

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-26 (C10990212).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10990212
v.	:	(Consolidating No. C10990212
	:	and No. C10000031)
	:	
	:	
	:	Hearing Officer - EBC
	:	
	:	
	:	
Respondents.	:	

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	
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	:	
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	:	
Respondents.	:	

**ORDER DENYING ENFORCEMENT’S MOTION FOR PARTIAL
SUMMARY DISPOSITION AGAINST RESPONDENT**

Introduction

In this consolidated disciplinary proceeding, the Department of Enforcement (“Enforcement”) alleges that Respondent _____ (“_____”) along with Respondents _____, _____,

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and _____ violated NASD Conduct Rule 2110 by permitting a person who they knew or should have known was subject to statutory disqualification, _____, to become and remain associated with First United Equities Corporation (“First United” or the “Firm”), without having obtained the NASD’s or SEC’s prior approval for _____ association. Enforcement also alleges, in the Fifth Cause of the Complaint in which _____ is named as a Respondent, that _____ violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to respond to various questions at on-the-record interviews (“OTRs”) conducted by NASD Regulation, Inc. (NASDR) staff on September 28, 1999 (the “September 1999 OTR”) and October 12, 1999 (the “October 1999 OTR”).

Enforcement moved, pursuant to Rule 9264, for an order granting it summary disposition against _____ on the Fifth Cause of the Complaint, and requested that the Hearing Panel bar _____ from associating with any member firm in any capacity.¹ _____, through his counsel, opposed the motion.²

For the reasons set forth below, the Hearing Officer has determined to deny Enforcement’s motion.³

Legal Standard for Summary Disposition

Code of Procedure Rule 9264(d) provides that the Hearing Panel “may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files

¹ In support of its motion, Enforcement submitted a Statement of Undisputed Facts (“Stmt.”), an Affidavit of Elsie G. Kopcha (“Kopcha Aff.”), who is a Senior Compliance Examiner at NASDR, a Memorandum of Points and Authorities, and 15 exhibits (CX A-CX O).

² _____ submitted an affidavit (“_____ Aff.”) accompanied by one exhibit, a Memorandum in Opposition to Enforcement’s Motion (“Opp. Mem.”), and six exhibits (all of which were copies of cases).

³ Pursuant to the recent amendments to the Code of Procedure, which became effective on September 11, 2000, the Hearing Officer may “deny or defer decisions on any motion for summary disposition”

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the motion is entitled to summary disposition as a matter of law.”⁴ Under the analogous federal court summary judgment procedure, it is clear that the moving party (in this case, Enforcement) bears the initial burden of showing “the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its initial burden, the opposing party must come forward with specific facts “showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). At the same time, however, at the summary judgment stage, it is incumbent on the court to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. Patrick v. LeFevre, 745 F.2d 153, 160 (2d Cir. 1984).⁵ A motion for summary judgment will not be granted if the trier of fact could resolve an outcome-determinative issue in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Discussion

A. Undisputed Facts

Certain core facts relevant to Enforcement’s motion are undisputed. By letter, dated July 30, 1999, NASDR requested, pursuant to Rule 8210, that _____ appear at its District 10 Office, on August 9, 1999, for an OTR concerning “FP #E 1098 3638/[Customers JW and FW] First United Equities Corp.” (CX G.) At the request of _____’s counsel, NASDR agreed to adjourn _____’s testimony until August 18, 1999 (CX H), at which time _____ appeared and testified

⁴ See also Department of Enforcement v. Usher, Complaint No. C3A980069, 2000 NASD Discip. LEXIS 5, at n.3 (NAC April 18, 2000) (reiterating summary disposition standard).

⁵ See also, e.g. American Cas. Co. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir. 1994) (in determining whether summary judgment is appropriate, the court “must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor”) (quoting Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 572 (2d Cir. 1993)).

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for approximately two hours. (CX I.) Enforcement does not allege any Rule 8210 violation stemming from the August 1999 OTR.

By letter, dated August 26, 1999, NASDR requested, pursuant to Rule 8210, that _____ appear at its District 10 Office, on September 14, 1999, for an OTR concerning “E10990863/ First United Equities Corp./_____.” In its August 26 letter, NASDR also advised _____ that, at the OTR, he might be asked “to provide information regarding issues not specifically (sic) delineated [in the subject heading in the letter] but related to [his] employment in the securities industry.” (Stmt. ¶ 7; CX J.) At the request of _____’s counsel, NASDR agreed to adjourn _____’s testimony until September 28, 1999. (Stmt. ¶¶ 8-9; Kopcha Aff. ¶ 15; CX K.)

On September 28, 1999, _____ appeared for an OTR, which lasted approximately five hours. (CX L.) The transcript of the September 1999 OTR shows that _____, based on the direction of his counsel, refused to answer certain of the staff’s questions concerning First United and _____’s role at the Firm. (CX L, pp. 73-87, 119-20, 130-31, 138-39, 145-47, 149, 156-58.) Although _____ was prepared to and did testify about customers JW and FW and about _____ relationship with First United, he apparently was not prepared to testify about matters that pertained generally to First United’s business structure or his involvement with the Firm, and _____’s counsel urged NASDR staff to grant a “reasonable” adjournment so that he could prepare his client to testify about these other matters. NASDR staff refused to grant _____ an additional adjournment and took the position that _____ should have been prepared to discuss all matters pertaining to his employment in the securities industry, as it had indicated in the text of its August 26

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letter. (CX L, pp. 73-83; see also Stmt. ¶ 13.)⁶ At the September 1999 OTR, NASDR staff repeatedly advised _____ that his failure to answer could result in disciplinary action and the imposition of serious sanctions against him (CX L, pp. 76, 82, 87, 120, 137; see also Stmt. ¶ 13), and also made clear that it did not view advice of counsel as a valid excuse for failing to respond. (CX L,

⁶ During the September 1999 OTR, the parties engaged in extensive colloquy regarding their respective positions on this point. The following is but one excerpt:

MR. SORKIN: . . . We came down here under the pretense that we were going to be asked questions about [customers JW and FW] and _____. That's what your letter states.

. . . I'm not going to let him continue to talk about First United, its history, its back office, its setup, and everything else for the next several hours, because, quite frankly, I haven't had the opportunity to talk to him about First United, other than [customers JW and FW] and the - _____ matter, which I understood was the reason he was going to be here today.

If you're going to go into that, I'm going to advise him not to continue today, and that we have the opportunity to confer, and we go over First United, and do all the things that I think at least a reasonable, competent counsel should do to prepare him for his testimony on First United.

He's here to testify about [customers JW and FW] and _____ and how they were generically involved at First United.

MR. CHODOSH: . . . The NASD will proceed with the examination how it deems appropriate, and the questions that are being asked are perhaps some background, some more directly related to some of the subjects that you're already aware of that are going to be the subject of this on-the-record, but we must be given the latitude to ask questions as we deem appropriate, just as any deposition is conducted.

MR. SORKIN: Let me say I do not disagree with what you said. The only point I am making is that we were prepared to come down today to talk about [customers JW and FW], of which we had some repetition from his prior testimony, and _____. I'm not prepared to proceed today and I will also advise him not to proceed today until I've had the opportunity to talk to him and go over this matter.

That is not to say that we'll not answer questions. That is not to say that we are unaware of your rules. That is not to say that he wouldn't cooperate. But it was our understanding, based upon the documents you asked for on the [customers] . . . and _____ . . . that's why we're here today.

To repeat myself, at the risk of being redundant, we will be in a position to continue to answer questions, but I'm not prepared to have him proceed today on First United other than as it pertains to _____.

MR. CHODOSH: That position is unacceptable to the NASDR.

(CX L, pp. 73-76.)

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pp. 133-34; see also Stmt. ¶ 13.) At the conclusion of the September 1999 OTR, NASDR staff advised _____ that “[w]e’ll close the deposition today with the understanding that we may well come back to pick up on other subjects but, once again, we don’t condone your failure to answer questions posed. We like to get it all done at one time, if possible.” (CX L. p. 180; see also Stmt. ¶ 15.)

By letter, dated October 1, 1999, NASDR requested, pursuant to Rule 8210, that _____ appear at its District 10 Office, on October 12, 1999, for an OTR concerning “E10990863/First United Equities Corp.” (Stmt. ¶ 16; Kopcha Aff. ¶ 17; CX M.) _____ appeared for the OTR on October 12, 1999 and, after approximately two hours of testimony, refused to respond to further questions based on advice of counsel or the invocation of the Fifth Amendment privilege against self-incrimination. (Stmt. ¶ 19; Kopcha Aff. ¶ 21; CX N, pp. 261-63, 267-68, 270-73.) At the October 1999 OTR, NASDR staff advised _____ that neither advice of counsel nor the invocation of the Fifth Amendment was a cognizable ground for failing to respond, and that his failure to respond might result in disciplinary action, including the imposition of a fine, suspension, bar, or other sanctions. (CX N, pp. 262-63, 264-65; see also Stmt. ¶ 20.)

B. Disputed Facts

According to Enforcement’s Statement of Undisputed Facts, at the September 1999 OTR, _____ refused to respond to inquiries pertaining to:

- (a) who at the firm reported to [him] in 1996;
- (b) [his] duties and responsibilities at the firm during the period January 1996 through June 1996, and whether his duties and responsibilities changed over time;

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- (c) his work activities during a normal workday during the period January 1996 through June 1996;
- (d) his meetings and discussions with traders at the firm during the period January to June of 1996;
- (e) whether he ever reviewed broker commission runs during the period January to June of 1996;
- (f) the manner in which customer complaints were handled at the firm between January and June of 1996, and who had authority to settle customer complaints;
- (g) whether he had any discussions with the firm's traders about the firm's trading activities during the period January to June of 1996;
- (h) who reviewed the firm's trading profit and loss figures; and
- (i) who approved broker order tickets prior to execution of transactions between January and June of 1996.

(Stmt. ¶ 14(a)-14(i) (citations to transcript omitted). According to Enforcement's Statement of

Undisputed Facts, at the October 1999 OTR, _____ refused to respond to inquiries pertaining to:

- (a) whether he had ever directed a trader at the firm to move a quote in certain securities;
- (b) whether he reviewed firm commission runs during 1996;
- (c) his role at firm compliance meetings;
- (d) whether he reported to anyone at the firm;
- (e) whether anyone at the firm ever reported to him;
- (f) whether he monitored broker activity at the firm;
- (g) who had ultimate supervisory responsibilities at the firm during the period January 1996 to June 1996;
- (h) whether the firm had hired consultants on more than one occasion;

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- (i) whether Customers JW and FW continued to invest with him after June of 1997;
- (j) whether he had told Customers JW and FW anything to keep them from withdrawing their investments; and if so, what he told them; and
- (k) checks bearing _____'s signature made payable to _____.

(Stmt. ¶ 22(a)-(k) (citations to transcript omitted.)

In his Answer to the Complaint, _____ admitted that he refused to answer various questions put to him at the September 1999 and October 1999 OTRs (Complaint, ¶¶ 27-30; Answer, ¶¶ 12-15), but asserted, as affirmative defenses, that: (1) the staff's questioning was "repetitious, harassing and exceeded the bounds of a fair and equitable examination intended to elicit information"; and (2) NASDR is a "quasi-governmental agency" and as such, it was required to provide him "fundamental constitutional protections," which it failed to do.

In opposition to Enforcement's motion for partial summary disposition, _____ does not raise any legal defenses for his failure to respond, but contends that there are material issues of fact in dispute. _____ claims that he in fact responded to "many of the inquiries listed as unanswered" in Enforcement's Statement of Undisputed Facts. (Opp. Mem., p. 3.) For example, as _____ points out, while he refused – based on his assertion of the Fifth Amendment – to respond to an inquiry pertaining to whether he had ever directed a trader to move a quote in Ashton Technologies or National Medical, he previously testified that he did not recall ever directing a trader at First United to raise or lower a bid. (CX N, p. 261; see also Opp. Mem., p. 3.) Similarly, while _____, at the October 1999 OTR, refused to respond to an inquiry as to whether First United ever hired anyone as a consultant in addition to _____ (CX N, p. 270), at the September 1999 OTR, he testified that, in 1996 (when _____ allegedly became associated with the Firm) First United employed other

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consultants to teach broker trainees. (CX L, pp. 106-07; see also Opp. Mem., p. 4.) In his papers in opposition to Enforcement's motion, _____ also demonstrates that while he failed to respond, at the September 1999 OTR, to certain questions pertaining to his duties and responsibilities at First United, he testified at length on these subjects at the October 1999 OTR. (CX N, pp. 212-20, 243-47; see also Opp. Mem. p. 6.)

C. Ruling

A person subject to the Association's jurisdiction does not have the right to second guess the legitimacy of NASDR's requests for information, In re Michael David Borth, 51 S.E.C. 178, 180 (1992), or to pick and choose among the questions he or she will answer. To the contrary, it is well-established that persons subject to the Association's jurisdiction have a duty to cooperate fully and promptly with NASDR's requests, In re Brian L. Gibbons, 52 S.E.C. 791 (1996), petition for review denied, 112 F.3d 516 (9th Cir. 1997) (table), and are not free to impose conditions on their response. In re Joseph Patrick Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *11 (Sept. 14, 1998). It is equally well settled that advice of counsel is not a valid defense to a failure to respond,⁷ and that NASDR, in performing its statutory mandate, is not a state actor and its investigations and proceedings therefore do not trigger the privilege against self-incrimination or any other constitutional protections.⁸

⁷ See, e.g., In re Michael Markowski, Exchange Act Release No. 32562, 1993 SEC LEXIS 1695, at *11 (June 30, 1993) ("[r]eliance on counsel is immaterial to an associated person's obligation to supply requested information to the NASD"), aff'd, 34 F.3d 99 (2d Cir. 1994).

⁸ See, e.g., Jones v. SEC, 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because the NASD is not a government agency), cert. denied, 523 U.S. 1072 (1998); Datek Securities Corp. 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.) See also, e.g., U.S. v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000) ("[i]t is beyond cavil that questions put to the defendants by the NASD in carrying out its own legitimate investigative purposes do not activate the privilege against self-

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However, _____ has come forward with sufficient credible evidence to demonstrate the existence of a genuine dispute as to his failure to respond to NASDR's inquiries. Enforcement ultimately may succeed in establishing, by a preponderance of the evidence, that _____ failed to respond to the inquiries Enforcement has identified as "unanswered" in the Statement of Undisputed Facts it filed in support of its summary disposition motion. However, given the extensive testimony that _____ did provide, absent further clarification from the Parties, including a complete and thorough parsing of the transcripts of _____'s investigative testimony, no such finding can be made.⁹

Based on the foregoing, Enforcement's motion for partial summary disposition against _____ is denied. To streamline the presentation of evidence on this charge and to assist the Hearing Panel in determining the Parties' respective positions regarding _____'s failure to respond, Enforcement shall serve and file, not later than September 25, 2000, a chart setting forth the specific questions (including page and line references to the appropriate transcripts) that it believes _____ failed to answer; _____ shall serve and file, not later than September 29, 2000, a chart setting forth the testimony he gave (including page and line references to the appropriate transcripts) that he believes was responsive to the alleged "unanswered" inquiries. At the hearing, Enforcement may offer

incrimination . . ."); Department of Enforcement v. Fernandez, Non-Summary Proceeding, slip op., at pp. 5-6 (June 23, 2000 NAC).

⁹ The Hearing Officer also notes that the record is not sufficiently developed on the issue of sanctions. Enforcement has requested the imposition of the maximum sanctions recommended in the applicable NASD Sanction Guideline for a failure to respond in any manner and has represented – without providing any support – that _____'s failure to cooperate impeded its investigation. _____, on the other hand, has indicated that there are mitigating factors he wishes to bring to the Hearing Panel's attention.

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witness testimony and argument for the limited purpose of addressing why _____'s claimed responses were inadequate and _____ may offer rebuttal testimony and argument on these points.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
September 19, 2000