

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 52693 / October 28, 2005

Admin. Proc. File No. 3-11852

<p>In the Matter of the Application of</p> <p>PAZ SECURITIES, INC.</p> <p>and</p> <p>JOSEPH MIZRACHI</p> <p>For Review of Disciplinary Action Taken by</p> <p>NASD</p>
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OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - - REVIEW OF DISCIPLINARY  
PROCEEDING

Violations of Conduct and Investigations Rules

Failure to Provide Requested Information

Former member firm of registered securities association and its president failed to respond to association's requests for information. Held, association's findings of violations and sanctions it imposed sustained.

APPEARANCES:

Gregory Sichenzia and Sameer Rastogi, of Sichenzia Ross Friedman Ference LLP, for PAZ Securities, Inc. and Joseph Mizrachi.

Marc Menchel, Alan B. Lawhead, and Jennifer C. Brooks, for NASD.

Appeal filed: March 11, 2005  
Last brief received: June 29, 2005

## I.

PAZ Securities, Inc. ("PAZ"), formerly an NASD member firm, and Joseph Mizrachi ("Mizrachi"), PAZ's president and part owner, appeal from NASD disciplinary action. NASD found that Applicants failed to provide information requested by letters dated May 6, May 20, and July 23, 2003, in violation of NASD Conduct Rule 2110 and NASD Investigations Rule 8210. 1/ NASD expelled PAZ from membership and barred Mizrachi from associating with any NASD member firm in any capacity as a result of their failure to respond. 2/ We base our findings on an independent review of the record.

## II.

In February 2003, NASD began a routine exam of PAZ. On May 6, 2003, NASD staff sent a request for information by overnight courier service to Mizrachi as PAZ's president at the business address listed for PAZ in the Central Registration Depository ("CRD") in connection with its exam. Pursuant to NASD Rule 8210, 3/ the letter requested information concerning:

- a. whether PAZ had implemented a continuing education program in 2000-2002;
- b. the investment banking and/or securities business in which PAZ had engaged since 2001 and supporting documentation for any such transactions;
- c. the duties and compensation of certain persons;
- d. whether the firm had revised its written supervisory procedures as requested during the audit or the reason for not doing so;
- e. the reason PAZ's 2001 audit was received late; and
- f. whether the firm had a written expense sharing agreement with MidAtlantic Agency, Inc., and, if not, why not. 4/

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1/ NASD Conduct Rule 2110 requires members to adhere to "high standards of commercial honor and just and equitable principles of trade." NASD Investigations Rule 8210 requires members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding. A violation of another NASD rule, such as Rule 8210, constitutes a violation of Conduct Rule 2110. Stephen Gluckman, 54 S.E.C. 175, 185 & n. 31 (1999).

2/ NASD Procedural Rule 9269(a)(2). Because NASD determined there was a default, it did not hold a hearing and deemed the allegations of its complaint admitted. The record before us includes the complaint as well as affidavits and other documents, including portions of Mizrachi's passports.

3/ This letter (mistakenly dated May 7) was directed to "Mr. Joseph Mizrachi, President, PAZ Securities, Inc." at PAZ's business address. It was delivered on May 7, 2003.

4/ MidAtlantic, a company headed by Simon Mizrachi, shared office space with PAZ.

The letter requested that the information be supplied by May 13, 2003.

On May 14, an NASD supervisor spoke by telephone with Simon Mizrachi ("S. Mizrachi"), Mizrachi's brother and PAZ's vice president, regarding the firm's failure to respond. S. Mizrachi acknowledged receipt of the request, stated that the firm would respond, and advised NASD's Department of Enforcement ("Enforcement") that he would inform Mizrachi of the request. <sup>5/</sup> Applicants did not provide the information or otherwise respond to the request.

On May 20, 2003, NASD staff repeated its request by overnight courier service to Mizrachi at PAZ's CRD address requesting a response by May 27, 2003. This second letter, delivered on May 21, 2003, advised Mizrachi that failure timely to provide the information requested could result in disciplinary action. Again, Applicants did not respond.

On July 23, 2003, NASD staff sent Applicants a third letter requesting a response by August 4, 2003. This letter was sent via certified and first-class mail to Mizrachi as PAZ's president at PAZ's CRD address and to Mizrachi's residential address in CRD. NASD received return receipt cards for the certified mailings evidencing delivery on July 28 and 30, 2003, respectively. Both cards appear to have been signed by "C. J. Mizrachi." <sup>6/</sup> Neither first-class mailing was returned to NASD. The letter advised Applicants that, if they failed timely to respond to the information request, NASD would recommend disciplinary action against them. Applicants did not provide the information or otherwise respond to the request.

On August 14, 2003, NASD instituted a disciplinary proceeding against Applicants alleging that they failed to provide requested information in violation of NASD Conduct Rule 2110 and NASD Investigations Rule 8210. On the same date, NASD staff sent the complaint by certified and first-class mail addressed to PAZ's CRD address and to Mizrachi's residence as reflected in CRD. Applicants did not respond. The certified letters were returned unclaimed. On the certified letter sent to Mizrachi's residence, an unidentified person struck out the residential address and wrote in the firm's address. NASD staff also sent copies of the complaint by first-class mail to the firm and Mizrachi. Neither first-class mailing was returned.

On September 12, 2003, Enforcement sent Applicants a second notice of complaint. The letters were sent by certified and first-class mail to Applicants' CRD addresses. Enforcement received return receipts for both certified mailings. The signature on the return receipt from the mailing to PAZ appears to be "C.J. Mizrachi." The signature on the return receipt from the mailing sent to Mizrachi's residential address appears to be "Mizrachi." In the affidavit Mizrachi submitted to NASD in support of his motion to set aside the default, Mizrachi admitted that, around this time, S. Mizrachi informed him that a complaint had been issued against him and the firm. S. Mizrachi also told Mizrachi that S. Mizrachi had retained counsel for Applicants. On

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<sup>5/</sup> S. Mizrachi was not a respondent in this proceeding.

<sup>6/</sup> The record does not identify "C. J. Mizrachi."

September 26, 2003, nearly two weeks later, pursuant to a request from Applicants' counsel, the Hearing Officer granted Applicants an extension until October 20, 2003, to answer the complaint. However, Applicants did not answer the complaint. According to his affidavit, Mizrachi left for London on October 24, 2003, four days after the answer was due.

On October 28, 2003, the Hearing Officer directed Enforcement to serve and file a motion for entry of a default decision. The Hearing Officer's order was served only on Applicants' counsel via a facsimile and by first-class mail. On November 18, 2003, NASD filed a motion for default against Applicants. NASD served a copy of the motion via first-class mail to Mizrachi at his CRD residential address and to PAZ at its CRD address, as well as on counsel. Applicants did not file a response.

According to a copy of his United States passport attached to his affidavit, Mizrachi was back in the United States on December 3, 2003. On December 15, 2003, S. Mizrachi spoke with Enforcement by telephone and inquired how PAZ could "get out of 'this mess.'" <sup>7/</sup> The NASD attorney advised S. Mizrachi that NASD had filed a motion for default against Applicants and that they could file a response with the Hearing Officer. Enforcement also informed S. Mizrachi that neither PAZ nor Mizrachi had responded to the information request and that Enforcement was seeking to bar Mizrachi and expel the firm. The attorney also informed S. Mizrachi that the Hearing Officer could issue a default decision against Applicants if they failed to respond. Applicants did not respond.

On December 31, 2003, the Hearing Officer issued a decision finding that Applicants had defaulted by failing to answer the complaint. The decision expelled PAZ from membership and barred Mizrachi from association with any member firm in any capacity for their failure to respond. The default decision was mailed to Applicants by overnight courier and first-class mail. Applicants' counsel was served by facsimile and first-class mail. According to his passport, Mizrachi left the United States on January 4, 2004, and returned on January 9, 2004. On January 26, 2004, Applicants belatedly responded to the information request, moved to vacate the default decision, and appealed to the National Adjudicatory Council ("NAC"). The NAC stayed its action until the Hearing Officer had an opportunity to rule.

In connection with Applicants' motion to set aside the default, on February 9, 2004, Mizrachi submitted an affidavit stating that he was traveling in Europe and Israel beginning January 2003 because of his unhappiness over his pending divorce. Mizrachi averred that he returned to the United States in late August 2003. In his affidavit Mizrachi stated that, at around that time, he discovered that his wife had been "taking my mail and refused to transmit it to me."

On February 18, 2004, the Hearing Officer denied Applicants' motion to vacate the default decision, finding that Applicants had refused to respond until they learned of the sanctions imposed by the default decision and had failed to show good cause for doing so. On

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<sup>7/</sup> NASD submitted a declaration from the Enforcement attorney who spoke with S. Mizrachi.

February 10, 2005, based on the written record, the NAC issued its decision on appeal. It sustained the default and affirmed the disciplinary sanctions imposed by the Hearing Officer.

### III.

A. On both May 6 and May 20, 2003, NASD staff sent by courier a request for information addressed to Mizrachi, as president of PAZ, at PAZ's business address. On July 23, 2003, NASD sent a third request by certified and first-class mail addressed to Mizrachi, as president of PAZ, at PAZ's business address and to Mizrachi's residential address listed in the CRD. NASD did not receive responses to its requests until January 26, 2004, after the Hearing Officer had expelled PAZ and barred Mizrachi.

Applicants do not dispute that NASD sent the requests, that they were properly addressed, and that their delivery complied with NASD Investigations Rule 8210(d). <sup>8/</sup> Applicants also do not dispute that PAZ received the requests. In particular, they do not dispute that, in May 2003, NASD staff spoke with S. Mizrachi about PAZ's failure to respond to the information requests. We sustain NASD's finding that PAZ violated NASD Conduct Rule 2110 and NASD Investigations Rule 8210.

NASD also effected valid service on Mizrachi. NASD sent the requests to Mizrachi first at PAZ's CRD business address and then at his last known residential address as reflected in the CRD.

Mizrachi argues that he was traveling and did not actually receive NASD's requests. Mizrachi includes in his brief a table showing that he was out of the country on the day of each attempted mailing by NASD. However, Mizrachi's travels do not excuse his failure to respond. In Ashton Noshir Gowadia, Gowadia argued that he left the country and was traveling and had no permanent address. <sup>9/</sup> We held that it was Gowadia's responsibility to provide the CRD with an address at which he could receive documents. Otherwise, an NASD member or associated person could avoid responding to requests by moving and not leaving a forwarding address.

Mizrachi argues that S. Mizrachi did not inform him of the information requests. However, the record does not support this assertion. Mizrachi's affidavit states only that he was traveling in Europe and Israel between January and August 2003. Mizrachi's affidavit is silent as to whether S. Mizrachi failed to tell him of the requests, or whether he and S. Mizrachi communicated during this period. The record contains no statement from S. Mizrachi.

We have held that a person to whom a request is addressed must respond promptly "or to supervise others diligently with adequate follow-up to ensure a prompt response to the

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<sup>8/</sup> Rule 8210(d) provides that a notice under the rule is deemed received by the member or person to whom it is directed upon mailing or otherwise transmitting to the member's or person's last known address on file in the CRD.

<sup>9/</sup> 53 S.E.C 786, 790 (1998).

<sup>10/</sup> Robert A. Fitzpatrick, Exchange Act Release No. 44956 (Oct. 19, 2001), 76 SEC Docket

NASD." 10/ Mizrachi's disregard of his responsibility is particularly critical here. Mizrachi was PAZ's president. He was responsible for PAZ's compliance unless and until he delegated that responsibility to another. Mizrachi does not dispute that he knew NASD would conduct an audit of PAZ in February 2003. Yet, in his affidavit, he admits that S. Mizrachi was not sufficiently familiar with the operation of PAZ to respond to any of NASD's requests (including ones that might reasonably occur as the result of this inspection). If Mizrachi was unavailable, he had an obligation to delegate PAZ's operations, including its compliance with the NASD's request for information, to another PAZ employee and to monitor that employee's performance. 11/

Moreover, by September 2003, Mizrachi knew about NASD's requests. S. Mizrachi informed him of NASD's complaint arising out of the requests. Mizrachi did not contact NASD or explain his absence, nor did he undertake any action to produce the requested information. 12/ Although Applicants supplied NASD with the information requested after the default was entered, as we have stated previously, NASD should not have to resort to filing a complaint, or here, issuing a default decision, in order to elicit a response to its request. 13/

B. Applicants complain that they never had a hearing before NASD and urge us to set aside the default. 14/ However, we believe that Applicants have to establish good cause.

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- 252, 256 n.13 (quoting Richard J. Rouse, 51 S.E.C. 581, 585 (1993), petition denied, 63 Fed. Appx. 20 (2d Cir. 2003) (unpublished summary order).
- 11/ See, e.g., Harry Glikzman, 54 S.E.C. 471, 482 n. 22 (1999), aff'd, 24 Fed. Appx. 702 (9<sup>th</sup> Cir. 2001) (unpublished); Universal Heritage Investments Corporation, 47 S.E.C. 839,845 (1982).
- 12/ Mizrachi states that he was diagnosed with "clinical depression." He attaches to Applicants' brief a letter from his psychologist. The psychologist states that he treated Mizrachi for "emotional distress" and "stress symptoms." Mizrachi had office appointments until the end of November 2002 and, thereafter, spoke with the psychologist by telephone. NASD began making its requests in May 2003. In Mizrachi's affidavit, he admits that when he returned to the country in August 2003, he was able to resume business activities. Certainly, by that time, Mizrachi could have responded to NASD's requests for information.
- 13/ See Charles R. Stedman, 51 S.E.C. 1228, 1232 (1994) (NASD should not have to bring disciplinary proceeding and entertain an appeal to obtain compliance with its rules relating to investigations).
- 14/ Section 19(d) of the Exchange Act, 15 U.S.C. § 78s(d), authorizes Commission review of an action of a self regulatory organization that: i) imposes any final disciplinary sanction on any member or person associated with a member; ii) denies membership or participation to any applicant; iii) prohibits or limits any person in respect to access to services offered by such organization or member thereof; or iv) bars any person from becoming associated with a member.

In Lance E. Van Alstyne, 53 S.E.C. 1093, 1097 (1998), the Commission found that it lacked jurisdiction to review NASD's denial of respondent's motion to set aside a default decision because denial of the motion did not impose any disciplinary sanction, but rather

15/ NASD Procedural Rule 9134(b)(2) provides that an entity may be served through an officer of the entity at the entity's address listed in the CRD. NASD Procedural Rule 9134(b)(1) provides that a natural person may be served at his or her CRD residential address or, if NASD knows the residential address is not valid, at the business address where the person is employed. The record establishes that Applicants were properly served with this complaint in accordance with Procedural Rule 9134. NASD mailed both the first and second notice of complaint to PAZ and Mizrachi at their CRD addresses by first-class certified and first-class mail. 16/ Although the certified mailings to PAZ and Mizrachi of the first notices of the complaint were returned marked "unclaimed," the first-class mailings were not returned. The certified second notices of the complaint were delivered as evidenced by return receipts for both mailings. The first-class mailings were not returned. 17/

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was a mere denial of a motion collateral to an underlying disciplinary action in which Van Alstyne already had been sanctioned. In this instance, as discussed above, the NASD's order resolved the appeal of the Hearing Officer's entry of default, made findings of violation, and imposed sanctions. NASD thereby imposed final disciplinary sanctions on Applicants. We therefore have jurisdiction over this appeal.

15/ See James M. Russen, Jr., 51 S.E.C. 675, 677 (1993) (failure to show good cause for not appearing before NASD justifies default).

NASD Notice to Members 99-77 states that a person against whom a default decision has been validly entered under NASD Procedural Rule 9269 must make a timely motion to set aside the default and establish good cause for not having participated in the proceeding below. This Notice also provides that, in determining whether good cause has been established, the Hearing Officers and the NAC will consider, among other things: whether the person notified the CRD of any change of address, the length of time that passed between issuance of the default and the motion to set it aside, and the reasons for that person's failure to participate in the proceeding before the Hearing Officers.

16/ NASD Procedural Rule 9134(a) permits service of a complaint by first-class certified mail, among other means.

17/ Applicants raise various due process arguments. However, many courts and this Commission have determined that the Due Process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution do not apply to non-governmental action, such as NASD proceedings. E. Magnus Oppenheim & Co., Inc., Exchange Act Rel. No. 51479, (April 6, 2005), 85 SEC Docket 475, 480 n.15 and cases cited therein. See also, D.L. Cromwell Invs. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir.), cert. denied 537 U.S. 1028 (2002) (Fifth Amendment does not apply to a self-regulatory organization's ("SRO") disciplinary proceedings); Herbert Garrett Frey, 53 S.E.C. 146, 153 n.17 (1977) (NASD not a government actor for purposes of the Fifth and Fourteenth Amendments).

While SROs, such as NASD, are not subject to the Due Process clauses of the U. S. Constitution, NASD is required to provide "fair procedures" for the disciplining of members pursuant to Exchange Act Section 15A(h)(1) and the NASD Code of Procedure.

Moreover, Applicants had actual notice of the complaint. Mizrachi admitted that S. Mizrachi informed him that NASD had issued a complaint against him and the firm, and that S. Mizrachi had hired counsel to defend the proceeding. Applicants' counsel requested, and the Hearing Officer granted, an extension until October 20, 2003 to answer the complaint. Applicants did not answer or otherwise respond to the complaint.

Applicants argue that their counsel was negligent in failing to file an answer on their behalf. Mizrachi claims that, based on counsel's "apparent intention" to answer the complaint, he resumed his business activities and continued to travel. There is no evidence that Mizrachi took any actions to consult with counsel about the status of the answer or of the disciplinary matter. Mizrachi admits that he returned to the United States from a business trip on September 20, 2003. The answer was due on October 20, 2003, when Mizrachi was in the United States. Mizrachi does not assert that he contacted counsel about preparing the answer. Although he knew about the pending disciplinary action, Mizrachi did not inform NASD of any other address at which he could be served. Nor does he suggest that he arranged to have the pleadings forwarded to him or to have someone at the firm, such as S. Mizrachi, keep him informed of the status of the litigation. We conclude that Applicants have not established good cause to set aside the default.

We sustain NASD's findings that Mizrachi violated NASD Conduct Rule 2110 and NASD Investigations Rule 8210.

#### IV.

Applicants object to the sanctions. We may cancel or reduce sanctions imposed by NASD if we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary burden on competition. <sup>18/</sup> NASD Sanction Guidelines with respect to NASD Investigations Rule 8210 provide that a bar should be the standard sanction when an individual fails to respond in any manner to requests for information. <sup>19/</sup>

Applicants argue that certain mitigating circumstances require elimination or reduction of

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15 U.S.C. § 78o-3(b)(8). Here, NASD made service pursuant to rules approved by the Commission in a manner designed to give notice.

<sup>18/</sup> See Exchange Act Section 19(e)(2), 15 U.S.C. § 78s (e)(2). Applicants do not claim, and the record does not show, that NASD's action has imposed an undue burden on competition.

<sup>19/</sup> See NASD Sanction Guidelines, at 39 (2001 ed. ) ("If the individual did not respond in any manner, a bar [is] standard. Where mitigation exists, or the person did not respond in a timely, consider suspending the individual in any or all capacities for up to two years.") The Guideline also recommends a fine of \$25,000 to \$50,000 for failure to respond or to respond truthfully, a fine of \$10,000 to \$25,000 for failure to respond completely, and a fine of \$2,500 to \$25,000 for failure to respond in a timely manner.

the sanctions imposed on them. 20/ Applicants suggest that the information requests were not important because they focused on PAZ' s supervisory procedures. However, NASD's requests were not as limited as Applicants contend. The requests concerned inquiries about the nature of PAZ's investment banking and securities activities, the duties and responsibilities of certain individuals, and whether the firm had a written agreement regarding shared expenses. Even if the requests had been limited, NASD has a right to request information and require cooperation from those persons it investigates. Members and their associated persons cannot second-guess NASD's requests. 21/

We have repeatedly emphasized the importance of complying with NASD's information requests. 22/ When members and associated persons delay their responses to requests for information, they impede the ability of NASD to conduct its investigations fully and expeditiously. 23/ The sanctions imposed will serve as a deterrent to others who may be inclined to ignore NASD's information requests.

Applicants assert that their untimely response was unintentional. However, PAZ was immediately aware of the requests, and Mizrachi certainly knew about the requests by September 2003, if not earlier. However, Applicants made no effort to comply prior to the default order expelling PAZ and barring Mizrachi. Although aware of the disciplinary matter, Mizrachi, the president of a member firm, did not keep the CRD apprised of a forwarding address, delegate anyone to assume compliance with NASD's requests, or remain apprised of the status of the proceeding.

The evidence that Mizrachi provided does not substantiate his claim of depression so severe that he could not respond in any manner to NASD's multiple requests for information. 24/ By his own admission, Mizrachi was able to resume his business activities in August 2003. We

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20/ Mizrachi also contends that he should not be individually penalized for responding late because he did not receive the information requests. As discussed above, we reject that argument.

21/ Joseph Patrick Hannan, 53 S.E.C. 854, 859 (1998) (citations omitted).

22/ It is well settled that, because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate. See, e.g., Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000). Applicants may not second-guess NASD's information requests. Hannan, 53 S.E.C. at 858-859 (since NASD lacks subpoena power, failure to provide information undermines NASD's ability to carry out its self-regulatory functions).

23/ See Mark Allen Elliott, 51 S.E.C. 1148, 1151 (1994).

24/ See supra note 10.

previously have found that unsubstantiated personal problems do not excuse an applicant's failure to respond. 25/ Having found that Applicants ignored three attempts by NASD to obtain information, and failed to answer the complaint, and having found no mitigating factors, we find the sanctions imposed by NASD to be consistent with NASD Sanction Guidelines and neither excessive nor oppressive.

An appropriate order will issue. 26/

By the Commission (Chairman COX and Commissioners GLASSMAN, CAMPOS and NAZARETH); Commissioner ATKINS not participating.

Jonathan G. Katz  
Secretary

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25/ See Lee Gura, Securities Exchange Act. Rel. No. 50570 (Oct. 20, 2004), 83 SEC Docket, 3829, 3832-33; John A. Malach, 51 S.E.C. 618, 620 (1993).

26/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
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<p>In the Matter of the Application of</p> <p>PAZ SECURITIES, INC. and JOSEPH MIZRACHI</p> <p>For Review of Disciplinary Action Taken by NASD</p>
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ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES  
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against PAZ Securities, Inc. and Joseph Mizrachi be, and it hereby is, sustained.

By the Commission

Jonathan G. Katz  
Secretary