material fact and that, as a matter of law, Respondent violated NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to provide full and complete testimony before NASD staff. For this misconduct, the Hearing Panel barred Respondent from associating with any NASD member in any capacity.

Respondent’s timely appeal followed.

II. Facts¹

NASD commenced an investigation in December 2002 concerning statements issued in July 2003 by Firm A for certain hedge fund customer accounts serviced by Respondent. NASD staff issued a written request that Respondent provide on-the-record testimony pursuant to NASD Procedural Rule 8210.²

In September 2005, pursuant to this request, Respondent provided on-the-record testimony to NASD staff concerning his dealings with “SB” and “CS,” two individuals responsible for investing the assets of certain hedge funds. Staff’s questioning focused primarily upon an account held at Firm A in the name of the “Fund,” and Respondent’s handling of complaints received from SB and CS concerning errors allegedly committed by Firm A in executing and reporting certain option transactions on behalf of the Fund. Respondent answered fully each question posed to him by NASD staff during this first interview session.³ After testifying for approximately two hours, the parties mutually agreed to adjourn Respondent’s investigative interview and continue at a later date.

At the end of his testimony NASD staff requested that Respondent provide copies of documents that NASD staff believed might augment documents provided to NASD by Commission staff.⁴ Respondent agreed to provide the documents requested.⁵ In turn,

¹ The facts stated herein represent the undisputed facts and evidence set forth by the parties in support of and in opposition to Enforcement’s motion for summary disposition.

² The addendum accompanying staff’s request for Respondent’s testimony advised that Respondent was obligated to answer all questions asked by NASD staff and that his failure to do so could subject him to disciplinary action and the imposition of sanctions. The addendum further advised Respondent that he could inspect and purchase a copy of the official transcript of his on-the-record interview. Finally, the addendum stated that “NASD staff does not release copies of exhibits to testimony but you may review these exhibits at NASD’s offices.”

³ In November 2001, Respondent was served with a Securities and Exchange Commission subpoena, in an investigative matter concerning SB and CS, requesting that Respondent produce documents and provide testimony. In response to the subpoena, Respondent asserted his Fifth Amendment privilege against self-incrimination “as to all matters.” Although Respondent initially requested the postponement of his NASD testimony until a date after the completion of the Commission’s investigation concerning SB and CS, Respondent complied with the request that he appear and subject himself to questioning by NASD staff.

⁴ Despite earlier informing the Commission of his intention to assert his Fifth Amendment privilege “as to all matters,” Respondent ultimately provided Commission staff with certain documents concerning his handling of the Fund account. Commission staff later provided copies of these documents to NASD.

⁵ Subsequent to his first day of testimony, NASD staff also requested, by electronic mail sent to his counsel, that Respondent provide certain additional information. Respondent complied and provided the information requested.

Respondent requested that he be permitted to inspect, before testifying again, all documents within NASD's investigative files relating to Respondent. NASD staff at first consented to Respondent's request and established a date for his inspection. Prior to that date, however, NASD staff reversed their position. They informed Respondent that he could inspect only those documents that Respondent provided to the Commission and that NASD staff would not permit Respondent, prior to the completion of his on-the-record testimony, to inspect any documents obtained from anyone other than Respondent.

In November 2003, Respondent appeared before NASD staff to provide additional on-the-record testimony. Respondent testified fully for approximately one hour about various issues, at which point NASD staff marked certain documentary evidence for identification as an exhibit.

NASD staff marked for identification as "Exhibit 1" to Respondent's testimony a compilation consisting of 70 pages of e-mails and other documents. A copy of this exhibit was presented to Respondent and his counsel for reference during Respondent's interview.

Respondent's counsel asked NASD staff whether he could obtain a copy of the exhibit for his files. Staff responded that he could not. Counsel then inquired whether a copy of the exhibit would be attached to the official transcript of Respondent's interview. NASD staff stated that it would not. NASD staff explained that NASD does not, as a matter of policy, provide interview witnesses with copies of exhibits compiled from documents provided by other persons. Staff stated that such documents are maintained in NASD's files and generally would be available for inspection after the completion of testimony.

In response, Respondent's counsel noted that NASD staff had previously informed Respondent that he could inspect certain documents maintained within NASD's files, only to then have the staff unilaterally withdraw that invitation before the second day of Respondent's testimony. Thus, notwithstanding the staff's on-the-record assurances, Respondent's counsel objected to the use of any documents that were not either provided to Respondent and his counsel for their files or attached to the transcript of Respondent's testimony.

After acknowledging counsel's objection on the record, NASD staff proceeded to question Respondent concerning page one of Exhibit 1. Respondent answered the questions posed to him concerning this excerpt of Exhibit 1 for which he possessed personal knowledge. NASD staff continued their interview of Respondent with questions concerning the second page of Exhibit 1. Respondent answered staff's questions.

When staff began questioning Respondent, however, concerning a fax cover sheet from SB to Respondent dated June 24, 1999 (page seven of Exhibit 1), counsel for Respondent again interposed his objection to staff's use of documentary evidence during Respondent's interview. Counsel stated that, by not either providing a copy of the document for Respondent's keeping or attaching the exhibit to the interview transcript, NASD could not assure Respondent that the interview exhibits would not be lost, mishandled, or otherwise altered at a later date. Counsel stated that, absent the implementation of his suggested "precautions," he would advise Respondent not to

answer any additional questions concerning exhibits presented to him by NASD staff during his testimony.⁶

NASD staff reiterated that the exhibits to investigative interviews become part of NASD's record of the matter at issue and are maintained in NASD's files by staff for inspection at a later date.⁷ This response, however, proved insufficient to allay counsel's objections. Respondent's counsel stated that "we are not going to testify on a document to which we're not going to be given a copy or attached to the record . . . I'm going to instruct [Respondent] not to answer any questions if that's the line you're going to take." Indeed, when NASD staff returned to questioning Respondent about the exhibit before him, Respondent complied with his counsel's instruction to him not to answer NASD staff's questions.

When NASD staff asked Respondent whether he would answer any further questions concerning any documents to be identified as exhibits during his testimony, Respondent's counsel stated "I will instruct my client not to answer any of those questions" and Respondent compliantly stated that, "under the advice of counsel, that's my position."

NASD staff then explained to Respondent that they planned to terminate his testimony. Staff further stated that they intended to recommend that NASD commence disciplinary proceedings against Respondent and bar him for violating NASD Procedural Rule 8210.

Respondent and his counsel acknowledged the portent of staff's position.⁸ NASD staff thereafter adjourned the interview without any additional questioning of Respondent.

⁶ Counsel for Respondent also offered as an alternative safeguard reading the contents of the exhibits into the record.

⁷ NASD staff's response to counsel's objection was, in its entirety:

Okay. At this point, I'm just telling you that this is the way it is going to be done. I can't possibly, unless I put this under some sort of armed guard, give you assurances that nothing will happen. I will give you our statement, our position, that this document becomes part of the NASD record, this will be kept in our files. And unless you're insinuating that I or someone on the staff would alter this document, there is no way for the document to be altered. I want to leave it at that point. I'm not going to go through further discussions. Either [the Respondent] is going to answer the questions or not. You tell me.

⁸ In response to NASD staff's statements that they would seek to bar him, Respondent's counsel stated "[w]e understand that" and Respondent stated "if you need to bar me, . . . do what you gotta do."

III. Discussion

A. Standards for Summary Disposition

NASD Procedural Rule 9264(a) provides that a party to a disciplinary proceeding may make a motion for summary disposition of any or all of the causes of action filed against a respondent. Pursuant to Procedural Rule 9264(e), a 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.”

A party seeking summary disposition bears the “initial responsibility” of informing an adjudicator “of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, . . . and admissions on file, together with the affidavits, if any,’ which it believes demonstrates the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).⁹ Once the moving party has carried its burden, the party opposing summary disposition is required to come forward with “‘specific facts showing that there exists a *genuine issue*’” for hearing. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

When determining whether summary disposition is appropriate, an adjudicator’s function is not to weigh the evidence and determine the truth of the case presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). An adjudicator must instead determine whether the evidence presents a disagreement sufficient to require submission to fact finding. *Id.* at 251-252. When the record as a whole could not lead a rational adjudicator to find for the nonmoving party, no genuine issues exist that warrant a hearing. *Matsushita*, 475 U.S. at 587. If, however, the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, then the motion for summary disposition should be denied. *Anderson*, 477 U.S. at 248.

B. The Hearing Panel Correctly Granted Enforcement Summary Disposition as to Liability, Finding that Respondent Violated NASD Rules 8210 and 2110

By granting Enforcement summary disposition on the issue of liability, the Hearing Panel concluded that there existed no genuine issues with regard to any material fact and that, as a matter of law, Respondent violated NASD Procedural Rule 8210 and Conduct Rule 2110 by refusing to comply fully with staff’s requests for testimony. We agree with the Hearing Panel’s conclusions.

Procedural Rule 8210 grants NASD staff the right to require members and persons subject to NASD jurisdiction “to provide information orally, in writing, or

⁹ In cases involving motions for summary disposition, we look for guidance to Rule 56 of the Federal Rules of Civil Procedure concerning motions for summary judgment. *See, e.g., Dep’t of Enforcement v. U.S. Rica Fin., Inc.*, Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n.3 (NAC Sept. 9, 2003).

electronically . . . and to testify . . . under oath or affirmation . . . with respect to any matter involved” in an investigation, complaint, examination or proceeding. NASD Procedural Rule 8210(a). The rule further enjoins the failure of any member or person to provide information or testimony requested by NASD staff. NASD Procedural Rule 8210(c).

The duty of members and their associated persons to provide information and testimony is thus “*unequivocal*.” *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000) (emphasis added). NASD is entitled to the “*full and prompt*” cooperation of persons subject to its jurisdiction when requests for information and testimony are made by its staff. *Michael David Borth*, 51 S.E.C. 178, 180 (1992) (emphasis added).

The record before us establishes that there exists no controversy over the fact that staff requested that Respondent appear and provide on-the-record testimony. It also is beyond dispute that, upon appearing to testify for his second interview session, Respondent refused to answer certain questions posed to him concerning documents that staff had identified, or intended to identify, as exhibits for use during his testimony.

Respondent asserts, nonetheless, that genuine issues of material fact exist and that the Hearing Panel erred in granting Enforcement summary disposition on the issue of his alleged misconduct. We disagree.

First, Respondent asserts that he testified to the best of his abilities. Respondent thus states that he appeared and provided testimony to NASD staff on two occasions and provided additional documents and information requested by staff during the interstice between interview sessions.

These facts, however, are not in dispute and are immaterial to findings that Respondent violated Procedural Rule 8210.¹⁰ The record is clear that Respondent testified when requested by NASD staff, provided several hours of testimony during two interview sessions, and otherwise provided documents and information that the staff informally requested. In doing so, however, Respondent was not excused from his obligation to cooperate fully and answer all questions posed to him. We have held that a refusal to provide certain information or testimony, even when other requested information or testimony has been provided, is serious misconduct that, after appropriate consideration, may be sanctioned. *See Dep’t of Mkt. Regulation v. Ryan & Co.*, Proceeding No. FPI040002, 2005 NASD Discip. LEXIS 8, at *17, 31 (NAC Oct. 3, 2005) (concluding that respondents’ production of fewer than half of the requested documents did not satisfy the requirements of Rule 8210); *Dep’t of Enforcement v. Van Dyk*, Complaint No. C3B020013, 2004 NASD Discip. LEXIS 12, at *24 (NAC Aug. 9, 2004) (rejecting respondent’s argument that he complied with Rule 8210 by providing selective responses to NASD’s inquiries); *Dep’t of Enforcement v. Bello*, Complaint No.

¹⁰ The substantive law governing a case will identify those facts that are material and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248.

CAF000030, 2002 NASD Discip. LEXIS 10, at *10, 16 (NAC June 3, 2002) (finding that respondent violated Rule 8210 even though he produced four of the six bank statements requested by NASD staff).

Second, Respondent argues that he reached an agreement with NASD staff to review all documents within their possession concerning Respondent and that staff breached that agreement prior to the second day of his testifying. These events, Respondent claims, led to his counsel's demand during the second interview session for certain procedural safeguards to ensure that documents Respondent was questioned about could be appropriately identified at a later date. Providing Respondent the benefit of all inferences which must run in his favor, we conclude that these assertions do not raise any factual or legal controversies that prevented the Hearing Panel from summarily finding that Respondent violated Procedural Rule 8210.

The parties do not dispute that the staff agreed to grant Respondent the opportunity to inspect all documents within NASD's investigative files concerning Respondent prior to his second interview session. There is likewise no contest over the fact that the staff reversed their position and concluded that they would permit the review of only those documents that Respondent previously provided to Commission staff. Finally, it is beyond controversy that Respondent declined, on the second day of his testimony, to answer questions posed by NASD staff about certain exhibits that the staff identified or intended to identify for the record, unless staff provided Respondent and his counsel with copies of the exhibits for their keeping or attached the exhibits to the official transcript.

Procedural Rule 8210 requires that members and their associated persons provide unconditionally information and testimony requested by NASD staff. *See Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *11 (Feb. 13, 2004) (holding that NASD "members and associated persons may not impose conditions . . . under which they will respond to NASD requests for information"); *Sundra Escott-Russell*, 54 S.E.C. 867, 872 (2000) ("Escott-Russell was not free to impose conditions on [her] responses.") (internal quotations omitted); *Michael David Borth*, 51 S.E.C. 178, 181 (1992) ("Members cannot impose conditions on their response to NASD inquiries, and thus an associated person cannot use such a condition as an excuse."). Respondent's refusal to testify concerning exhibits presented to him, unless NASD staff instituted certain "precautions," defied this basic precept. *See Escott-Russell*, 54 S.E.C. at 871-73 (finding that respondent violated her duty to cooperate when respondent's counsel demanded that NASD staff produce documents as a preliminary condition for respondent's cooperation); *John J. Fiero*, 53 S.E.C. 434, 436-37 (1998) (finding respondent's refusal to testify, unless NASD allowed him to obtain a copy of his transcript as soon as it was prepared, flouted his obligation to cooperate in an NASD investigation), *rev'd on other grounds*, 1999 U.S. App. LEXIS 38873 (2d Cir. 1999) (unpublished opinion); *Michael Markowski*, 51 S.E.C. 553, 558 n.16 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994) (finding impermissible a respondent's offer to allow NASD to inspect a firm's books and records provided that the documents sought were identified and a method of production acceptable to respondent's counsel was specified).

That Respondent's objections were prompted by what he and his counsel perceived as concerns regarding the potential corruption of the investigative record does not alter our view of his misconduct. We do not, for purposes of assessing liability under

Procedural Rule 8210, distinguish between conditions interposed by a respondent for claimed procedural purposes and those introduced in an effort to limit NASD staff's questioning "'on some substantive basis.'" ¹¹ See *John J. Fiero*, 53 S.E.C. at 437 ("Fiero tries to distinguish prior cases in which we rejected such attempts as instances where respondents tried to limit NASD questioning 'on some substantive basis.' This suggested distinction has no validity.").

Respondent's objections find their genesis in a contention that NASD staff should, when procuring investigative testimony, follow the protocols routinely afforded witnesses in civil depositions. NASD investigative interviews, however, are not civil depositions. See *Van Dyk*, 2004 NASD Discip. LEXIS 12, at *23 ("Van Dyk should have known that the rules of discovery in civil disputes among individuals did not govern NASD's investigation . . .").

NASD's procedural rules do not provide a witness, during a pendent investigation, the right to either demand copies of documents provided to NASD staff by persons other than the witness or to require that staff stipulate that such documents be attached to the interview transcript. ¹² Instead, after the conclusion of his or her investigative interview, a witness is permitted to inspect the official transcript of their interview and may, under appropriate circumstances, procure a copy of such transcript and any documentary evidence that the witness provided to NASD staff. NASD Procedural Rule 8210(f). Staff's stated policy of permitting a witness to inspect documentary evidence provided to NASD staff by persons other than the witness only after the completion of the witness's testimony thus is not inconsistent with the requirements of NASD's rules.

Any disadvantage to a witness from the lack of an immediate inspection of a document used as an exhibit in an NASD investigative interview is outweighed by the exigencies of the investigation being conducted by NASD staff. If witnesses were permitted the opportunity to obtain copies of documents provided to NASD by persons other than the witness, prior to the completion of an NASD investigation, they would be in a better position to tailor their testimony or to threaten or compromise the testimony of other persons who might also shed light upon the documents provided. *John J. Fiero*, 53 S.E.C at 437 ("The NASD staff acted reasonably in trying to prevent premature disclosure of investigative testimony.").

¹¹ We also do not recognize a claim of reliance upon the advice of counsel as a defense to liability under Rule 8210. See *Valentino*, 2004 SEC LEXIS 330, at *13 ("We have repeatedly held that reliance on counsel does not excuse an associated person's obligation to supply information or testimony or otherwise cooperate with NASD investigations.").

¹² After the filing of a complaint, NASD staff generally must make available for inspection and copying by any respondent documents prepared or obtained by the staff in connection with the investigation that led to the institution of proceedings. NASD Procedural Rule 9251(a)(1).

In opposing Enforcement's request for summary disposition, Respondent states that he concluded that NASD staff intended to mislead him into believing that he would be given an opportunity to review NASD's files before his second day of testimony if he cooperated and voluntarily provided information to staff. Respondent contends that after NASD reversed its position concerning the pre-testimony inspection of documents, he had reason to be suspicious of staff's intentions, which consequently resulted in the objections that led to Enforcement's complaint. Providing Respondent the benefit of all inferences which must run in his favor, we find these assertions immaterial to a finding of liability. Respondent's state of mind is irrelevant for purposes of assessing liability under NASD Procedural Rule 8210. *See Richard J. Rouse*, 51 S.E.C. 581, 585-86 & n.12 (1993) (rejecting argument that a violation of Rule 8210 requires an intentional or deliberate effort to withhold information). Although unfortunate, staff's vacillation did not alter Respondent's duty to answer fully and promptly all questions posed during his testimony.

With no genuine issues of material fact present, we find that Enforcement, as a matter of law, was entitled to summary disposition on the issue of liability. We therefore affirm the Hearing Panel's findings that Respondent violated Procedural Rule 8210 and Conduct Rule 2110.¹³

IV. Sanctions

The NASD Sanction Guidelines ("Guidelines") for cases involving a failure to respond to requests made pursuant to Procedural Rule 8210 recommend that a bar be imposed if an individual did not respond in any manner.¹⁴ Where mitigation exists, or a person did not respond in a timely manner, adjudicators are instructed to consider suspending the individual for up to two years.¹⁵ The Guidelines further suggest monetary sanctions of \$25,000 to \$50,000 for a complete failure to respond and \$2,500 to \$25,000 for a failure to respond in a timely manner.¹⁶

The Hearing Panel barred Respondent from associating with any NASD member in any capacity for his refusal to answer certain questions while testifying during an on-the-record interview. In reviewing the Hearing Panel's decision, we have considered both the Guidelines' principal considerations and the considerations that are specific to

¹³ A violation of Procedural Rule 8210 constitutes a violation of Conduct Rule 2110. *Paz Sec., Inc.*, Exchange Act Rel. No. 52693, 2005 SEC LEXIS 2802, at *1 n.1 (Oct. 28, 2005), *appeal docketed*, No. 05-1467 (D.C. Cir. Dec. 22, 2005). Conduct Rule 2110 provides that all members "shall observe high standards of commercial honor and just and equitable principles of trade." Pursuant to NASD Rule 115 all NASD rules apply to members and persons associated with a member.

¹⁴ *NASD Sanction Guidelines* 35 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

¹⁵ *Id.*

¹⁶ *Id.*

failures to provide information and testimony. In this case, we conclude that the Hearing Panel erred by summarily imposing sanctions.

First, the Guidelines' principal considerations list a number of factors that should be considered in conjunction with the imposition of sanctions in all cases. Among these, it is relevant to consider in determining sanctions for violations of Procedural Rule 8210 whether a respondent's misconduct was intentional¹⁷ and whether the respondent attempted to delay an NASD investigation.¹⁸ We have in the past thus differentiated between willful attempts to obstruct or delay NASD investigations and non-deliberate, non-dilatory conduct. *Compare Valentino*, 2004 SEC LEXIS 330, at *15 ("Valentino's attempts to delay and ultimately avoid her appearance are especially troubling given the importance of Rule 8210."), and *Dist. Bus. Conduct Comm. v. Rudi*, Complaint No. C9A970019, 1997 NASD Discip. LEXIS 59, at *11 (NBCC Dec. 22, 1997) ("[T]here is evidence of willful attempts by Rudi and his attorney to delay the investigation . . ."), with *Dep't of Enforcement v. Benz*, Complaint No. C01020014, 2004 NASD Discip. LEXIS 7, at *25 (NAC May 11, 2004) ("Although Benz did not intentionally delay or obstruct NASD's investigation, he did not fully appreciate the subject matter of NASD's requests, and did not take all necessary steps to respond to NASD's investigation."), *aff'd*, Exchange Act Rel. No. 51046, 2005 SEC LEXIS 116 (Jan. 14, 2005).

The Hearing Panel found that, "[i]n 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, . . . [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." The Hearing Panel erred in making these findings. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts" are appropriate only after an evidentiary hearing and are not functions of a ruling on a motion for summary disposition. *Anderson*, 477 U.S. at 255. The Hearing Panel, for purposes of ruling upon Enforcement's motion for summary disposition, was not permitted to draw negative inferences against Respondent from the evidence put forth by the parties. *See Matsushita*, 475 U.S. at 587-88 ("Respondents correctly note that '[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962))). In its decision to bar Respondent, the Hearing Panel thus wrongly rejected factual assertions put forth by Respondent that his misconduct was not deliberately dilatory.¹⁹

¹⁷ *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

¹⁸ *Id.* (Principal Considerations in Determining Sanctions, No. 12).

¹⁹ The Hearing Panel also rejected, based upon the inappropriately drawn inference that he never intended to testify, Respondent's contention that the sanctions in this case should be mitigated as a result of his reliance upon advice of counsel. Reasonable reliance upon advice of counsel has been recognized as a mitigating factor for sanctions resulting from violations of Procedural Rule 8210 in the rare case. *Compare Valentino*, 2004 SEC LEXIS 330, at *13 ("[Valentino] argues that her reliance on counsel should be considered in mitigation This contention is unavailing."), and *Dep't of Enforcement*

Second, the Guidelines list two specific principal considerations that adjudicators should regard in connection with the imposition of sanctions for violations of Procedural Rule 8210.²⁰

The first of these considerations instructs adjudicators to consider the nature of the information requested.²¹ The Hearing Panel's decision makes no particular reference to this consideration in reaching its decision to bar Respondent. Although we recognize that the Hearing Panel obliquely states that Respondent impeded the staff's ability to pursue its investigation, we cannot find support for this finding in the undisputed facts or evidence put forth by the parties below.²² Respondent refused in this case to answer a specific genus of questions (i.e., questions concerning documentary evidence that NASD staff identified or intended to identify as exhibits to Respondent's testimony). Enforcement, however, in moving for summary disposition, did not include any of the

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v. Steinhart, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at *11 (NAC Aug. 11, 2003) ("Reliance on advice to engage in conduct that is a violation of NASD rules cannot be considered reasonable, especially when the legal counsel or client has knowledge that the advice violates the applicable rule."), *with Dep't of Enforcement v. Erenstein*, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at *19 (NAC Dec. 18, 2006) ("[Erenstein's] refusal to answer one question during the OTR, while a violation of Procedural Rule 8210, was based on counsel's apparently good-faith objection."), *appeal docketed*, No. 3-12529 (SEC Jan. 9, 2007). We find, however, that the Hearing Panel erred in summarily rejecting Respondent's arguments in this regard as a consequence of the negative inferences drawn against him.

²⁰ *Id.* at 35.

²¹ *Id.* (Principal Considerations in Determining Sanctions, No. 1).

²² Enforcement filed before the National Adjudicatory Council ("NAC") subcommittee empanelled to consider oral arguments in this matter a one-half page brief urging the NAC to affirm the Hearing Panel's decision. Enforcement's brief contained no argument or citations to the record. At oral argument, however, Enforcement argued that it could neither conclude its investigation of Respondent nor bring charges against him because of Respondent's obstinacy. Enforcement also asserted that Respondent's refusal to answer questions concerning documents occurred at a time in staff's questioning when Respondent was in greatest jeopardy and thus had every incentive not to testify. We note that the record does not support these arguments, and we are disinclined to affirm the Hearing Panel's decision concerning sanctions based upon arguments raised by Enforcement for the first time at oral argument. *See Dep't of Enforcement v. Sturm*, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *14 n.11 (NAC Mar. 21, 2002) ("Because Sturm did not argue these points below or in his brief, he has waived them."); *cf. Citizens Coal Council v. EPA*, 447 F.3d 879, 905 (6th Cir. 2006) ("The general rule of appellate procedure is that issues not presented in an appellant's initial merits brief are waived.").

documentary evidence with which staff attempted or intended to question Respondent and the record does not otherwise shed light upon the potential violations being investigated by NASD staff. Absent some evidence of the material nature of the information sought to the investigation being conducted by NASD staff, we conclude that the Hearing Panel erred in summarily barring Respondent. *See, e.g., Dep't of Enforcement v. Sahai*, Complaint No. C9B020032, 2006 NASD Discip. LEXIS 2, at *17-18 (NAC Mar. 2, 2006) (finding aggravating for purposes of imposing sanctions that information sought by NASD staff was of crucial and material significance to staff's investigation), *modified*, 2007 SEC LEXIS 13 (Jan. 5, 2007); *Charles R. Stedman*, 51 S.E.C. 1228, 1230-32 (1994) (upholding the sanction of a bar where respondent engaged in dilatory conduct by failing to answer questions that probed the substance of the allegations against him).

Finally, the second principal consideration specific to violations of Procedural Rule 8210 instructs adjudicators to consider whether the requested information has been provided.²³ The Hearing Panel equated Respondent's failure to answer certain questions with a complete failure to respond for purposes of imposing sanctions. The Hearing Panel also rejected Respondent's factual assertion that, after his second day of testimony, and prior to the filing of a complaint in this matter, Respondent informed the staff of his willingness to appear and provide the testimony requested by NASD staff at a time of staff's choosing. We have in the past found mitigating post-violation efforts to comply fully with staff requests for information. *See Erenstein*, 2006 NASD Discip. LEXIS 13, at * 19 (finding it appropriate to give some weight for purposes of assessing sanctions to the fact that respondent produced requested information before a complaint was filed); *Dist. Bus. Conduct Comm. v. Goldstein*, Complaint No. C02950053, 1997 NASD Discip. LEXIS 50, at *23-24, 27-29 (NBCC Aug. 28, 1997) (finding that a bar was not an appropriate sanction where a respondent, albeit late, attempted to produce information that was responsive to the stated purpose of NASD's investigation); *Dist. Bus. Conduct Comm. v. Gowadia*, Complaint No. C01950010, 1997 NASD Discip. LEXIS 68, at *19-20 (NBCC Nov. 5, 1997) ("Gowadia has taken steps, albeit post-complaint, to address the outstanding requests for information . . . we may consider [this] in fashioning a remedial sanction."), *aff'd*, 53 S.E.C. 786 (1998). In considering the evidence put forth by the parties both in support of and opposition to Enforcement's motion for summary disposition, the Hearing Panel was not permitted to reject out of hand factual assertions put forth by Respondent concerning possibly mitigative efforts to comply with staff's requests for information. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.").

In sum, the Hearing Panel erred by summarily imposing sanctions in this case. We conclude that Respondent produced sufficient evidence to raise a question as to the outcome of sanctions in this case and that the record developed to date does not otherwise suggest that the decision to summarily bar Respondent was correct as a matter of law. We therefore remand this case for a hearing to determine the sanctions, if any, to be

²³ *Guidelines*, at 35. If the information was provided, the Guidelines further state that the adjudicator should consider the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response. *Id.*

imposed for Respondent's misconduct. In ordering this remand, we express no view on what sanctions would be appropriate in this matter.²⁴

V. Conclusion

We affirm the Hearing Panel's findings that Respondent violated NASD Procedural Rule 8210 and Conduct Rule 2110. We vacate, however, the sanctions imposed and remand this matter for a hearing on sanctions.²⁵

On behalf of the National Adjudicatory Council,

Marcia E. Asquith, Vice President and Deputy
Corporate Secretary

²⁴ Like all of the sanction ranges set forth in the Guidelines, those applicable to Procedural Rule 8210 violations are neither absolute nor mandatory. *Id.* at 3 (General Principles Applicable to All Sanction Determinations, No. 3). Rather, the Guidelines state that, "[a]djudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case," and "adjudicators must identify the basis for the sanctions imposed." *Id.*

²⁵ We have also considered and reject without discussion all other arguments advanced by the parties.