

**NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980013
v.	:	
	:	
HERMAN EPSTEIN	:	<b>Hearing Panel Decision</b>
(CRD # 201696),	:	
	:	
Franklin Lakes, NJ	:	Hearing Officer - GAC
	:	
Respondent.	:	December 2, 1999

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**ORDER AND DECISION GRANTING COMPLAINANT’S  
MOTION FOR SUMMARY DISPOSITION**

*Digest*

The Department of Enforcement (“Complainant” or “Enforcement”) filed a two-count Complaint alleging that Herman Epstein (“Respondent” or “Epstein”), a registered representative, failed to respond to a request for information, in violation of Procedural Rule 8210, and failed to appear for testimony in connection with an investigation, in violation of Conduct Rule 2110. In his Answer, the Respondent acknowledged that he had not complied with the information request. He stated, however, that he would provide the requested information upon resolution of a concurrent investigation by the Securities and Exchange Commission (“SEC”). Enforcement filed a Motion for Summary Disposition, to which the Respondent filed a brief opposing Enforcement’s motion. Finally, both Parties made oral arguments in favor of their positions.

Based on a review of the record, the Hearing Panel granted the Motion for Summary Disposition filed by Enforcement and held that the Respondent: (1) violated Procedural Rule 8210 by failing to respond to a request for information made pursuant to Procedural Rule 8210, and (2) violated Conduct Rule 2110 by failing to appear for testimony as requested pursuant to Procedural Rule 8210. The Respondent was barred from association with any NASD member in any capacity.

*Appearances*

Helen G. Barnhill, Esq., Washington, DC, (Rory C. Flynn, of Counsel, Washington, DC) for the Department of Enforcement.

Chad N. Cagan, Esq., Sonnenblick, Parker & Selvers, PC, New York, NY, for Herman Epstein.

**DECISION**

**I. PROCEDURAL BACKGROUND**

A. Complaint

Enforcement filed a Complaint in this disciplinary proceeding, alleging in two causes of action that Epstein failed to respond to a duly issued request for information by failing to appear for testimony requested pursuant to NASD Rule 8210. The Complaint alleges that Epstein was associated with Investors Associates, Inc. (“Investors Associates”), formerly a member firm, from 1969 through 1997. Specifically, the Complaint states that in a letter dated February 12, 1998, Enforcement requested that Respondent appear in Enforcement’s offices in Washington, DC on March 7, 1998, to

provide information in connection with an investigation. The request was made pursuant to NASD Rule 8210.

On or about February 26, 1998, Respondent, through counsel, requested that the testimony be rescheduled, and suggested alternative dates, including March 31, 1998. By letter dated February 27, 1998, Enforcement agreed to reschedule the testimony for March 31, 1998. According to the Complaint, on March 30, 1998, Respondent's counsel informed Enforcement that Epstein would not attend the interview scheduled for March 31, 1998, stating that there was an SEC investigation pending and that Epstein "[could not] testify until such time as the issue of possible violation of the federal securities laws has been resolved."<sup>1</sup> Since then, the Respondent has not contacted Enforcement to reschedule the interview.

B. Answer

In his Answer, Epstein admitted that he was associated with Investors Associates from 1969 through 1997.<sup>2</sup> Epstein acknowledged that by letter dated February 12, 1998, Enforcement requested, pursuant to Rule 8210, that he appear in the NASD's offices in Washington, DC on March 7, 1998, to provide information orally by testifying on the record.<sup>3</sup>

Respondent stated that on February 26, 1998, he sent a letter to Enforcement requesting that the testimony be rescheduled for New York City, and suggesting a number

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<sup>1</sup> Complaint, ¶ 8, quoting counsel for Respondent's letter dated March 30, 1998.

<sup>2</sup> Answer, ¶ 1; Complaint, ¶ 1.

<sup>3</sup> Answer, ¶ 4; Complaint, ¶ 4.

of alternative dates for the testimony, including March 31, 1998.<sup>4</sup> Epstein admitted that the testimony was thereafter rescheduled for March 31, 1998, in New York City, as he requested.<sup>5</sup> On March 30, 1998, Respondent's counsel informed Enforcement by telephone that Respondent would not attend the testimony scheduled for the following day.<sup>6</sup> On March 31, 1998, Enforcement sent a letter via telecopier to the Respondent providing specific citations to SEC decisions purporting to show that Epstein could not properly delay his cooperation.<sup>7</sup>

Epstein acknowledged that as of the date of the Complaint, neither he nor his counsel had contacted Enforcement to reschedule testimony.<sup>8</sup>

C. Pre-Hearing Conferences and Submissions

In a Pre-Hearing Conference ("Conference"), Respondent, through counsel, stated that he was unable to testify before Enforcement because there was a pending investigation being conducted by the SEC into possible violations of federal securities laws. He further asserted that the Respondent had the legal right to withhold testimony requested pursuant to Rule 8210, pending resolution of the SEC matter. Respondent further asserted that he was willing to comply with requests for testimony from Enforcement upon resolution of the SEC matter.

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<sup>4</sup> Answer, ¶ 5; Complaint, ¶ 5.

<sup>5</sup> Answer, ¶ 6.

<sup>6</sup> Answer, ¶ 7; Complaint, ¶ 7.

<sup>7</sup> Answer, ¶ 9. Respondent denies that such citations contradict Respondent's position. Complaint, ¶ 9.

<sup>8</sup> Id.

The Parties jointly filed stipulations in the case. The stipulations establish that the Respondent was scheduled to participate in an on-the-record interview by Enforcement, and at the request of Respondent's counsel, the interview was postponed to March 31, 1998. The stipulations further provide that on March 30, 1998, Respondent's counsel informed Enforcement that the Respondent would not appear for testimony the next day, and would not testify until such time as the SEC investigation was resolved.

D. Enforcement's Motion for Summary Disposition

Enforcement filed a Motion for Summary Disposition ("Motion"). The Respondent filed a brief in opposition to Complainant's Motion for Summary Disposition ("Opposition Brief"). Thereafter, the Parties gave oral argument in favor of their positions, including arguments related to sanctions. Code of Procedure Rule 9264(a) provides that:

[a]fter a Respondent's answer has been filed and [d]ocuments have been made available to that Respondent for inspection and copying pursuant to Rule 9251, the Respondent or the Department of Enforcement, without leave of the Hearing Officer, may make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent.

Rule 9264(d) provides in part 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."

In this case, the Respondent's Answer has been filed and documents have been made available to Epstein in satisfaction of Rule 9251.<sup>9</sup> The next issues to address are

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<sup>9</sup> Complainant's Motion for Summary Disposition, p. 5. Respondent does not contest Complainant's assertion that discovery has been completed pursuant to 9251.

whether there are any genuine issues with regard to any material fact, and whether Enforcement is entitled to summary disposition as a matter of law.

## **II. FINDINGS OF FACT**

The facts in this case leading up to the filing of the Complaint are undisputed. Epstein admits, and the Hearing Panel finds, that the relevant period, February and March of 1998, was within two years of the date in which the Respondent was last registered with an NASD member firm, and that he was therefore subject to the NASD's jurisdiction for purposes of complying with Rule 8210 information requests.

The Hearing Panel finds that Enforcement properly served the Respondent with a request for an on-the-record interview pursuant to Rule 8210, to take place on March 7, 1998 in Washington, DC. Enforcement then accommodated the Respondent in rescheduling the on-the-record interview to a mutually agreed upon date, March 31, 1998. Enforcement also agreed, at the request of Epstein, to relocate the interview to New York City.

On March 30, 1998, one day before the scheduled interview, Epstein reneged on his agreement to appear for the on-the-record interview set for March 31, 1998, informing Enforcement that he would not appear for that interview or any interview with Enforcement while the SEC investigation was pending. When he reneged on his agreement to appear on March 31, 1998, Epstein did not suggest a specific date when he would be willing to provide the information. The record reflects that, to date, the Respondent has not agreed to be interviewed by Enforcement, pursuant to Rule 8210.

### III. CONCLUSIONS OF LAW

Procedural Rule 8210 requires NASD members and their associated persons to cooperate with NASD investigations by providing information with respect to their business practices as requested by the Association. The SEC stated:

We have repeatedly stressed the importance of membership cooperation in NASD investigations. The membership's failure to provide information undermines the NASD's ability, in the absence of subpoena power, to carry out its self-regulatory functions. We have also stressed that members and their associated persons may not impose conditions on their obligation to supply requested information.<sup>10</sup>

Respondent claims there is a genuine issue of material fact as to whether Epstein will, in the future, cooperate with Enforcement in providing the requested information.<sup>11</sup> Respondent's position, however, is merely an attempt by him to place a condition upon his testimony – the completion of the SEC investigation. Respondent failed to cite any authority that would allow him to impose such a condition and postpone his interview indefinitely. Indeed, registered representatives may not determine the appropriate time for responding to such requests for information.<sup>12</sup> That issue was squarely addressed by the NASD's National Business Conduct Committee in December 1997, when it held that the NASD staff is not required to consolidate its enforcement efforts with state or federal governmental entities or to postpone its interviews until after the SEC has deposed a witness.<sup>13</sup> The SEC has held that registered representatives cannot delay their responses

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<sup>10</sup> Mark Allen Elliott, 51 S.E.C. 1148, 1150 (1994). See also Richard J. Rouse, 51 S.E.C. 581, 584-586 (1993); Michael David Borth, 51 S.E.C. 178, 180 (1992); Darrell Jay Williams, 50 S.E.C. 1070, 1072 (1992); Boren & Co., 40 S.E.C. 217, 225 (1960).

<sup>11</sup> Pre-Hearing Conference Tr., July 7, 1999, p. 30.

<sup>12</sup> Rouse, supra. See also Richard Stephen Levitov, et al., No. CAF980025 (NAC Nov. 1, 1999).

<sup>13</sup> District Business Conduct Committee v. Rudi, No. C9A970019 (NBCC Dec. 22, 1997).

to requests for information due to possible collateral litigation<sup>14</sup> or even if the individual is the target of a criminal investigation.<sup>15</sup>

The fact that the SEC is conducting an investigation that may in some manner involve the Respondent provides no valid basis for the Respondent's refusal to provide information to the NASD pursuant to Procedural Rule 8210.<sup>16</sup> The Hearing Panel finds that the resolution of the question as to whether Respondent will testify once his condition is met is neither relevant nor material in determining liability under Rules 8210 and 2110.

The Hearing Panel finds that there is no genuine issue of material fact and finds, as a matter of law, that Epstein violated Procedural Rule 8210 as alleged in the first cause of the Complaint for his failure to respond to a valid request for information. The Hearing Panel also finds that Epstein violated Conduct Rule 2110 as alleged in the second cause of the Complaint, by failing to appear for the interview as requested pursuant to Procedural Rule 8210.

#### **IV. SANCTIONS**

The NASD Sanction Guideline ("Guideline") for a violation of Procedural Rule 8210 contains two principal considerations: the nature of the information requested; and whether the information was provided. While the record does not indicate the nature of

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<sup>14</sup> Darrel Jay Williams, 51 S.E.C. 1434 (1992).

<sup>15</sup> Edward C. Farni, 56 S.E.C. 2076, nn. 5 & 6 (1994).

<sup>16</sup> The Hearing Panel did not make a finding of fact that there was an SEC investigation that involved the Respondent. That assertion was made by the Respondent and was not challenged by Enforcement. It is not relevant whether there was in fact an SEC investigation and whether the Respondent faced any possible liability in the SEC investigation, since those facts, even if assumed to be true, do not constitute a defense in this case.



the investigation, other than that it involved possible violations of “anti-fraud provisions of the federal securities laws and NASD rules,” Complainant asserts that Epstein was a “central figure in the staff’s investigation.”<sup>17</sup>

According to the Guideline, in the case of a failure to respond, “a bar should be standard.”<sup>18</sup> Both Parties had an opportunity to address the issue of sanctions in written submissions and oral argument. Enforcement requests that Epstein be barred from association with any member and fined \$50,000.<sup>19</sup> Enforcement believes those sanctions are appropriate given Epstein’s extensive disciplinary history and the tactics he used to delay Enforcement’s investigation. According to CRD, since 1997, Epstein has been sanctioned by five states for securities violations, including unauthorized trading and failing to supervise. In 1994, Epstein was sanctioned by the SEC for failing to supervise. Epstein has also been previously sanctioned twice by the NASD. In 1993, Epstein was sanctioned by the NASD for withdrawing funds from a bank escrow account for a direct participation program before the minimum sales contingency was met. Finally, in January 1998, the NASD sanctioned Epstein for failing to timely respond to an NASD request for information pursuant to Rule 8210. This is therefore Epstein’s second violation of NASD Rule 8210.

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<sup>17</sup> Complainant’s Memorandum of Points and Authorities in Support of its Motion for Summary Disposition (“Complainant’s Memorandum”), exhibit 1.

<sup>18</sup> NASD Sanction Guidelines, p. 31 (1998 ed.). In October 1999, the NASD issued Notice to Members 99-86, which amended the Guideline by eliminating monetary sanctions in certain cases. According to the Notice, “if an individual is barred and there has been no customer loss, NASD Regulation will not impose a fine.” Failure to respond violations under Rule 8210 was specifically cited as covered by the new policy.

<sup>19</sup> Pre-Hearing Conference Tr., July 7, 1999, p. 16. Enforcement’s request for a fine predated the policy change announced by the NASD as noted in footnote 18.

In view of Epstein’s extensive disciplinary history, including a recently imposed sanction for a Rule 8210 violation, the Hearing Panel believes that it is appropriate to sanction Epstein with a severe sanction within the Guideline.<sup>20</sup> The Hearing Panel therefore concludes that Respondent should be barred from association with any NASD member in any capacity.

## V. CONCLUSION

The Hearing Panel found that Respondent Herman Epstein violated NASD Rules 8210 and 2110 as set forth in the two causes of action in the Complaint. The Hearing Panel ordered that Epstein be barred from association with any NASD member in any capacity.<sup>21</sup> The sanction shall become effective on the date this decision becomes the final disciplinary action of the Association.

Hearing Panel

by: \_\_\_\_\_  
Gary A. Carleton  
Hearing Officer

Copies to:

Herman Epstein (via Airborne Express and first class mail)  
Helen G. Barnhill, Esq. (via first class mail and facsimile)  
Rory C. Flynn, Esq. (via first class mail and facsimile)  
Chad N. Cagan, Esq. (via first class mail and facsimile)

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<sup>20</sup> The Hearing Panel did not find mitigating factors similar to the “unique circumstances” in Levitov that would justify a lower sanction. Specifically, there was no evidence that Epstein cooperated with the NASD prior to the start of the SEC investigation. Also, contrary to the facts in Levitov, the Hearing Panel finds that Epstein’s failure to cooperate “frustrated [Enforcement’s] attempts to obtain important testimony from a central figure” in its investigation. Complainant’s Memorandum, p. 7. In this case, Enforcement had already accommodated the Respondent by changing the location of the interview and by granting more than a three week adjournment. Finally, Epstein’s request for a delay was open-ended, as opposed to Levitov, who requested a specific amount of time for the adjournment.

<sup>21</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.