NASD OFFICE OF HEARING OFFICERS

MARKET REGULATION DEPARTMENT	:	
	:	Disciplinary Proceeding
Complainant,	:	No. CMS030269
	:	
v.	:	Hearing Officer – DMF
	:	
ANTHONY JOHN ORLANDO, JR. (CRD #2497838) 400 East 54th Street (24B) New York, NY 10022	:	**HEARING PANEL DECISION** March 30, 2004
PHILIP ANTHONY ORLANDO (CRD #2839212) 84 Harmon Avenue Pelham, NY 10803	:	
Respondents.	:	

Respondents are barred from associating with any NASD member in any capacity for refusing to appear for testimony and failing to respond adequately to requests for documents, in violation of Rules 8210 and 2110

Appearances

Laurie A. Doherty, Esq. and Jeffrey K. Stith, Esq., Rockville, MD, for Complainant.

Marvin G. Pickholz, Esq. and Jason Pickholz, Esq. New York, NY, for Respondents.

DECISION

I. Procedural History

The Market Regulation Department filed a Complaint on November 17, 2003, charging that respondents Anthony John Orlando, Jr. and Philip Anthony Orlando failed to appear for testimony and failed to provide requested documents in violation of Rules

8210 and 2110. Respondents filed an Answer in which they contested the charges and requested a hearing. On February 12, 2004, Market Regulation filed a motion for summary disposition, pursuant to Rule 9264, supported by the declarations of three Market Regulation staff members and ten Complainant's Exhibits (CX). Respondents filed a memorandum of law in opposition to the motion, to which they attached three documents, all of which had been included in Complainant's Exhibits. The Hearing Panel, which included the Hearing Officer, a member of the District 9 Committee and a member of the District 10 Committee, heard oral argument on the motion on March 3, 2004. For the reasons set forth below, Market Regulation's motion for summary disposition is granted.

II. Facts

Anthony Orlando has been in the securities industry since 1993. In June 2000, he became associated with NASD member Park Capital Securities, LLC, where he was registered as a General Securities Principal and served as the firm's Chief Operating Officer and Executive Vice President. Philip Orlando entered the securities industry in 1995. He also became associated with Park Capital in 2000 as a General Securities Principal and served as the firm's Chief Executive Officer. (CX-1, CX-2.)

According to Central Registration Depository (CRD) records, the Orlandos were the owners of Park Capital Financial Group, an entity that, in turn, owned 75% or more of Park Capital Securities, LLC. On January 15, 2004, Park Capital filed Forms U-5 terminating both Orlandos' registrations, and they have not been registered with any NASD member since that date. (CX-1; Austen Decl. ¶¶ 5-6.)

The Market Regulation staff had been conducting an investigation of Park Capital and others, including the Orlandos, to determine whether they violated the securities laws

or NASD rules in connection with the sale of Cordia Corporation stock to Park Capital customers. In connection with that investigation, the staff sent the Orlandos requests, pursuant to Rule 8210, that they appear for on-the-record interviews (OTRs) and that they provide certain documents. (Nielands Decl. ¶¶ 2-4; Austen Decl. ¶¶ 7-8; CX-3, CX-4, CX-7.)

Specifically, on July 22, 2003, the staff sent letters to both Orlandos, pursuant to Rule 8210, requesting, among other things, that they appear for OTRs on specified dates in September 2003. At the request of the Orlandos' counsel, the OTRs were postponed to specified dates in October 2003. The staff's July 22 letters also requested that the Orlandos produce certain documents. The Orlandos provided some of the requested documents, but on October 2, 2003, the staff sent their counsel a letter listing several categories of documents called for by the July 22 letter that they had not produced. The letter directed that the Orlandos produce those documents by October 6. On October 7, 2003, counsel for the Orlandos sent the staff a letter that stated, in relevant part: "Neither of the Messrs. Orlando will be appearing for their scheduled interviews or individually producing documents." Nevertheless, on the scheduled dates, the staff convened OTRs, but neither of the Orlandos appeared, and they did not provide any additional documents. (Nielands Decl. ¶¶ 2-4; Austen Decl. ¶¶ 7-17; CX-3 through CX-10.)

III. Discussion

Rule 9264 provides that either the complainant or a 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 its 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).[1]

There is no genuine dispute as to the material facts set forth above, and, based on those facts, Market Regulation is entitled to summary disposition as a matter of law. The Complaint charges that respondents violated Rule 8210, which provides:

> For the purpose of an investigation … [NASD] staff shall have the right to: (1) require … a person associated with a member … to provide information orally, in writing, or electronically … and to testify … under oath or affirmation … with respect to any matter involved in the investigation … and (2) inspect and copy the books, records and accounts of [any] member or person [associated with a member] 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

[1] Respondents contend that summary disposition as authorized in Rule 9264 is impermissible under Section 15A of the Securities Exchange Act of 1934. The Hearing Panel rejects this contention. Section 15A(b)(7) requires that NASD's rules be "in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members . . . ." Section 15A(h)(1) requires that in any disciplinary proceeding, "the association shall bring specific charges, notify [the respondent] of, and give him an opportunity to defend against, such charges, and keep a record." Here, the Complaint sets forth specific charges against respondents; they were notified of those charges and had an opportunity to defend against them; and NASD has kept a complete record. Nothing in Section 15A prohibits summary disposition, or requires a full-blown hearing, where, as here, there is no genuine dispute regarding any of the material facts and, based on those undisputed facts, one of the parties is entitled to prevail as a matter of law, and it is well established that summary disposition is a "fair procedure" under such circumstances. See Fed. R. Civ. P. 56 (authorizing summary judgment in federal court under identical circumstances).

subject to NASD jurisdiction have "an absolute obligation to appear for testimony,"[2] and must provide documents in their possession or control, if requested to do so pursuant to Rule 8210.

The Orlandos were registered with NASD through Park Capital and, therefore, were subject to Rule 8210. For purposes of an on-going investigation, Market Regulation staff required the Orlandos to appear for OTRs and to produce documents. Through their counsel's October 7, 2003 letter, the Orlandos flatly refused to testify or to produce the requested documents, and, in fact, they did not appear to testify at the designated date, time and location, or produce any documents.

The Orlandos argue that Market Regulation has not affirmatively established that they refused to supply documents in their possession or control. In his October 7, 2003, letter their counsel stated that the Orlandos would not be "individually producing documents," and that "[c]ertain documents which the staff has requested are corporate records; of those certain records are in the possession of a former counsel for Park Capital." (CX-6.) This was not an adequate response. "We have previously held that if an associated person cannot provide the information sought by the NASD, the associated person has the obligation 'to explain the deficiencies in his responses as completely as he [is] able.'" Joseph Patrick Hannan, 53 S.E.C. 859, 860 (1998), quoting Robert A. Quiel, 53 S.E.C. 165, 168 (1997). See also Robert Fitzpatrick, Exch. Act Rel. No. 44956, 2001 SEC LEXIS 2185, at *10-12 (Oct. 19, 2001), aff'd, 63 Fed. Appx. 20 (2d Cir. May 9, 2003). At a minimum, the Orlandos were required to attest unambiguously that, after conducting a thorough search for all responsive documents in their possession and

[2] Department of Enforcement v. Respondent Firm, No. CAF000013, 2003 NASD Discip. LEXIS 40, at *46 (NAC Nov. 14, 2003).

making a good faith effort to obtain all responsive documents under their control, as owners of Park Capital Financial Group, they could not produce the documents requested by Market Regulation. Their actual response, through their counsel, fell far short of that requirement.[3]

The Orlandos argue that they properly refused to comply with the Rule 8210 requests because NASD is a "state actor." The courts, however, have consistently held that NASD is a private entity, not a state actor. See, e.g., Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999), cert. denied, 531 U.S. 1069 (2001); Marchiano v. NASD, 134 F. Supp. 2d 90, 95 (D.D.C. 2001). In D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002), 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.)

[3] After the Complaint was filed, in response to another Rule 8210 request, counsel for the Orlandos sent Market Regulation another letter stating, in relevant part, that "virtually all" of Park Capital's records had been made available to Market Regulation, except documents in the possession of Park Capital's former counsel, which "had not been received from Park Capital's former counsel before [Market Regulation] filed its Complaint," and documents in possession of Park Capital's clearing agent, which had refused to produce them to Park Capital. (CX-9.) This statement, although more complete than the October 7, 2003 letter, was also inadequate. First, it came too late –"[t]he NASD should not have had to resort to filing a complaint in order to have received a response . . . ." DBCC v. Blech, No. C10960019, 1997 NASD Discip. LEXIS 72, at*9 (NBCC Dec. 1, 1997). Second, it failed to address the Orlandos' ability and efforts to retrieve the documents allegedly in the possession of Park Capital's former counsel, given that they controlled Park Capital through their ownership of Park Capital Financial Group. Third, it offered no explanation or excuse for the Orlandos' failure to produce the documents pertaining to the financial condition of Park Capital Financial Group that Market Regulation had requested.

The Orlandos have offered no evidence that Market Regulation's requests were fairly attributable to any governmental entity. Instead, as the court stated in rejecting a similar argument in United States v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000), the Orlandos "have offered nothing more than a theory that is 'as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had been starved to death.'"[4] Like the defendants in Shvarts, the Orlandos "have made neither a meaningful nor a factual showing of an improper purpose by the NASD . . . ." Id. at 223. Instead, the Orlandos have argued that they should be allowed to fish through Market Regulation's files in the hope of finding something to support their speculation. This argument was squarely rejected by the National Adjudicatory Council, however, in Department of Enforcement v. Respondent Firm, No. CAF000013, 2003 NASD Discip. LEXIS 40, at *34-35 (NAC Nov. 14, 2003):

> 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.

Therefore, the Hearing Panel finds that the material facts are undisputed, and establish, as a matter of law, that the Orlandos violated Rule 8210 by failing to appear for their OTRs and by failing to respond adequately to requests for documents. 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).

[4] Quoting Grosswald v. Schweiker, 653 F.2d 58, 61 (2d Cir. 1981).

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 for an OTR. See, e.g., Department of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *14-15 (NAC May 21, 2003), aff'd, Exch. Act. Rel. No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004); Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *10-14 (Aug. 11, 2003).

The Hearing Panel finds no mitigating factors in this case that would warrant a sanction less than a bar for the Orlandos. In light of the bar, no fine will be imposed.

V. Conclusion

Respondents Anthony John Orlando and Philip Anthony Orlando are barred from associating with any NASD member in any capacity for refusing to appear for an on-the-record interview, in violation of Rules 8210 and 2110. If this decision becomes NASD's final disciplinary action in this matter, the bars shall become effective immediately.[5]

HEARING PANEL

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By: David M. FitzGerald
Hearing Officer

[5] 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: Anthony John Orlando, Jr. (*via overnight and first class mail*)
Philip Anthony Orlando (*via overnight and first class mail*)
Marvin G. Pickholz, Esq. (*via facsimile and first class mail*)
Jason Pickholz, Esq. (*via facsimile and first class mail*)
Laurie A. Doherty, Esq. (*electronically and via first class mail*)
Jeffrey K. Stith, Esq. (*electronically and via first class mail*)