

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C11040006
	:	
v.	:	Hearing Officer – DMF
	:	
JUSTIN F. FICKEN	:	HEARING PANEL DECISION
(CRD #4059611)	:	
58 West Rutland Square, Unit 1	:	June 14, 2004
Boston, MA 02118	:	
	:	
Respondent.	:	

Respondent is barred from associating with any NASD member in any capacity for refusing to provide testimony, in violation of Rules 8210 and 2110

Appearances

Paul M. Tyrrell, Esq., Boston, MA, (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

Brad Bailey, Esq., Boston, MA, and Willis H. Riccio, Esq., Providence, RI, for Respondent.

DECISION

I. Procedural History

The Department of Enforcement filed a Complaint on February 18, 2004, charging that respondent Justin F. Ficken refused to provide testimony in violation of Rules 8210 and 2110. Ficken filed an Answer in which he contested the charge and requested a hearing. Enforcement subsequently filed a motion for summary disposition, pursuant to Rule 9264, supported by the declaration of NASD Special Investigator Alan Rubin and nine Complainant’s Exhibits (CX 1-9). Ficken filed a memorandum of law in

opposition to the motion, to which he attached three Respondent's Exhibits (RX A-C). For the reasons set forth below, the Hearing Panel, including the Hearing Officer and two members of the District 11 Committee, grants Enforcement's motion.

II. Facts

Ficken entered the securities industry in 1999. Until July 2003, he was registered with NASD member Prudential Securities Incorporated as a General Securities Representative. From July 2003 to October 2003, he was registered in the same capacity with Wachovia Securities, LLC. He has not been registered with any NASD member since October 2003. (CX 1, 2.)

In October 2003, Wachovia filed a Uniform Termination Notice for Securities Industry Registration (Form U-5) with NASD disclosing that Ficken had been permitted to resign from Wachovia because of "business practices inconsistent with management philosophy." "Based on information that Ficken was terminated by ... Wachovia ... in connection with an already existing NASD investigation into market timing and late trading activity in mutual fund shares at Prudential ..., NASD opened an independent investigation ... relating to Ficken's activities while registered at [Prudential]. NASD's investigation was opened to determine whether Ficken had engaged in, among other things, market timing and late trading activity in mutual fund shares." (CX 1; Rubin Decl. at 1.)

In connection with the investigation, NASD staff requested, pursuant to Rule 8210, that Ficken appear at NASD's Boston office and testify under oath. Ficken appeared, with counsel, on December 17, 2003. During his testimony, however, Ficken refused to answer a number of questions propounded by the staff, asserting his Fifth Amendment right against self-incrimination on advice of his counsel. He persisted in

refusing to answer the staff's questions, even after the staff advised him that he was required to answer. (Rubin Decl. at 2-3; CX 3, 4.)

In January 2004, in connection with the investigation, NASD staff sent Ficken another letter, pursuant to Rule 8210, requiring him to appear and testify. At the request of Ficken's counsel, his appearance was postponed to February 9, 2004. On February 6, however, Ficken's counsel sent NASD staff a letter stating that Ficken would not appear, and, in fact, he did not appear at the scheduled time, date and location. Since then, he has not appeared, nor offered to appear, to provide the requested testimony. The staff's investigation remains open, but the staff cannot complete the investigation without obtaining Ficken's testimony, including his responses to the questions that he refused to answer. (Rubin Decl. at 4-6; CX 5-9.)

In addition to being the subject of NASD staff's investigation, Ficken has been named as a defendant in a civil action filed by the Securities and Exchange Commission, and as a respondent in an administrative proceeding filed by the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth of Massachusetts. (RX A, B.) According to the correspondence that his counsel sent to NASD staff when he refused to appear for his February 9, 2004, scheduled testimony, he had also "been informed by the U.S. Department of Justice that it is likely that an indictment will be issued against him in matters similar, or relating, to the same circumstances about which the NASD is seeking his testimony." (CX 8 at 1.)

III. Discussion

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

There is no genuine dispute as to the material facts set forth above, and, based on those facts, Enforcement is entitled to summary disposition as a matter of law. The Complaint charges that Ficken violated Rule 8210, which 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 effective performance of its 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. Department of Enforcement v. Respondent Firm, No. CAF000013, 2003 NASD Discip. LEXIS 40, at *46 (NAC Nov. 14, 2003).

Ficken 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 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. Nevertheless, Ficken, having been requested to testify pursuant to Rule 8210, first refused to answer questions posed by the staff and then refused to appear at all.

Ficken argues that he was entitled to refuse to answer the staff's questions and to refuse to appear based on his Fifth Amendment right against self-incrimination. He contends that NASD is required to recognize his Fifth Amendment assertion because in conducting the investigation it is "acting in a quasi-governmental capacity sufficient to invoke Mr. Ficken's Constitutional protections." The courts, however, 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, e.g., 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). In D.L. Cromwell, the Court explained that actions by a private entity such as NASD may be treated as governmental conduct only if those actions are found to be "fairly attributable" to the government. This can occur if the government has "exercised coercive power" over the private entity, or has "provided such significant encouragement" to the private entity, either overtly or covertly, that the private entity's action must be deemed that of the government. Alternatively, a private entity may be treated as if it were a governmental

actor if “the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the State.’” (Citations omitted.)

The Rubin Declaration, submitted by Enforcement in support of its motion, attests that NASD staff requested Ficken’s testimony in connection with their investigation of Ficken. In spite of this, Ficken argues that “there is a genuine issue of material fact as to the extent of the SEC involvement and control over the relevant NASD investigation for purposes of invoking Mr. Ficken’s Constitutional rights.” Ficken offers no evidence to support this contention, however; he merely points to the fact that the SEC filed a civil suit against Ficken at around the same time that NASD requested him to appear. The fact that both the SEC and the NASD are looking at Ficken’s activities, however, does not raise any inference that NASD’s investigation is under the SEC’s control. As the court stated in rejecting a similar argument in United States v. Shvarts, Ficken has “made neither a meaningful nor a factual showing of an improper purpose by the NASD” 90 F. Supp. 2d at 223.

Ficken argues that he should be allowed to call an NASD examiner as a witness in the hope of finding evidence to support his speculation that NASD is acting under the direction of the SEC. A similar argument was squarely rejected by the National Adjudicatory Council, however, in Department of Enforcement v. Respondent Firm, 2003 NASD Discip. LEXIS 40, at *34-35:

Nor do we find that [respondents] should have been allowed, based on the minimal information that they provided regarding the [NASD] attorney, to have gone on a “fishing expedition” in an effort to produce evidence that the attorney, in requesting their appearances, was acting on behalf of any entity other than NASD... As a self-regulatory organization, NASD has an independent obligation to investigate possible rule violations, and respondents have offered no evidence that NASD was acting on anything other than its own investigation.

Ficken also argues that the Hearing Panel should reject the charge against Ficken because he initially appeared and answered many of NASD staff's questions, but a person requested to testify pursuant to Rule 8210 cannot pick and choose which questions he will answer and which he will not. Because NASD 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." Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (unpublished table decision).

Therefore, the Hearing Panel finds that the material facts are undisputed, and establish, as a matter of law, that Ficken violated Rule 8210 by refusing to answer the staff's questions and to appear for his February 9 scheduled testimony. 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 (NAC Nov. 2, 2001).

IV. Sanctions

The Sanction Guidelines provide that for a failure to respond to a Rule 8210 request, "a bar should be standard." NASD Sanction Guidelines (2001 ed.) at 39. The National Adjudicatory Council has repeatedly held that a bar is appropriate when a respondent has refused to appear on Fifth Amendment grounds. See, e.g., Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *10-14 (Aug. 11, 2003). A bar is also appropriate where a respondent has appeared, but has refused to answer questions based on a Fifth Amendment claim. Department of Enforcement v. Laucius, No. C9A030017, 2003 NASD Discip. LEXIS 45 (OHO Oct. 1, 2003).

Ficken argues that the Hearing Panel should not impose a bar in this case, pointing to the fact that the Hearing Panel did not impose a bar in Department of

Enforcement v. Quattrone, No. CAF030008, 2004 NASD Discip. LEXIS 2 (OHO Jan. 16, 2004), appeal pending. As explained in that decision, however, the imposition of sanctions must turn on the specific circumstances of each case. In this case, the Hearing Panel finds no mitigating factors that would justify a sanction less than a bar. Apart from the pending criminal investigation, which the Hearing Panel finds is not mitigating, the only specific mitigating circumstance to which Ficken points is that he is not currently employed in the securities industry. Whether or not Ficken is currently in the industry, however, is irrelevant to the sanctions issue. NASD staff is attempting to conduct an investigation of his conduct while he was in the industry. He refused to provide testimony relating to that investigation, and still refuses to do so, pending completion of the criminal investigation, which has hampered the staff in concluding its investigation. The Hearing Panel, therefore, finds that a bar is the appropriate sanction under the circumstances of this case. In light of the bar, no fine will be imposed.

V. Conclusion

Respondent Justin F. Ficken is barred from associating with any NASD member in any capacity for refusing to answer NASD staff's questions and for refusing to appear and provide testimony, in violation of Rules 8210 and 2110. If this decision becomes NASD's final disciplinary action in this matter, the bar shall become effective immediately.¹

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

¹ The Hearing Panel has 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.

Copies to: Justin F. Ficken (*via overnight and first class mail*)
Brad Bailey, Esq. (*via facsimile and first class mail*)
Willis H. Riccio, Esq. (*via facsimile and first class mail*)
Paul M. Tyrrell, Esq. (*electronically and via first class mail*)
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