NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RICHARD L. NEWBERG (CRD No. 346857) 550 N. Island Golden Beach, FL 33160, Respondent.	Disciplinary Proceeding No. CAF030013 **Hearing Panel Decision and Order Granting Complainant's Motion for Summary Disposition** Hearing Officer - SW Dated: July 6, 2004

The Hearing Panel granted the Department of Enforcement's motion for summary disposition on liability holding that Respondent violated NASD Conduct Rule 2110 by testifying falsely at an NASD disciplinary hearing. After a Hearing on sanctions, the Hearing Panel imposed a bar on Respondent for his violation of NASD Conduct Rule 2110.

Appearances

Brian Bressman, Esq., Counsel, and Rory C. Flynn, Esq., Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

Richard N. Friedman, Esq., Miami, FL, for Richard L. Newberg.

DECISION

I. PROCEDURAL BACKGROUND

On March 28, 2003, the Department of Enforcement ("Enforcement") filed a single count Complaint alleging that Richard L. Newberg ("Respondent"), a registered principal of J. Alexander Securities, Inc. (the "Firm"), testified falsely in October 2002 at a Hearing in NASD Disciplinary Proceeding No. CAF010021 (the "CAF010021 Hearing"), in violation of NASD Conduct Rule 2110. In his answer, Respondent denied

that he intentionally lied; he stated that any contradictions or inconsistencies in his testimony were based on facts newly considered and/or discovered and/or on legal positions not previously considered by him.

On September 30, 2003, Enforcement filed a Motion for Summary Disposition, with 29 exhibits; Enforcement supplemented the Motion for Summary Disposition on October 1 and 3, 2003, with additional declarations.[1] On October 20, 2003, Respondent filed an Opposition Motion, with seven exhibits and a declaration by Respondent.

Based on a review of the record, the Hearing Panel granted Enforcement's Motion holding that Respondent violated NASD Conduct Rule 2110 by providing false testimony at the CAF010021 Hearing. The Hearing Panel determined to continue the proceeding to a Hearing on the issue of sanctions.

After conducting a sanctions Hearing on February 12-13, 2004 ("Sanctions Hearing"), the Hearing Panel finds that barring Respondent from associating with any NASD member in any capacity is an appropriate sanction for his violation of NASD Conduct Rule 2110.[2] The Hearing Panel sets forth below the basis for granting Enforcement's Motion for Summary Disposition and the basis for the sanction.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent first became registered with a member firm as a general securities

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[1] Hereinafter, Enforcement's exhibits attached to the Motion for Summary Disposition will be designated as "CX-" with the appropriate page number. References to the pages of those exhibits that are transcripts will be designated as "CX-, page." Hereinafter, exhibits attached to Respondent's Opposition Motion will be designated as "RX-."

[2] Hereinafter, Enforcement's exhibits presented at the Sanctions Hearing will be designated as "CXH-," Respondent's exhibits presented at the Sanctions Hearing will be designated as RXH-," and references to the transcript of the Sanction's Hearing will be designated as "Tr. p."

representative and general securities principal in April 1988. (CX-4, p. 7). On February 21, 1995, Respondent became registered as a general securities principal and general securities representative with the Firm, where he remains registered. (CX-4, p. 5). Accordingly, NASD has jurisdiction over Respondent.

B. Respondent Intentionally Provided False Testimony at the CAF010021 Hearing

1. Facts

The material facts in this disciplinary proceeding are undisputed. On February 21, 1995, Respondent was approved as a general securities principal of the Aventura, Florida office of the Firm, the home office of which was located in Los Angeles, California.

(CX-4, p. 5; CX-1, p. 1). Mr. James Alexander, the president and owner of the Firm, designated Respondent as the branch manager of the Aventura office. (Tr. pp. 42-44).

On April 28, 1995, Jerome Rosen became an employee of the Firm. (CX-3, p. 5). On July 12, 1995, Mr. Rosen was approved as a general securities representative in the Firm's Aventura office.[3] (Id.).

Beginning in early 1997, Respondent and Mr. Rosen began having conflicts about both personal and business matters.[4] On January 28, 1997, Respondent wrote a memorandum to Mr. Kerr in the compliance department of the Firm's California office suggesting that Mr. Kerr advise Mr. Rosen of the requirements of professional conduct and of the consequences of failing to abide by those requirements.[5] (CX-11). In a

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[3] Mr. Rosen's registration with the Firm was terminated on May 23, 2002. (CX-3, p. 5).

[4] In sworn NASD testimony on February 18, 1999, Respondent testified that Mr. Rosen had exhibited "rude, crude behavior, nonprofessionalism, lack of respect for the principal in the office." (CX-6, page 37).

[5] Mr. Kerr was employed by the Firm from August 1995 to September 2000. (CX-5, p. 5).

February 3, 1997 memorandum to Mr. Alexander, Respondent asked him to: (i) contact Mr. Rosen directly; and (ii) to take action with regard to Mr. Rosen's unprofessional conduct. (CX-13).

On April 1, 1997, because of his continuing difficulties with Mr. Rosen, Respondent wrote Mr. Kerr that he "[could] no longer be responsible for Mr. Rosen." (CX-7). Subsequently, Respondent stated in at least three on-the-record interviews and in several memoranda to the Firm that he would not be responsible for supervising Mr. Rosen. (CX-6; CX-8; CX-9; CX-22). Respondent consistently advised the Firm's compliance department, Mr. Alexander, third parties,[6] members of the staff of the Securities and Exchange Commission ("SEC"),[7] and members of the staff of NASD[8] of

[6] In a memorandum to Mr. Kerr, date-stamped March 2, 1998, Respondent reported that he had advised a market maker that Mr. Alexander was in charge of Mr. Rosen and that the market maker needed to contact Mr. Alexander directly about Mr. Rosen's conduct. (CX-22).

[7] In sworn testimony before SEC on August 26, 1998, Respondent testified that he stopped being Mr. Rosen's supervisor "about a year ago maybe, or a little bit longer." (CX-8, p. 20). In responding to the question how had he ended his supervision of Mr. Rosen, Respondent testified, "I notified verbally and in writing the main office that I will not assume any responsibility for Mr. Rosen in any form, shape or manner." (CX-8, p. 21). In responding to the question to whom does Mr. Rosen report, Respondent testified, "Jim Alexander." (CX-8, p. 99).

[8] In sworn testimony before NASD on November 12, 1998, in response to the question who reports to Respondent, Respondent answered "Everybody except Jerry Rosen and his—whoever his assistants are." (CX-9, page 12). In response to the question to whom do Jerry Rosen and his assistants report, Respondent answered, "Directly to Jim Alexander." (Id.). Respondent testified, "I resigned as being the principal in charge of Mr. Rosen April 1, 1997. I felt I could not properly supervise Mr. Rosen." (CX-9, page 24).

In sworn testimony before the NASD staff on February 18, 1999, in responding to questions regarding Mr. Rosen, Respondent testified, "After April 1, 1977 . . . '97. Excuse me, '97, I no longer kept track of Mr. Rosen nor had anything to do with him." (CX-6, page 36). Respondent further testified that on April 1, 1997, "I notified California that I would no longer have any regulatory responsibility for Mr. Rosen." (Id.). Finally, Respondent testified that after April 1, 1997, Mr. Kerr and Mr. Alexander "were aware that I had no responsibility [over Mr. Rosen]." (CX-6, page 38). Respondent testified that, "To the best of my recollection and knowledge Jim Alexander accepted responsibility for [Mr. Rosen] - supervisory responsibility." (Id.). In testifying regarding his relationship to Mr. Rosen, Respondent stated, "I assumed no responsibility over him. It's not my responsibility to cut off his phone. It's not my responsibility not to use his cell. It's California's responsibility. And I notified them. And it's their call." (CX-6, page 50). In responding to the question did Respondent review Mr. Rosen's trading blotters for the period 1997 through 1998, Respondent testified that after April 1, 1997, "I no longer observed what he was doing in his account." (CX-6, page 89).

his refusal to be responsible for the supervision of Mr. Rosen.

Between April 1, 1997 and August 1, 2000, Respondent consistently stated, orally and in writing, that he was not supervising the activities of Mr. Rosen in 1997 and 1998, and that the Firm's California office was responsible for supervising Mr. Rosen. In a memorandum date-stamped August 1, 2000, Respondent wrote, "From August 1, 2000 I will assume principal responsibility for Mr. Jerry Rosen." (RX-D).

In 2001, NASD filed a Complaint in Disciplinary Proceeding No. CAF010021 that, among other things, alleged that the Firm and Mr. Alexander failed to establish and maintain an adequate supervisory system at the Firm's Aventura branch office in violation of NASD Conduct Rules 2110 and 3010. Respondent was not named in the CAF010021 Complaint. The CAF010021 Hearing was held from September 30, 2002 through October 4, 2002, in Boca Raton, Florida, before an extended hearing panel. Respondent voluntarily testified at the CAF010021 Hearing as a witness for Mr. Alexander.

On October 3 and 4, 2002, at the CAF010021 Hearing, Respondent testified, contrary to his prior testimony and prior memoranda, that after resigning as supervisor for Mr. Rosen on April 1, 1997, he orally agreed to continue supervising Mr. Rosen. At the CAF010021 Hearing, Respondent stated several times that he retained the responsibility for the supervision of Mr. Rosen after April 1, 1997.

At the CAF010021 Hearing, Respondent testified that shortly after writing the April 1, 1997 resignation memorandum, he agreed that he would "continue on with [his] supervisory responsibilities." (RX-A, p. 13). Respondent testified, "I was even more on

top of the situation rather than less on top of the situation. I did not walk away from the situation." (RX-A, p. 14).

On October 4, 2002, Respondent also testified that, "[on October 17, 1997,] as part of his heighten[ed] supervision responsibilities [of Mr. Rosen]" he "let California know that . . . Mr. Rosen was not in compliance with Jim Alexander's memo."[9] (RX-A, pp. 34-35; CX-15). Respondent also testified that he sent a memorandum to Mr. Alexander on January 9, 1998, regarding trading in Sara Hallitex, as part of his "supervision of the office and Jerry Rosen." (CX-27, Vol II pages 39, 43-44; CX-19). Respondent testified, "I was responsible for Mr. Rosen."[10] (RX-A, p. 54).

Enforcement filed the Complaint in this proceeding alleging that the testimony provided by Respondent at the CAF010021 Hearing was false.

C. Summary Disposition Standard

After a respondent's answer has been filed and Enforcement has made its investigative file available to the respondent in compliance with NASD Procedural Rule 9251, the parties may file a motion for summary disposition of any or all of the causes of action in the complaint, as well as any defenses raised in respondent's answer. Enforcement filed its Motion for Summary Disposition alleging that there was no genuine dispute about the facts and therefore it was entitled to summary disposition.

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[9] Pursuant to a September 29, 1997 memorandum from Mr. Alexander, Mr. Rosen was required to notify Respondent of trades that he executed that were in excess of $100,000. (RX-A, pp. 33-34).

[10] On October 4, 2002, in explaining his contradictory testimony to the NASD staff in 1999, Respondent testified, "I was not correct in my testimony." (CX-27, Vol II page 108). Respondent further testified, "I should have, maybe should not have said that. It was pure puffing on my part and I was responsible for the man." (CX-27, Vol II page 109).

Pursuant to NASD Procedural Rule 9264(d), a Hearing Panel may grant a motion for summary disposition when "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." This is identical to the standard under Rule 56(c) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") governing summary judgments. It is well established under Fed. R. Civ. P. 56 that the moving party bears the initial burden of showing "the absence of a genuine issue of material fact."[11]

The substantive law governing the case will identify those facts that 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."[12] Factual disputes that are irrelevant or unnecessary will not be counted.[13] If the moving party meets the initial burden, the opposing party must come forward with specific facts "showing that there is a genuine issue for trial."[14]

Enforcement argued that the undisputed facts as established by Respondent's own prior written statements and testimony showed that the testimony provided by Respondent at the CAF010021 Hearing was false. Enforcement's exhibits to its Motion for Summary Disposition clearly demonstrate that Respondent consistently wrote and stated that, between April 1, 1997 and August 1, 2000, he disavowed responsibility for the supervision of Mr. Rosen. However, at the CAF010021 Hearing, Respondent

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[11] Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986).

[12] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[13] Id.

[14] Matsushita Elec. Indus. Corp., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

testified that he continued to supervise Mr. Rosen after April 1, 1997, and he cited examples of his supervision of Mr. Rosen in 1997 and 1998.

In his Opposition Motion, Respondent failed to dispute that he wrote the memoranda or provided the testimony cited in Enforcement's exhibits. Respondent argued that the Hearing Panel should not consider Respondent's SEC testimony on August 26, 1998, or his NASD testimony on November 12, 1998, because the transcripts were not presented as exhibits in the CAF010021 Hearing. Respondent also argued that he did not see a copy of the February 18, 1999 transcript before the CAF010021 Hearing and therefore should not be held responsible for his earlier testimony. The Hearing Panel finds no support for such an argument.

Respondent also argued in his Opposition Motion that case law indicates that allegations involving a person's state of mind do not lend themselves to summary disposition because questions of credibility are implicated. In his affidavit, Respondent stated that prior to the October 2002 Hearing, he had taken heart medications, which affected his ability to remember matters both short and long term. However, in a notice filed on December 2, 2003, Respondent admitted that he had been taking his heart medications since at least 1995. In any event, case law is clear that "where the record taken as whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[15]

Finding that Enforcement carried its initial burden, the Hearing Panel finds that Respondent was required to "do more than simply show that there is some metaphysical

[15] Id.

doubt as to the material facts."[16] Respondent must identify concrete evidence on which a reasonable jury could rely to find in his favor.

In this case, based on Respondent's own testimony and writings, a rational trier of fact could only find that: (1) between April 1, 1997 and August 1, 2000, Respondent consistently disavowed that he was responsible for the supervision of Mr. Rosen; (2) at the CAF010021 Hearing, Respondent testified that he orally agreed to and did continue to supervise Mr. Rosen after April 1, 1997, citing 1997, 1998, and 2000 examples of his supervision; and (3) consequently, the CAF010021 Hearing testimony was false. Accordingly, the Hearing Panel finds that there are no genuine issues of fact in dispute.

No rational trier of fact could find for Respondent based on Respondent's claim that he orally retracted his refusal to supervise Mr. Rosen. If Respondent had orally retracted his statements, Respondent would have said that in his testimony before the regulatory authorities, the SEC and NASD. Instead, in Respondent's 1998 testimony before the SEC, Respondent stated "I notified verbally and in writing the main office that I will not assume any responsibility for Mr. Rosen in any form, shape or manner." (CX-8, p. 21). In a memorandum to Mr. Kerr and Mr. Alexander dated June 15, 1998, Respondent wrote, "As I informed you last year I cannot supervise Mr. Rosen nor would I in any form nor manner be responsible for Mr. Rosen." (CX-23).

Respondent never indicated in any testimony or document, between April 1, 1997 and August 1, 2000, that he had retracted his decision to refuse responsibility for supervising Mr. Rosen. In his August 1, 2000 memorandum, Respondent wrote, "From August 1, 2000 I will assume principal responsibility for Mr. Jerry Rosen." (RX-D). The

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[16] Id.

August 1, 2000 memorandum would not have set August 1, 2000 as the date for Respondent to assume responsibility for Mr. Rosen if Respondent had previously assumed responsibility for Mr. Rosen.[17] Thus, Respondent offered no evidence that established a genuine dispute as to Respondent's supervision of Mr. Rosen in 1997 and 1998. Further, having consistently indicated both in testimony and in writing that he was not responsible for supervising Mr. Rosen in 1997 and 1998, Respondent knew that his testimony to the extended hearing panel at the CAF010021 Hearing that he had supervised Mr. Rosen in 1997 and 1998 was false.

Accordingly, the Hearing Panel finds that Respondent knowingly testified falsely at the CAF010021 Hearing in violation of NASD Conduct Rule 2110 as alleged in the Complaint.

III. SANCTIONS

On February 13 and 14, 2004, the Sanctions Hearing for this disciplinary proceeding was held in Miami, Florida, in which both Parties were to provide evidence concerning the sanctions to be imposed on Respondent for violating NASD Conduct Rule 2110 by testifying falsely at the CAF010021 Hearing. Enforcement primarily relied on the evidence provided in its Motion for Summary Disposition.

Respondent provided the testimony of five witnesses. However, Respondent's witnesses did not address the issue of sanctions but rather attempted to support Respondent's claim that he was in fact supervising Mr. Rosen, and therefore had not lied at the CAF010021 Hearing. None of the witnesses, however, offered credible testimony on that issue.

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[17] At the CAF010021 Hearing, Respondent testified that on January 12, 2000, he was responsible for

For example, Mr. Alexander testified at the Sanctions Hearing that Respondent continually supervised Mr. Rosen after April 1, 1997.[18] Specifically, Mr. Alexander stated, "[Respondent] was still there to be for Jerry Rosen as an [sic] supervisor . . . I took on the role as the supervisor as well, another layer of supervision." (Tr. p. 55).

Mr. Alexander's testimony was inconsistent with his prior testimony to the SEC regarding his supervision of Mr. Rosen. On October 27, 1999, Mr. Alexander testified, "I in turn just took over the responsibility of managing it, supervising." (Tr. pp. 58-59). Mr. Alexander's testimony at the Sanctions Hearing also conflicted with his January 12, 2000 letter to NASD, in which he stated that he was responsible for supervising Mr. Rosen.[19]

Mr. Keith Brodsky[20] testified that Respondent supervised Mr. Rosen and that he was not aware that Mr. Alexander supervised Mr. Rosen. (Tr. p. 209). This was in conflict with Mr. Brodsky's prior statement that Mr. Alexander supervised Mr. Rosen, made to the NASD staff in an on-the-record interview on January 28, 1999.[21] (Tr. pp. 235-236).

Respondent also provided: (i) documents to demonstrate that Respondent held compliance meetings, which Mr. Rosen attended; and (ii) testimony that Respondent

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supervising Jerry Rosen. (RX-A, p. 65).

[18] Mr. Alexander also testified that in 1995, when Mr. Rosen and Respondent joined the Firm, Mr. Rosen and Respondent had a prior 20-year relationship. (Tr. p. 100).

[19] When describing his supervisory responsibility for the Aventura office to the NASD staff, Mr. Alexander wrote in January 12, 2000, "I am also responsible for supervising Jerry Rosen, a trader in the Florida office. Mr. Rosen and I talk daily." (CX-40, p. 2).

[20] Mr. Brodsky began working at the Firm as a clerk in December 1995. (Tr. p. 203). Mr. Brosky is not a registered principal and has taken the Series 24 exam several times but has failed to pass it. (Tr. p. 210).

[21] In response to question from the NASD staff on January 28, 1999 regarding who is responsible for supervising the Aventura office, Mr. Brodsky answered "Jim Alexander supervises, supervises Jerry, and

opened mail for the office and reviewed the office blotters.[22] (RXH-8; RXH-9; RXH-10; RXH-11; RXH-12; RXH-13). However, even accepting these documents and statements to be true, they do not establish that Respondent orally disavowed his decision not to supervise Mr. Rosen and did in fact supervise Mr. Rosen between April 1, 1997 and August 1, 2000.

Neither the testimony of the witnesses nor the documents established the existence of any genuine factual issue concerning Respondent's supervision of Mr. Rosen, or persuaded the Hearing Panel to reconsider its original determination of liability.

On the second day of the Sanctions Hearing, counsel for Respondent announced that Respondent would not be attending and had decided not to testify at the Sanctions Hearing. Consequently, Respondent offered no testimony to mitigate the seriousness of his false testimony to the extended hearing panel at the CAF010021 Hearing.

Although there is no specific sanction guideline for voluntarily providing false testimony, the Hearing Panel finds that Respondent's conduct is most analogous to providing false testimony in response to a request for information as set forth in the NASD Sanction Guidelines for a violation of NASD Procedural Rule 8210. The Hearing Panel considered the type of information misrepresented, the circumstances surrounding

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Dick supervises the rest of us." (Tr. pp. 235-236). Mr. Brodsky had no explanation for the inconsistency. (Tr. p. 236).

[22] Ms. Lisa Newberg and Mr. Daniel Kohn testified that they did not notice a change in Respondent's interaction with Mr. Rosen from before April 1, 1997 and after April 1997. (Tr. pp. 147-148, 193-195). Both admitted that they were not and had never been registered principals, and were not familiar with the duties of a registered principal. (Tr. pp. 170-171, 173-174, 199). Mr. Arthur Redler testified that he was aware that Respondent had written documents indicating that he did not want to supervise Mr. Rosen. (Tr. p. 299). Mr. Redler was not aware that Respondent testified before NASD and SEC regarding his lack of supervision of Mr. Rosen. (Tr. p. 318).

Respondent's misrepresentation, the clarity of the questions asked, and Respondent's experience in the securities industry.

In addressing the appropriate sanction for a violation of Procedural Rule 8210, the National Adjudicatory Counsel has advised that "untruthful responses [are] as harmful as a complete failure to respond and, as such, that a bar is the appropriate sanction."[23] As explained above, the questions posed to Respondent at the CAF010021 Hearing and Respondent's subsequent answers were clear, and Respondent must have known that this testimony offered in support of his supervisor Mr. Alexander was false.

Enforcement requested that Respondent be barred from associating with any NASD member. Enforcement stated that a bar was appropriate given: (1) Respondent's willful and intentional lies to the extended hearing panel at the CAF010021 Hearing; (2) Respondent's past disciplinary history;[24] and (3) Respondent's continued failure to acknowledge and express remorse for his misconduct at the CAF010021 Hearing.

The Hearing Panel, finding no mitigating circumstances, finds that Respondent intentionally and willfully lied to the extended hearing panel at the CAF010021 Hearing in an attempt to thwart the extended hearing panel's efforts to receive and consider all relevant evidence pertaining to the issue of the supervision of Mr. Rosen. The Hearing Panel finds that, with more than 10 years experience in the securities industry, Respondent was very aware of his obligation to be truthful to regulatory entities. The

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[23] See Dep't of Enforcement v. Marlowe Robert Walker, III, 2000 NASD Discip. LEXIS 2, at *30 (Apr. 20, 2002).

[24] In reviewing Respondent's past disciplinary history, the Hearing Panel did not consider any findings of liability in proceedings that are on appeal, including the hearing panel decision issued on September 3, 2003 in Disciplinary Proceeding No. CAF010011.

Hearing Panel therefore concludes that Respondent should be barred from associating with any NASD member in any capacity.

IV. CONCLUSION

Finding that Respondent Richard L. Newberg violated NASD Conduct Rule 2110 as set forth in the Complaint, the Hearing Panel orders that Respondent be barred from associating with any NASD member firm in any capacity for providing false testimony to an NASD hearing panel.[25] The sanction shall become effective on the date this decision becomes the final disciplinary action of NASD.

HEARING PANEL

by:____________________
Sharon Witherspoon,
Hearing Officer

Date: Washington, DC
July 6, 2004

Copies to:

Richard L. Newberg (via Federal Express and first class mail)
Richard N. Friedman, Esq. (via facsimile and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

[25] 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.