



## **I. PROCEDURAL BACKGROUND**

### **A. Complaint**

Enforcement filed a single cause Complaint on August 3, 2000, charging Respondent with violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The Complaint alleged that on May 8, 2000, Respondent appeared for an on-the-record interview conducted by the NASD Regulation, Inc. (“NASDR”) staff pursuant to NASD Procedural Rule 8210, but refused to answer the NASDR staff’s questions. (Complaint, ¶ 5.) According to the Complaint, Respondent’s refusal to answer questions constituted violations of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. (Complaint, ¶ 6.)

### **B. Answer**

Respondent filed an Answer on August 25, 2000, in which he denied the allegations in the Complaint. (Answer, ¶¶ 1-5.) Respondent’s Answer included 23 affirmative defenses.

### **C. Motion for Summary Disposition**

Prior to Hearing, Enforcement filed a Motion for Summary Disposition (“Motion”), pursuant to NASD Code of Procedure Rule 9264, supported by a Statement of Undisputed Facts, Memorandum of Law in support of the Motion, affidavit of Geary Seeley (“Seeley Aff.”), and eleven exhibits (CX 1-11). Respondent did not respond to the Motion.<sup>2</sup> The Hearing Panel granted the Motion, finding that there were no material issues of fact, and that Enforcement was entitled to summary disposition as a matter of law.

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<sup>2</sup> Respondent was notified of his obligation to respond to the Motion after his counsel withdrew from the proceeding. That notification was contained in an order issued February 13, 2001. By failing to respond to the Motion, Respondent is deemed to have waived any objection to the Hearing Panel’s granting of it. NASD Code of Procedure Rule 9146(d).

## II. FINDINGS OF FACT

### A. Respondent's Background

Respondent has been registered as a General Securities Representative at various times since 1993 with five different member firms. (CX 1.) Since February 2000, Respondent has been registered as a General Securities Representative with member firm Carlin Equities Corp.

(Id.)

### B. Respondent's Refusal to Answer Questions

On March 22, 2000, the NASDR staff sent Respondent a letter in which it requested, pursuant to NASD Procedural Rule 8210, that he appear on April 20, 2000, for an on-the-record interview at the NASDR's offices in New York, New York. According to the March 22 letter, the NASDR staff was "reviewing matters related to [Respondent's] employment in the securities industry." (CX 6.)

In a letter to the NASDR staff dated March 28, 2000, counsel for Respondent noted his representation and stated that Respondent was unavailable to appear for the interview on April 20, 2000. (CX 9, p. 3.) On April 4, 2000, Respondent's counsel informed the NASDR staff in a letter that Respondent Coniglione would be available for an on-the-record interview on May 8, 2000. (CX 9, pp. 1-2.) On April 5, 2000, the NASDR staff confirmed in a letter to Respondent, and copied to his counsel, that the on-the-record interview had been rescheduled for May 8, 2000. (CX 10.) The April 5 letter noted that the request for Respondent's interview was pursuant to NASD Procedural Rule 8210. (Id.)

On May 8, 2000, Respondent appeared with counsel for the on-the-record interview. After Respondent had been duly sworn, the NASDR staff informed Respondent that:

your testimony has been requested in this matter pursuant to Procedural Rule 8210. Rule 8210 requires any person associated with an NASD member to provide all information requested by the staff. Therefore please be advised that failure to answer any of our questions, ... [or] to provide any information requested by the staff during this meeting ... could be inconsistent with Rule 8210 and could be the basis for the initiation of sanctions, including a bar, censure, suspension and/or fine. (CX 5, pp. 4-5.)

The NASDR staff then asked Respondent questions relating to a member firm and his prior employment with that firm. Respondent refused to answer each and every question asked of him, replying only, "I respectfully rely on my Fifth Amendment right and decline to answer this question." (CX 5, pp. 8-10.)

After Respondent asserted that he would not respond based on his rights under the Fifth Amendment to the U.S. Constitution, counsel for NASDR informed Respondent that the "NASD and NASD Regulation is not a government entity, so ... you have an obligation to answer all of the Staff's questions .... I remind you if you continue to refuse to answer the questions for whatever reason, whatever grounds, we will seek disciplinary action for your failure to answer." (CX 5, p. 8.) Respondent's counsel then asserted his belief that the NASD is a governmental agency and that Respondent was asserting the Fifth Amendment privilege. (CX 5, pp. 8-9.) Thereafter, in response to additional questions posed by the NASDR staff, Respondent continued to assert his claimed Fifth Amendment right. (CX 5, p. 9.) Based on Respondent's continued refusal to respond to any of the NASDR staff's questions, the NASDR staff concluded the interview. (CX 5, p. 10.)

### **III. LEGAL DISCUSSION**

#### **A. Jurisdiction**

Respondent was registered with a member firm at the time of the on-the-record interview and also at the time the Complaint was filed. The Hearing Panel therefore finds that the NASD has jurisdiction over Respondent for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws.

#### **B. Standard for Granting a Motion For Summary Disposition Has Been Satisfied**

Code of Procedure Rule 9264(e) provides that the Hearing Panel “may grant the 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.” It is well-established that the moving party bears the initial burden of showing “the absence of a genuine issue of material fact.”<sup>3</sup> The substantive law governing the case will identify those facts which are material and “only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”<sup>4</sup>

In this case, there are no material facts in dispute. The evidence established that Respondent was requested, pursuant to NASD Procedural Rule 8210, to appear for an on-the-record interview and to answer questions posed to him by the NASDR staff. Respondent appeared for the interview but refused to respond to questions based on a claimed Fifth Amendment privilege.

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<sup>3</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

<sup>4</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The Hearing Panel granted the Motion after determining that there was no genuine issue with regard to any material fact and that Enforcement was entitled to summary disposition as a matter of law.

C. Failure to Respond

NASD Conduct Rule 2110 requires that a member, “in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.” The ethical standards imposed on members in Rule 2110 apply equally to persons associated with members. (NASD Rule 0115.) Rule 8210(a)(1) authorizes the NASD to require a “person subject to the Association’s jurisdiction to provide information orally, in writing, or electronically ... with respect to any matter involved in [an] investigation....” This Rule provides a means for the NASD to carry out its regulatory functions in the absence of subpoena power. A violation of Rule 8210 is also a violation of Rule 2110.

The Securities and Exchange Commission (“SEC”) has stated that “[w]e have repeatedly stressed the importance of cooperation in NASD investigations. We have also emphasized that the failure to provide information undermines the NASD’s ability to carry out its self-regulatory functions.... Failures to comply are serious violations because they subvert the NASD’s ability to carry out its regulatory responsibilities.” In re Joseph Patrick Hannan, Exchange Act Rel. No. 40438 (September 14, 1998) (*omitting citations noted therein*).

The SEC and NASD have consistently held that an individual subject to NASD jurisdiction cannot properly invoke the Fifth Amendment privilege in response to a request for

information pursuant to Rule 8210.<sup>5</sup> The Federal courts have likewise held that the Fifth Amendment claim against self-incrimination cannot be properly asserted when appearing before a self-regulatory organization. Most recently, in D.L. Cromwell Investments, Inc., et al., v. NASD Regulation, Inc., the court held that the Fifth Amendment privilege does not apply to NASDR proceedings, since it is not a government actor.<sup>6</sup> In that case, the court explained:

The Fifth Amendment prohibits only governmental action. The NASD and [NASD] Regulation are private entities .... Hence, even if the individual plaintiffs are being compelled to give evidence against themselves by the threat of NASD sanctions, [NASD] Regulation's actions raise no Fifth Amendment issue unless it fairly may be said that its actions are fairly attributable to the government. This in turn requires that the government have “exercised coercive power or ... provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the” government or, at least, that “the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the State.’”<sup>7</sup>

The court’s holding in D.L. Cromwell is consistent with an earlier decision by the Court of Appeals for the Second Circuit in denying a Fifth Amendment claim in a New York Stock

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<sup>5</sup> See In re Vladislav S. Zubkis, Exchange Act Release No. 40409, n.2 (Sept. 8, 1998) (“It is well established ... that the self-incrimination privilege does not apply to questioning in proceedings by self-regulatory organizations, since such entities are not part of the government.”); In re Edward C. Farni II, 51 S.E.C. 1118, 1994 SEC LEXIS 1630, at \*3 (1994) (“a refusal to provide information is a violation [of Rule 8210], without regard to invocation of the right against self-incrimination”); In re Daniel C. Adams, 47 S.E.C. 919, 921 (1983) (an invocation of the Fifth Amendment privilege would not affect the right of the NASD to sanction the respondent for his refusal to provide information, since the NASD is not a part of the government); In re Richard Neuberger, 47 S.E.C. 698, 699 (1982); In re Lawrence H. Abercrombie, 47 S.E.C. 176, 177 (1979). See also DBCC No. 10 v. Gerald Cash McNeil, No. C3B960026, 1999 NASD Discip. LEXIS 3, at \*13-15 (NAC Jan. 21, 1999).

<sup>6</sup> 2001 U.S. Dist. LEXIS 1912 (S.D.N.Y. February 26, 2001).

<sup>7</sup> Id. at \*13-14, citing Blum v. Yaretsky, 457 U.S. 991, 1004-05, 73 L. Ed 2d 534, 102 S. Ct. 2777 (1982) quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 42 L. Ed 2d 447, 95 S. Ct. 449 (1974)(other citations omitted).

Exchange proceeding, wherein the court stated that “interrogation by the New York Stock Exchange in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination ....” United States v. Solomon, 509 F.2d 863, 867 (1975).<sup>8</sup>

There is no claim or evidence in this case that the government exercised coercive powers over the NASDR or encouraged the NASDR to conduct the on-the-record interview. The Hearing Panel therefore finds that Respondent’s invocation of the Fifth Amendment privilege against self-incrimination was not a valid defense for refusing to provide information requested pursuant to Rule 8210.

By reason of the foregoing, the Hearing Panel finds that Respondent Coniglione violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by refusing to respond to questions during the May 8, 2000 on-the-record interview.

#### **IV. SANCTIONS**

Enforcement requests that the Hearing Panel bar Respondent from associating with any member in any capacity. The NASD Sanction Guidelines (“Guidelines”) provide that in the case of a failure to respond, “a bar should be standard.”<sup>9</sup>

In this case, the NASDR staff provided Respondent with the opportunity to reschedule the interview for a more convenient date. During the course of the on-the-record interview, the NASDR staff notified Respondent that the Fifth Amendment privilege could not be invoked in

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<sup>8</sup> *See also, Datek Securities, Inc. v. NASD*, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims challenging the fairness of a disciplinary proceeding because the NASD is not a state actor.)

<sup>9</sup> NASD Sanction Guidelines, p. 39 (2001 ed.).



order to avoid his obligations under NASD Rule 8210. The NASDR staff also advised Respondent that his refusal to respond to questions might result in a disciplinary proceeding and sanctions that could include a bar. In reviewing the evidence, including counsel for Respondent's mistaken belief that the NASD was a government agency, the Hearing Panel did not find any mitigating factors that would require a sanction different from that recommended in the Guidelines.

Given the lack of mitigating factors and Respondent's intentional refusal to answer questions posed to him during the on-the-record interview, the Hearing Panel finds that a bar from associating with any member in any capacity, as requested by Enforcement, is appropriate under the facts and circumstances of this case.

## **V. CONCLUSION**

The Hearing Panel found that Respondent Coniglione violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 as alleged in the Complaint.<sup>10</sup> The Hearing Panel barred Respondent Coniglione from association with any member firm in any capacity. The bar shall

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<sup>10</sup> The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

become effective immediately upon this Decision becoming the final disciplinary action of the NASD.

Hearing Panel

by: \_\_\_\_\_  
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Hearing Officer

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