

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

The Department of Enforcement,

Complainant,

vs.

Manuel M. Bello
Kinnelon, New Jersey,

Respondent.

DECISION

Complaint No. CAF000030

Dated: June 3, 2002

Respondent failed to produce bank records in response to NASD Regulation's requests for information. Respondent also failed to produce certain bank account statements in a timely manner in response to NASD Regulation's requests for information. Held, findings of violation and sanctions modified.

Pursuant to Procedural Rule 9312, we called the Hearing Panel's August 27, 2001 decision for review to examine the Hearing Panel's findings and sanctions and, in particular, to determine whether the Hearing Panel properly assessed all factors in aggravation and mitigation with respect to sanctions. After a review of the entire record in this matter, we find that Manuel M. Bello ("Bello") failed to produce certain documents in response to NASD Regulation's requests for information. We also find that Bello failed to produce other documents in a timely manner in response to NASD Regulation's requests for information. We order that Bello be barred from associating with any member in any capacity and assessed costs of \$2,235.

I. Background

Bello entered the industry in 1989 as a general services representative. He was associated with Lloyd Wade Securities Inc. ("Lloyd Wade Securities" or "Firm") as a general securities representative and a general securities principal from October 1996 through June 1999. Bello is not currently associated with a member firm.

II. Procedural Background

The complaint alleged that Bello failed to produce certain requested information and documents, and that he failed timely to produce other documents first requested on June 7, 1999, in violation of Conduct Rule 2110 and Procedural Rule 8210. Prior to the hearing in this matter, Bello stipulated as to liability, and the Hearing Officer ordered that the hearing be limited to sanctions in accordance with the parties' pre-hearing request.

As to sanctions, the Hearing Panel imposed a bar on Bello in all capacities, subject to the condition that the bar be converted to a 120-day suspension in all capacities if Bello produced the outstanding bank account statements and wire instructions or a notarized letter from a bank officer that the wire instruction records did not exist.¹ Bello did not produce the requested information within the period set forth by the Hearing Panel, and he has not produced the information to this date.

On October 2, 2001, NASD Regulation's Office of General Counsel ("OGC") sent the parties a letter informing them that this case had been called for review. On November 5, 2001, OGC sent the parties a letter setting forth the briefing schedule in this matter.² Bello failed to file a brief, or otherwise participate in the call for review proceeding, notwithstanding numerous attempts by OGC to contact him and his attorney to ascertain if Bello would be participating in the call for review proceeding.

In accordance with Procedural Rule 9341(b), we have considered this matter on the basis of the written record because neither party requested oral argument.

III. Facts

NASD Regulation's Department of Enforcement ("Enforcement" or "staff") initiated an investigation into suspicious trading activity and unusually high trading volume at Lloyd Wade Securities involving the stock of two issuers (Tollycraft Yacht Corporation and NetBet, Inc.). The Firm had an investment banking relationship with these issuers, and it was a market maker in their stocks. Staff determined that the majority of the trading activity involving NetBet had occurred at Lloyd Wade Securities' Office of Supervisory Jurisdiction ("OSJ") in West Patterson, New Jersey, which was an office that Bello co-owned. During the course of the investigation, staff determined that Bello had a close relationship with Netbet and that he had been instrumental in bringing the issuer to the Firm. The focus of staff's investigation was to

¹ In conjunction with the suspension order, the Hearing Panel ordered Bello to requalify as a general securities principal.

² OGC sent notice letters stating that the matter had been called for review and establishing the briefing schedule to Bello, his attorney of record, and the Department of Enforcement.

determine whether Netbet had paid Lloyd Wade Securities for its market making and sales activities, which would be a violation of NASD rules.

As part of Enforcement's investigation, on June 7, 1999 staff sent a written request to Bello's attorney for copies of "all monthly bank statements and wire instructions" related to "any and all financial accounts" utilized in Lloyd Wade Securities' business operations in West Patterson, New Jersey. The letter directed Bello promptly to request the relevant bank statements and wire instructions from the appropriate financial institution if they were not in his possession and, upon receipt, to forward the documents to staff by June 21, 1999. Bello failed to produce the requested documents by the required deadline.

On June 25, 1999, Bello appeared for an on-the-record interview and testified that he was in the process of gathering the requested documents. Bello assured staff during his interview that he would forward the documents to staff in "short order."³ When Bello failed to produce the requested documents following his June 25 interview, staff sent a letter to Bello's attorney, dated July 8, 1999, advising him that the information requested in the June 7, 1999 letter had not been produced. The letter warned that failure to produce the requested information could result in disciplinary action against Bello.

On August 13, 1999, staff sent a "Wells" letter to Bello's attorney advising him that NASD Regulation had preliminarily determined to recommend that a disciplinary action be filed against Bello for his failure to produce the information requested on June 7 and July 8, 1999. The letter further advised Bello's attorney that Bello, or someone on his behalf, could make a written submission ("Wells Submission")⁴ to Enforcement on or before August 27, 1999, stating why such an action should not be filed.

On August 27, 1999, Bello's attorney made a Wells Submission, in which he represented that Bello would produce the information sought in the June 7, 1999 letter by September 15, 1999. The attorney also recommended that any disciplinary action be held in abeyance based on Bello's plans to produce the requested material by September 15, 1999.

Bello made an incomplete production of documents on September 15, 1999, in response to the information requested in Enforcement's June 7, 1999 letter. NASD Regulation Examiner

³ The NASD Regulation staff examiner who investigated this matter, Traci Manuel ("Manuel"), testified that staff had planned to use the documents that Bello failed to produce by the June 21 deadline during Bello's on-the-record interview on June 25.

⁴ A "Wells" letter refers to a letter sent by NASD Regulation staff notifying a respondent "that a recommendation of formal disciplinary charges is being considered" and usually provides the respondent with an opportunity to "submit a written statement explaining why such charges should not be brought." NASD Notice to Members 97-55, 1997 NASD LEXIS 77, at *13 (Aug. 1997).

Manuel testified that staff knew of only one Firm bank account at the time that it sent the June 7, 1999 requests for "all documents, monthly [bank] statements and wire instructions" utilized by the West Patterson office. During the course of its investigation, however, staff identified five additional Firm bank accounts. Manuel testified that Bello's September 15, 1999 production was incomplete because it included only two of the six identified bank account statements and none of the wire instructions for the identified accounts.

Staff sent Bello's attorney a letter, dated September 20, 1999, advising him that Bello's September 15, 1999 production was still incomplete. In a letter dated September 28, 1999, staff responded to Bello's attorney's request for a clarification of the term "wire instructions," explaining that "wire instructions" describe "each wire, including but not limited to the name of the person and/or entity money was wired to and/or from, and the corresponding account numbers." The letter further advised Bello's attorney that staff's June 7, 1999 letter had clearly directed Bello to produce "all wire instructions related to any and all financial accounts utilized in [Lloyd Wade Securities'] business operations," located in West Patterson, New Jersey. Staff's September 20, 1999 letter also directed Bello to produce "forthwith" the information that Enforcement had requested in its June 7, 1999 letter.

In a letter dated November 4, 1999, staff informed Bello's attorney that Bello's production was still incomplete and overdue. The letter directed Bello to produce forthwith all monthly statements for the four remaining bank accounts and the wire instructions for the requested accounts. The letter also directed Bello to request the documents promptly from the appropriate financial institution and, upon receipt, to forward the documents.⁵ In addition, the letter advised Bello that he could "also execute a written authorization permitting the staff to obtain the requested documents from the appropriate financial institution."

On November 15, 1999, Bello's attorney responded that Bello had requested the relevant documents from the Firm's banks and that the document retrieval was expected to take two to six weeks. Notwithstanding this assurance, staff did not receive the requested documents, nor did it hear from Bello or his attorney within the six-week period specified.

On March 14, 2000, Bello made an untimely and incomplete production of documents that failed to include the requested wire instructions and two outstanding monthly bank account statements. In a second Wells notice, dated March 15, 2000, Enforcement advised Bello that it was prepared to recommend a formal disciplinary action based on his failure to cooperate with Enforcement's investigation. Bello made no further production in response to the second Wells notice. On July 14, 2000 Enforcement filed a complaint against Bello based on his failure to produce certain requested documents and his untimely production of other documents.

⁵ This is the same directive that staff included in its June 7, 1999 letter to Bello's counsel.

IV. Discussion

Procedural Rule 8210 authorizes NASD Regulation, in the course of an investigation, to require persons associated with an NASD member to "provide information orally [or] in writing... with respect to any matter involved in the investigation." It is well settled that, because NASD Regulation lacks subpoena power over its members, a failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate. See, e.g., Joseph G. Chiulli, Exchange Act Rel. No. 42359, 2000 SEC LEXIS 112, at *8 (Jan. 28, 2000).

It is undisputed that Enforcement made numerous requests to Bello to produce the requested bank account statements and wire instructions. There also is no dispute that Bello failed to provide four bank account statements in a timely manner, and that he failed to produce two out of the six bank account statements and all of the wire instructions for those six accounts. "When [Bello] registered with the NASD, he agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations." Id. Accordingly, we find that Bello violated Conduct Rule 2110 and Procedural Rule 8210.⁶

V. Sanctions

We have determined that Bello's unreasonable refusal to produce certain requested documents and information and his untimely responses to NASD Regulation's requests for other documents constitute serious violations and warrant a bar. Accordingly, we impose a bar on Bello from association with any NASD member in any capacity.⁷ We note that the alternative

⁶ The Hearing Panel found that Bello had violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond completely to NASD Regulation requests for documents. In fact, the complaint alleged that Bello failed totally to produce certain requested information and that he failed to produce other documents in a timely manner. We have modified the Hearing Panel's findings in accordance with the allegations that are contained in the complaint.

⁷ The sanction is consistent with the applicable NASD Sanction Guidelines ("Guidelines") with respect to Bello's complete failure to produce certain requested documents (Failure to Respond to Requests Made Pursuant to NASD Procedural Rule 8210, (2001 ed.) at 39). The Guideline provides that a bar should be standard if the individual did not respond in any manner. The Guideline recommends the imposition of a suspension in any or all capacities for up to two years where mitigation exists, or the person did not respond in a timely manner.

As noted above, the Hearing Panel imposed a bar on Bello for failing to respond completely to NASD requests for information. We have modified the Hearing Panel's sanction and impose a bar on Bello for each of the violations alleged in the complaint (failure to produce requested documents and untimely production of documents).

sanction set forth in the Hearing Panel's decision is vacated because Bello failed to satisfy any of the requisite conditions.

We first address the aggravating circumstances presented by the facts of this case. In applying the principal considerations in the NASD Sanction Guideline for failure to respond, we find that the requested documents were of material importance to staff's efforts to trace money coming into and going out of Lloyd Wade Securities. The information that Enforcement sought was essential to determine if payments had been made to the Firm in violation of NASD rules.⁸ It also took numerous requests and regulatory pressure in the form of the first "Wells" notice before Bello produced some of the requested documents. We consider these facts to be evidence in aggravation.

We have determined that the following factors constitute additional evidence of aggravating circumstances: (1) that Bello engaged in a pattern of misconduct by continuously failing to produce the requested documents in a timely and complete manner;⁹ (2) that Bello attempted to lull Enforcement into inactivity by assuring staff that the requested documents would be produced by September 15, 1999;¹⁰ (3) that Bello sought to delay the investigation by his untimely responses and his failure to provide staff with two of the requested bank account

⁸ Staff identified \$872,000 in wire transactions from its review of the account statements that Bello provided. Staff Examiner Manuel testified that, although the amount of the wire transactions was reflected in the account statements, staff needed to review the wire transactions that Bello refused to produce in order to determine the source of those transactions. It was not until approximately one year after the original document request was made to Bello that staff determined from sources other than Bello that Lloyd Wade Securities was the source of a majority of the \$872,000 in wire transactions. Manuel testified that staff was nevertheless unable to identify the source of approximately \$50,000 in wire transactions because Bello never produced the requested documents.

⁹ See Guidelines, Principal Consideration No. 8, at 9 (2001 ed.).

Enforcement staff sent Bello six requests for information and had numerous telephone conversations with Bello and his attorney over an approximately two-year period in an effort to obtain the requested information.

¹⁰ See Guidelines, Principal Consideration No. 10, at 9 (2001 ed.).

Based on Bello's assurances that he would produce the requested documents, Enforcement agreed to hold its disciplinary action against Bello in abeyance. Although Bello did produce some documents by September 15, 1999, the production was untimely and occurred only after repeated requests from Enforcement.

statements and the requested wire instructions for the six accounts under review;¹¹ and (4) that Bello failed to accept responsibility for his misconduct.¹² Bello's failure to cooperate with Enforcement's requests for information delayed the staff's investigation and obstructed staff's efforts to determine if payments had been made for market making, thereby undermining NASD Regulation's ability to carry out its self-regulatory functions. See District Business Conduct Committee v. Chlowitz, Complaint No. C02980025, 1999 NASD Discip. LEXIS 31 (NAC Nov. 4, 1999).

We also are particularly troubled by Bello's cavalier attitude regarding his duty to cooperate with Enforcement's requests for information. Bello testified that he decided not to produce the two bank account statements and wire instructions at issue because he could not obtain assurances from Enforcement that the investigation would conclude if he did produce the requested documents. It is well settled that persons subject to information requests pursuant to Procedural Rule 8210 cannot dictate the conditions under which information will be furnished. Michael David Borth, 51 S.E.C.178, 182 (1992).

We next address the Hearing Panel's assessment of mitigating factors. The Guidelines list as a principal consideration whether the respondent has demonstrated reasonable reliance on competent legal advice.¹³ The Hearing Panel concluded that Bello's refusal to produce the outstanding documents stemmed from his reliance on counsel, which it considered as a fact in mitigation. The record contains no evidence, however, to support such a conclusion. Although Bello's attorney argued in the proceedings below that Bello had relied on "competent legal counsel," Bello did not testify on this issue or otherwise establish the nature of the advice sought or rendered. Therefore, the record does not provide any evidence to substantiate the reliance on competent counsel claim made by Bello's attorney.

The Hearing Panel also considered it a mitigating fact that the bank documents were not under Bello's control and that, according to Bello, the bank had not been forthcoming in producing the documents. The record is devoid of documentary evidence, however, that the non-production was caused by the Firm's banks. Rather, the record shows that Bello decided at a critical stage of the investigation not to pursue NASD Regulation's document requests with the

¹¹ See Guidelines, Principal Consideration No. 12, at 10 (2001 ed.).

¹² See Guidelines, Principal Consideration No. 2, at 9 (2001 ed.).

When asked on cross-examination if he had any remorse for not having produced the outstanding documents, Bello replied "[a]bsolutely not."

¹³ See Guidelines, Principal Consideration No. 7, at 9 (2001 ed.); see also Department of Enforcement v. Fergus, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3 (NAC May 17, 2001).

banks, thus subverting NASD Regulation's ability to carry out its regulatory functions. See Edward C. Farni II, 51 S.E.C. 1118 (1994). If Bello had problems or concerns about his ability to respond timely or completely to the staff's requests, he should have raised these concerns with staff in a cooperative and prompt manner. See Richard J. Rouse, 51 S.E.C. 581 (1993). Instead, Bello unreasonably refused to cooperate with Enforcement with respect to the non-produced documents.

Additionally, we do not concur with the Hearing Panel's determination that Bello's production of certain documents is evidence of mitigating conduct. In fact, Bello produced these documents in an untimely manner and did so only after numerous requests and regulatory pressure from Enforcement.¹⁴ Moreover, we disagree with the Hearing Panel's conclusion that Enforcement discovered the source of over 90% of the funds that had been wired into the West Patterson office based on Bello's highlighting of the wire transactions on the account statements that he produced. As explained by NASD Regulation Examiner Manuel at the hearing, the account statements that Bello provided did not include information about the source of the wired funds. A source other than Bello produced the Firm's bank account statements approximately one year after the original document request, which permitted Enforcement to discover that a majority of the wired funds had come from Lloyd Wade Securities.

In sum, we order that Bello be barred from association with any member in any capacity. We also assess costs against Bello in the amount of \$2,235 for the proceedings below. The bar shall be effective upon service of this decision.¹⁵

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

¹⁴ Bello's attorney argued at the hearing below that Bello's production of some of the documents should be viewed as a factor in mitigation. We reject this argument for the same reasons that we disagree with the Hearing Panel's determination on this issue.

¹⁵ We also have considered and reject without discussion all other arguments advanced by Bello.