

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. C11040006

Hearing Officer – DMF

**HEARING PANEL ORDER GRANTING, IN PART, AND DENYING, IN PART,  
COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION**

**1. Procedural History**

The Hearing Panel issued its original decision in this matter on June 14, 2004, granting the Department of Enforcement's motion for summary disposition. Based upon the undisputed facts, the Panel held that Respondent had violated Rules 8210 and 2110 by refusing to provide testimony in an NASD investigation, and barred him from association with any NASD member in any capacity. Respondent appealed the Hearing Panel's decision to NASD's National Adjudicatory Council (NAC), which affirmed the Panel in a decision issued in December 2005. Respondent then appealed the NAC's decision to the Securities and Exchange Commission. In November 2006, the SEC remanded this case to NASD for reconsideration. [Citation omitted.] In turn, on December 1, 2006, the NAC remanded this case to the Hearing Panel.

On December 18, 2006, the Hearing Officer issued an order indicating that "the Hearing Panel will reconsider its June 14, 2004, decision granting Complainant's motion for summary disposition." The parties were ordered "to file supplementary briefing and evidence in support of or in opposition to the motion," and, in particular, "to address the issues discussed in the

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SEC's opinion, including the application of the principles set forth in the SEC's decision in Frank P. Quattrone ... to the facts and circumstances of this case."

In response to this order, the Department of Enforcement filed a supplemental brief and declarations in support of its motion for summary disposition, and Respondent filed a supplemental brief renewing his opposition to the motion. Upon consideration of the complete record, including the parties' supplemental submissions, the Hearing Panel has determined that it is appropriate to grant the motion as to liability, but to hold a hearing as to sanctions.

## **2. Undisputed Facts**

There is no genuine dispute as to the material facts relating to liability. Respondent was registered with NASD as a general securities representative through Prudential Securities, Inc. from January 2000 until July 2003, after which his registration was transferred to Wachovia Securities, LLC. His registration through Wachovia was terminated in October 2003.

In November 2003, NASD staff requested, pursuant to Rule 8210, that Respondent appear and provide sworn testimony in connection with the staff's investigation to determine whether Respondent engaged in, among other things, market timing and late trading activity in mutual fund shares while he was associated with Prudential. In NASD parlance, such testimony is referred to as an on-the-record interview, or OTR. In December 2003, Respondent appeared for his OTR with counsel and answered the staff's questions for several hours. But, when the staff posed questions about certain trades, his counsel announced that "at this stage going forward" he was "advising [Respondent] not to answer any questions related to NASD suspicions about late trading ... on the grounds of the [F]ifth [A]mendment. That will continue with regard to all questions and documents related to the NASD's suspicions about late trading." (OTR Tr. 140.)

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The staff, however, continued to question Respondent, and although he refused to answer questions about some trades, based on his counsel's advice, he answered many other questions. At the end of the day, with Respondent's counsel advising the staff that he would not allow Respondent to answer questions on certain topics at that time, the staff concluded the OTR "with the caveat that we are leaving it open for future conversations," to which Respondent's counsel responded, "Agreed." (OTR Tr. 187.)

In January 2004, NASD staff requested, pursuant to Rule 8210, that Respondent appear for a second OTR. On February 6, 2004, however, Respondent's counsel sent NASD staff a letter stating that "in view of the real possibility of criminal action being taken against him, and because an invocation [of] our client's constitutional right not to incriminate himself in any proceedings does not preclude the NASD from a Rule 8210 finding, we have advised our client that it is not in his best interest to provide you documentary or testimonial evidence material to the NASD's investigation until all related criminal issues have been resolved and/or adjudicated." Accordingly, the letter advised NASD staff that Respondent would not appear for his OTR. In spite of the letter, the staff convened the OTR as scheduled, but Respondent did not appear.

### **3. Violation**

As the Hearing Panel explained in its original decision, Rule 9264 provides that either the Complainant or the Respondent may move for summary disposition of any or all of the causes of action against the Respondent set forth in the Complaint, or any affirmative defense asserted by the Respondent 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. "[T]he moving party bears the burden of demonstrating the absence of a genuine issue of material fact.... If the moving party meets this burden, the

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opposing party must come forward with specific facts showing that there is a genuine issue in dispute.... Absent such a showing, summary judgment is appropriate.” Department of Enforcement v. Shvarts, No. CAF980029, 2000 NASD Discip. LEXIS 6, at \*10 n. 11 (N.A.C. June 2, 2000) (citations omitted).

In this case, the Complaint charges that Respondent violated Rules 8210 and 2110 by refusing to answer certain questions during his December 2003 OTR and by refusing to appear for his OTR in February 2004. Rule 8210 provides:

For the purpose of an investigation ... [NASD] staff shall have the right to ... require ... a person associated with a member ... to testify ... under oath or affirmation ... with respect to any matter involved in the investigation ....

This authority is critically important to NASD's self-regulatory function. To perform that function, NASD must be able to gather information, and because NASD has no subpoena power, it depends on the cooperation of its members and their associated persons to obtain that information. See, e.g., Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table). Therefore, persons subject to NASD jurisdiction have “an absolute obligation to appear for testimony,” if requested to do so pursuant to Rule 8210.<sup>1</sup> Department of Enforcement v. Respondent Firm, No. CAF000013, 2003 NASD Discip. LEXIS 40, at \*46 (N.A.C. Nov. 14, 2003). A violation of Rule 8210 is also a violation of Rule 2110. Department of Enforcement v. Hoeper, No. C02000037, 2001 NASD Discip. LEXIS 37 at \*5 (N.A.C. Nov. 2, 2001).

It is undisputed that Respondent was properly requested to appear for an OTR in February 2004, that he knew of the request, and that he nevertheless refused and failed to appear

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<sup>1</sup> Respondent was registered with NASD through Prudential and Wachovia until October 2003. Pursuant to Article V, Section 4 of the NASD By-Laws, he remained subject to NASD's jurisdiction for two years thereafter with respect to conduct that commenced prior to the termination of his registration, and he was required to provide any information or testimony requested pursuant to Rule 8210 during that two year period. See Department of Enforcement v. Respondent Firm, 2003 NASD Discip. LEXIS 40, at \*\*27-31.

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at the scheduled date, time and location.<sup>2</sup> Respondent maintains, however, that this did not violate Rule 8210 or Rule 2110 because in refusing to appear he was properly exercising his Fifth Amendment rights.

The Hearing Panel, however, finds, once again, that Respondent has failed to make even a threshold showing that he was entitled to assert Fifth Amendment rights in NASD's investigation. The courts have consistently held that NASD is a private entity, not a "state actor," and, therefore, that "questions put to [associated persons] by the NASD in carrying out its own legitimate investigative purposes do not activate the privilege against self-incrimination ...." United States v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000). See also, D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002); Marchiano v. NASD, 134 F. Supp. 2d 90, 95 (D.D.C. 2001).

NASD may, however, be treated as a state actor in conducting an investigation if its actions are "fairly attributable" to the government, because the government has "exercised coercive power" over NASD or has "provided such significant encouragement" to NASD, either overtly or covertly, that NASD's action must be deemed that of the government. Cromwell, supra. In that regard, when this proceeding was originally before the Panel, Respondent contended that there was "a genuine issue of material fact as to the extent of the SEC

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<sup>2</sup> There is also no dispute that Respondent refused to answer some questions posed to him during his December 2003 testimony. The Hearing Panel notes, however, that (1) Respondent answered the vast majority of the staff's questions, and (2) Respondent's attorneys explained to the staff that, although Respondent was refusing to answer certain questions "at this time," they "want[ed] to have an opportunity to evaluate whether or not his best interests are going to ultimately be served by claiming a privilege or continuing to co-operate." (OTR Tr. 123.) As they explained, "We ... just haven't had enough time to evaluate the situation." (Id. at 127.) Moreover, even after Respondent's counsel announced that Respondent would claim Fifth Amendment rights, the staff kept asking and Respondent generally kept answering questions until nearly 5 p.m. And when the staff adjourned Respondent's testimony at that point, Respondent's counsel again emphasized that Respondent was refusing to answer "at this time," and both sides indicated that they understood that the staff was "leaving it open for future conversations." (Id. at 186-87.) Under these circumstances, and considering that this case is before the Hearing Panel on a motion for summary disposition, the Hearing Panel does not find that Respondent's refusal to answer a few questions during his December OTR violated Rules 8210 and 2110. Instead, the Panel grants Enforcement's motion for summary disposition on liability solely on the basis of Respondent's undisputed refusal to appear in February 2004.

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involvement and control over the relevant NASD investigation.” The Panel, however, found that Respondent had “made neither a meaningful nor a factual showing of an improper purpose by the NASD ....” Shvartz, 90 F. Supp. 2d at 223. Furthermore, although Respondent argued that he should be allowed to call an NASD Special Investigator involved in the investigation as a witness, in order to try to elicit testimony to support his speculation that the SEC was involved in or controlling NASD’s investigation, the Hearing Panel determined that, in the absence of any evidence tending to support an improper purpose, Respondent was not entitled to engage in a “fishing expedition.”

In remanding this case, the SEC directed NASD to reconsider whether Respondent should be allowed to pursue additional “discovery” from NASD staff in light of the SEC’s decision in Frank P. Quattrone, Exchange Act Rel. No. 53547, 2006 SEC LEXIS 703 (Mar. 24, 2006), where the SEC held that NASD improperly granted summary disposition. The Hearing Panel, however, finds that Quattrone is clearly distinguishable from this case.

As the SEC explained, in opposing summary disposition, Quattrone offered evidence that the Commission, the NYSE, and NASD launched a joint inquiry into spinning and research analyst conflict allegations at twelve investment firms, that they decided that NASD would lead the investigation of Quattrone’s firm, and that NASD investigated Quattrone as part of this inquiry. Commission staff also sent Quattrone a letter two days after NASD sent Quattrone the Rule 8210 Request emphasizing the joint nature of NASD's investigation, stating that any settlement of that investigation would have to involve the Commission and NYSE, and declaring that the Commission, NYSE, and NASD would confer to determine how to proceed if no settlement was reached. Quattrone, therefore, did not rely on mere conclusory allegations or speculation but instead offered specific facts to support his contention that NASD engaged in state action as a joint actor with the Commission.

2006 SEC LEXIS 703 at \*19-20.

The SEC concluded that “taking [all these facts] together and giving Quattrone all reasonable inferences, we cannot say that Quattrone failed to earn the right to present evidence

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regarding whether NASD's role in the Joint Investigation rendered the Rule 8210 Request state action." Id. at \*20.

Unlike Quattrone, in the original proceeding before the Hearing Panel, Respondent did not offer any evidence tending to show that NASD was engaged in a joint investigation with any governmental entity. Instead, he merely pointed to the fact that he had been named as a defendant in a civil action brought by the SEC and as a respondent in an administrative proceeding filed by the Massachusetts Securities Division. As the Panel explained in its initial decision, neither circumstance by itself supports any inference that NASD's investigation of Respondent was under the direction or control of the SEC or any other governmental entity. Nevertheless, following the SEC's remand, as explained above, the parties were offered an opportunity to supplement their previous submissions in light of Quattrone.

In response, Enforcement submitted, in addition to a brief, declarations from two NASD Special Investigators who were involved in NASD's investigation of Respondent. They state that neither the SEC nor the Department of Justice instructed them to initiate an investigation of Respondent, or to gather evidence for their investigations of Respondent. Although they acknowledge that the SEC had access to NASD's investigative file during NASD's investigation, and that the Justice Department obtained access after Enforcement filed its Complaint in this proceeding, one of them attests that NASD staff conducted "an independent investigation of Respondent and gathered our own evidence," and "did not collaborate with the SEC or the Department of Justice in scheduling, preparing questions or otherwise determining the testimony subject matter for Respondent's on-the-record interview." In addition, he notes that the civil complaint that the SEC filed against Respondent and others "did not include allegations of late trading, which was the subject of NASD's investigation of Respondent."

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In contrast, Respondent has offered no new evidence to show that NASD was involved in any kind of joint investigation or other action with a governmental entity, or that NASD staff was acting under the direction or control of a governmental entity. Instead, he argues that the declarations submitted by Enforcement show that NASD staff was cooperating with the SEC and the Justice Department, which required NASD to recognize Respondent's Fifth Amendment rights.

The Panel does not find Respondent's argument persuasive. As the SEC acknowledged in its decision remanding this case, "cooperation between the Commission and NASD will rarely render NASD a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action." And the SEC stated that, "[t]o survive summary disposition, Respondent must produce testimony or affidavits to support his assertions of joint action," which he has not done.<sup>3</sup> 2006 SEC LEXIS 2547, at \*24.

Respondent again argues that to obtain such evidence, he should be allowed to take the testimony of the NASD Special Investigators. On this point, the SEC's decision noted that under the Federal Rules of Civil Procedure, a party is generally entitled to take discovery to obtain evidence needed to oppose a motion for summary judgment. On the other hand, the SEC also explained that Respondent "'may not use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory.'" He is

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<sup>3</sup> In its Quattrone decision, the SEC cited Mathis v. PG&E, 75 F.3d 498, 503 (9<sup>th</sup> Cir. 1996) and Kirtley v. Rainey, 326 F.3d 1088, 1094 (9<sup>th</sup> Cir. 2003), for the proposition that "private entities engage in state action when they are willful participants in joint action with state officials." 2006 SEC LEXIS 703 at \*\*18 n. 23, 19 n. 25. The "joint action" test articulated in those cases addresses a somewhat different issue, *i.e.*, whether a private entity is acting "under color of state law" for purposes of imposing liability under 42 U.S.C. § 1983. Even as to that issue, however, Kirtley explained that joint action can be found only where "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity." 326 F.3d at 1093 (internal quotation marks and citation omitted). And Mathis held that the joint action test is satisfied only if "the particular actions [of the private entity] challenged are inextricably intertwined with those of the government." 75 F.3d at 503. As explained in the text, Respondent has adduced no evidence establishing a genuine factual issue as to whether some governmental entity "insinuated itself" into NASD's investigation, or whether NASD's investigation was "inextricably intertwined" with any parallel governmental investigation or suit.



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required to state 'the precise manner in which [the facts he does possess] support[] his claims,' to explain 'why he needs additional discovery,' to 'state with some precision the materials he hope[s] to obtain with further discovery,' and to explain 'exactly how' the further information would support his claims." 2006 SEC LEXIS 2547, at \*25 (footnotes omitted). Respondent has not done any of those things.

The SEC also stated that "in the past, NASD has made its employees who possess material, non-privileged information available for testimony at a respondent's request or produced affidavits responding to an issue."<sup>4</sup> 2006 SEC LEXIS 2547, at \*23. Under NASD Rule 9251(b), however, communications between NASD and other regulators or criminal enforcement authorities are generally privileged, and are subject to discovery only if there is reason to believe that they contain exculpatory evidence. Here, there is no reason to believe that is the case.<sup>5</sup> Therefore, the Hearing Panel found that Respondent failed to show that there is any

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<sup>4</sup> The cases cited by the SEC in which NASD staff testified or provided affidavits are not controlling here. In D.L.Cromwell, there was no dispute that NASD's Criminal Prosecution Assistance Unit was assisting federal authorities in a criminal investigation involving the plaintiffs. The issue was whether that assistance tainted NASD's own investigation, which was being conducted by other staff, and NASD staff provided evidence showing that the Unit was effectively walled off from the investigating staff. Here, in contrast, there is no evidence that any NASD staff was assisting SEC or Department of Justice staff, and indeed the declarations filed by Enforcement expressly deny any such involvement by the investigating staff. In Robert Fitzpatrick, Exchange Act Rel. No. 44956, 2001 SEC LEXIS 2185 (Oct. 19, 2001), the Respondent contended that ex parte communications between NASD Enforcement staff and the Hearing Panel had occurred during an NASD hearing while he was excluded from the hearing room; NASD staff who were in the room at the time submitted affidavits responding to this contention. And in Ashvin R. Shah, 52 S.E.C. 1100 (1996), which arose under NASD's prior Code of Procedure, the SEC simply noted with approval various reasons why NASD examiners did not testify in that proceeding.

<sup>5</sup> In its decision, the SEC quoted a comment by the Hearing Officer originally assigned to this case in a pre-hearing conference, during a far-ranging discussion of Enforcement's pending motion for summary disposition. When Respondent's counsel asked whether the Hearing Officer had the authority to compel NASD employees to testify, the Hearing Officer responded that in cases in which a Hearing Panel had requested that an NASD employee testify, "[w]e have always had employees come in, never had a case where they have refused," and that if NASD refused to allow an employee to testify, the Panel might draw an adverse inference. (Tr. 4/6/2004 at 44-45.) The Hearing Officer did not, however, rule that any such testimony was appropriate in this case; on the contrary, he issued an order after the pre-hearing conference indicating, among other things, that "[r]ulings on Enforcement's Motion for Summary Disposition are deferred pending the completion of discovery and an opportunity for the parties to make such supplemental filings as they may choose to file." Neither party, however, submitted any supplemental filings. Instead, Respondent's counsel sent the Hearing Officer a letter to "update [him] on the status of discovery" in the case in which he indicated that he was planning to "formally request that the Hearing Officer issue a subpoena to [an NASD Special Investigator] for the purpose of providing testimony at the scheduled hearing." After the case was transferred, the new Hearing Officer held a pre-hearing conference at which Respondent's counsel renewed his

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genuine issue as to whether he was entitled to claim Fifth Amendment rights in NASD's investigation.

Moreover, even assuming, for the sake of argument, that Respondent would have been entitled to assert Fifth Amendment rights in NASD's investigation, he was not entitled to refuse to appear for his OTR.<sup>6</sup> It is firmly established that in order to assert Fifth Amendment rights in a civil proceeding—which would unquestionably include NASD's investigation—"a witness must normally take the stand, be sworn to testify, and assert the privilege in response to each allegedly incriminating question as it is asked." Roach v. NTSB, 804 F.2d 1147, 1151 (10<sup>th</sup> Cir. 1986), cert. denied, 486 U.S. 1006 (1988).

Requiring the witness to appear and assert the privilege in response to specific questions serves several important purposes. First, as Respondent's December 2003 testimony dramatically illustrates, merely because the witness will claim the privilege as to some questions does not mean he or she will claim it as to all. Thus, in this case if Respondent had appeared, he might have been able to respond to many of the staff's questions, as he had in December, without feeling compelled to assert a Fifth Amendment privilege; because he refused to appear, the staff had no opportunity to ask any questions.

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request that NASD be ordered to produce the Special Investigator to testify at the hearing. The Hearing Officer responded that he would "take that under advisement as part of the summary disposition motion." (Tr. 5/25/04 at 8.) As explained in the Hearing Panel's original decision and above, the Panel concluded that Respondent had, and still has, failed to make a sufficient threshold showing to justify holding a hearing or requiring the testimony of the Special Investigator.

The SEC also noted that Respondent had expressed concern about the reassignment of this case from one Hearing Officer to another. NASD cases are frequently re-assigned during the pre-hearing process, generally to adjust the Hearing Officers' workloads for the sake of efficiency. In 2004, there were approximately 40 such reassignments, a number of which, including this one, were attributable to the fact that the Hearing Officer originally assigned to this matter took part-time status in early 2004 in anticipation of retirement. Under NASD practice, the new Hearing Officer is free to resolve pending procedural or evidentiary issues as he or she believes appropriate.

<sup>6</sup> In contrast, in Quattrone, after Quattrone advised the staff that he intended to invoke his Fifth Amendment rights when he appeared at a scheduled OTR, NASD staff elected to cancel the OTR. 2006 SEC LEXIS 703 at \*10 n. 11. Thus, unlike Respondent, Quattrone did not refuse to appear; it was NASD staff who elected to forgo the opportunity to pose specific questions that Quattrone might, or might not, have refused to answer.

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Second, even in proceedings where the Fifth Amendment applies, “[t]o sustain the privilege, it [must] be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” Hoffman v. United States, 341 U.S. 479, 486-87 (1951). “A proper application of this standard implicitly requires that specific questions be propounded by the investigating body, and the claim of the right against self-incrimination must be claimed in response to each. A ‘blanket’ refusal to answer all questions is unacceptable.” United States v. Malnik, 489 F.2d 682, 685 (5<sup>th</sup> Cir. 1974), cert. denied, 419 U.S. 826 (1974). And in claiming the privilege, “[u]nless the danger of self-incrimination is readily apparent the burden of showing such a danger exists rests with claimant of the privilege.” Adelman v. Brady, 1990 U.S. Dist. LEXIS 4842, at \*4 (E.D. Pa. Apr. 23, 1990). In this case, because Respondent refused to appear for his February testimony, it is impossible to determine whether he properly would have been able to invoke a Fifth Amendment privilege in response to the staff’s questions, even assuming the privilege applied.

Finally, even when the Fifth Amendment applies, it is generally permissible in a civil proceeding to draw negative inferences from a party’s refusal to answer questions based upon a Fifth Amendment privilege claim. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); John Kilpatrick, 48 S.E.C. 481, 486 and n. 18 (1986). Unless the witness appears and asserts the privilege in response to specific questions, however, it may be unclear whether and to what extent such an adverse inference is warranted. See United States ex rel. DRC, Inc. v. Custer Battles, LLC, 415 F. Supp. 2d 628, 636 (E.D. Va. 2006) (holding that adverse inferences might be drawn based on the witness’ Fifth Amendment claims in response to specified questions).

Therefore, because Respondent failed to make even a threshold showing that NASD was a state actor in carrying out its investigation and because, in any event, he was required to appear

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for his OTR, the Hearing Panel grants Enforcement's summary disposition motion, in part, and holds that by refusing to appear for his OTR in February 2004, Respondent violated Rules 8210 and 2110.

#### **4. Sanctions**

In its original decision, the Hearing Panel also granted summary disposition on sanctions, imposing a bar. In doing so, the Hearing Panel relied upon the NASD Sanction Guidelines, which provide that "[i]f the individual did not respond in any manner, a bar should be standard." NASD Sanction Guidelines at 35 (2006). The NAC has held, "A refusal to comply with an NASD request for information is tantamount to a complete failure to respond [for purposes of applying the Sanction Guidelines]." Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23 at \*13 (N.A.C. Aug. 11, 2003). Accordingly, it would appear that a bar may be an appropriate sanction for Respondent's refusal to appear for his OTR.

At present, however, the issue is whether a bar—or any other sanction—should be imposed on summary disposition. As explained above, that would be appropriate only if, based upon the undisputed facts, Enforcement were entitled to a bar as a matter of law. In his recent filing, Respondent points out that in its decision remanding this case, the SEC noted that Respondent had "appeared at the initial OTR and answered questions for over three hours before invoking his Fifth Amendment privilege." 2006 SEC LEXIS 2547 at \*26 n. 38. Respondent also cites the SEC's recent decision in Rooney A. Sahai, Exchange Act Rel. No. 55046, 2007 SEC LEXIS 13 at \*13-14 (Jan. 5, 2007), where, after noting that the respondent had complied "with five of [NASD staff's] seven requests to some extent," had testified at an OTR, and had represented through counsel that he had no other responsive information in his file, the Commission reduced the sanctions for failing to provide information from a bar to a two-year suspension and a \$5,000 fine.

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The Hearing Panel also notes that even more recently in a case where the Hearing Panel had imposed a bar on summary disposition for the respondent's refusal to respond to certain questions during an OTR, the NAC, while affirming summary disposition on liability, remanded the case to the Hearing Panel for a hearing on sanctions. In remanding the case, the NAC noted that "the [NASD Sanction] 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 violation of Procedural Rule 8210 whether a respondent's misconduct was intentional and whether the respondent attempted to delay an NASD investigation. We have in the past thus differentiated between willful attempts to obstruct or delay NASD investigations and non-deliberate, non-dilatory conduct." Department of Enforcement v. Respondent, No. C02050006, 2007 NASD Discip. LEXIS 13, at \*25 (N.A.C. Feb. 12, 2007) (footnotes omitted). The NAC further held that in evaluating these considerations, "[t]he 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." Id. at \*27.

The NAC also noted that "the Guidelines list two specific principal considerations that adjudicators should regard in connection with the imposition of sanctions for violations of Procedural Rule 8210"—i.e., the nature of the information requested and whether the information has been provided. Id. at 28 (footnote omitted). With regard to the first consideration, the NAC held that, "[a]bsent 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," and with regard to the second consideration, the NAC stated that, "the Hearing Panel was not permitted to reject out of hand

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factual assertions put forth by Respondent concerning possibly mitigative efforts to comply with staff's requests for information." Id. at \*\*29, 31.

This case is distinguishable from both Sahai and the more recent NAC case in several respects. Nevertheless, in light of these decisions, and given the limited evidence in the summary disposition record, the Hearing Panel concludes that it would be prudent to deny Enforcement's motion with respect to sanctions, and to hold a hearing at which the parties may offer evidence addressing the various considerations set forth in the Sanction Guidelines, including, but not necessarily limited to, those identified in the NAC's recent Department of Enforcement v. Respondent decision.

Accordingly, Enforcement's motion for summary disposition is granted in part and denied in part, as set forth above. The Hearing Officer will schedule a pre-hearing conference promptly to schedule a hearing on the issue of sanctions, and to set an appropriate pre-hearing schedule.

**HEARING PANEL**

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By: David M. FitzGerald  
Hearing Officer

Dated: April 18, 2007