

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55046 / January 5, 2007

Admin. Proc. File No. 3-11652r

In the Matter of the Application of

ROONEY A. SAHAI
c/o Andrew Seewald, Esq.
46 Bayard Street, Suite 216
New Brunswick, NJ 08901

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Conduct Rules

Failure to Provide Requested Information

Sanctions

Associated person of association member failed to give complete and timely responses to requests for information. Held, association's sanctions sustained in part.

APPEARANCES:

Andrew Seewald, for Rooney A. Sahai.

Marc Menchel, Alan B. Lawhead, and Andrew Love, for NASD.

Appeal filed: March 27, 2006
Last brief received: July 3, 2006

I.

Rooney A. Sahai, an associated person with The Key Group, Inc. ("Key Group"), an NASD member firm, again appeals from NASD disciplinary action. NASD's decision on remand from the Commission bars Sahai in all capacities for violating NASD Rule 8210, which obliges associated persons to provide information to NASD in the course of an investigation. 1/ In his first appeal, Sahai sought review of NASD disciplinary action that found that Sahai was responsible for five forged customer signatures, an unauthorized transaction in one customer's account, and a failure to provide information requested by NASD pursuant to NASD Rule 8210. NASD barred Sahai for the forgery violations, barred him separately for the failure to provide information, and determined that a \$5,000 fine would have been an appropriate sanction for the unauthorized transaction, but declined to impose the fine because Sahai had been barred. 2/ We set aside NASD's findings of violation with respect to the forgeries, sustained its findings with respect to the unauthorized transaction and the failure to provide information, and remanded to NASD for consideration of the appropriate sanctions in light of our opinion. 3/

On remand, NASD barred Sahai for his failure to provide information. NASD also found that a \$5,000 fine would have been an appropriate sanction for the unauthorized transaction, although it again declined to impose the fine because Sahai had been barred. Sahai appeals the bar imposed for the failure to provide information. We base our findings on an independent review of the record.

II.

To assess the sanctions imposed by NASD on remand, we need to review the facts. In 1999 and 2000, Sahai was registered as a limited representative - investment company and variable contracts products representative with Key Group, an NASD member firm. Sahai worked out of his home. In 2001, NASD began an investigation into customer complaints that the writing and signatures on documents related to securities transactions were forged and that Sahai executed an unauthorized transaction. NASD also examined whether Sahai had engaged in undisclosed outside business activity in violation of NASD rules. 4/

1/ NASD Rule 8210(a).

2/ It is NASD policy not to impose monetary sanctions on a respondent who has been barred where there are no customer losses, as in violations of Rule 8210. NASD Sanction Guidelines, 10 (2006 ed.).

3/ Rooney A. Sahai, Securities Exchange Act Rel. No. 51549 (April 15, 2005), 85 SEC Docket 862.

4/ See, e.g. NASD Conduct Rule 3030, which provides that no associated person "shall be employed by, or accept compensation from, any other person as a result of any business

Sahai participated in four hours of on-the-record investigative testimony conducted by NASD staff on February 15, 2001. At that time, Sahai stated with respect to the forgery allegations that the writing on several customer documents was not his. He suggested that any one of three former administrative employees could have completed and executed the documents. Although Sahai could not identify the employees at that time, he promised to review his records, check with his accountant, and provide the requested information.

Later that day, NASD staff sent Sahai its first request pursuant to NASD Rule 8210 for the names, addresses, and related information of the three former employees who could have signed the customers' names. The staff intended to confirm the existence of the individuals, locate them, and question them about their roles, if any, in the alleged forgeries. In the same request, the staff also sought documents and information concerning two corporations, Amer-Asian Securities, Inc. ("AAS") and Physicians Financial Services, Inc. ("PFS"), to determine whether Sahai's activities with these entities violated NASD restrictions on outside business activities. The staff set a March 1, 2001, response date for this request and later agreed to a request from Sahai's counsel that the response date be extended to March 6.

Sahai did not provide NASD staff with any documents or information on March 6, 2001. On March 19, the staff sent a second request for the documents and information first requested on February 15. On March 26, a week after NASD's second request and six weeks after the initial request, Sahai identified Patrick Haas, Deepa Patel, and Chris Marra as the employees to whom he referred in his February 15 testimony. ^{5/} Sahai stated that he had not been able to locate the employees' addresses and that the employees had been terminated because Sahai was not "satisfied" with their performance. Sahai objected to the requests with respect to AAS and PFS on the grounds that they were irrelevant and burdensome. Notwithstanding his objections, Sahai provided a certificate of incorporation and an unsigned organizational resolution for AAS and stated that he had no corporate documents for PFS. Sahai represented that he was the sole shareholder for both corporations and that he disclosed his activities with both corporations to officers of Key Group.

On March 29, 2001, NASD staff repeated the February 15 requests noting that the March 26 response was incomplete. The staff also reminded Sahai that Rule 8210 imposes an obligation on him to provide information requested by the staff. The staff set a response date of April 9 for this request. On April 3, Sahai represented to the staff that he had provided all the documents in his files that were responsive to the February 15 request. Sahai stated that,

^{4/} (...continued)
activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member."

^{5/} Sahai responded to all of the information requests through his former counsel, Steven Mannion. NASD subsequently required Sahai to sign the responses initially tendered over Mannion's signature on March 26, April 3, and April 18, 2001. Sahai provided the signatures as directed on May 10, 2001.

although he would continue to search for responsive documents, the staff should consider his response to be complete. On April 18, Sahai amended his response to the information request by providing the certificate of incorporation for PFS. By a separate letter of the same date, Steven Mannion, then counsel for Sahai, confirmed that the staff wanted only the addresses and telephone numbers of Sahai's former employees. Although in that letter Mannion questioned NASD's authority to require Sahai to compel third parties (AAS, PFS) to produce information in response to NASD staff requests, Sahai nonetheless provided the corporate documents that NASD requested.

On April 23, 2001, NASD staff requested, in connection with its investigation of possible unauthorized transactions by Sahai, that Sahai explain his February 15 investigative testimony with respect to certain authorizations signed by one of Sahai's customers. In the same letter, the staff reiterated its request for the addresses of Sahai's former employees and required a response by May 7. On April 25, Sahai provided a Ridgefield, New Jersey address for one of the former employees, Patrick Haas. ^{6/}

Sahai stated further that he was unable to locate addresses for the other two former employees because the computer address book in which he maintained the records for those employees had malfunctioned in 2000. The type or exact effect of the malfunction does not appear from the record. Sahai's then-current administrative assistant testified that there had been a computer malfunction -- which she testified may have been in 2001 rather than 2000 -- that destroyed all the records Sahai kept in the address-book program. She testified further that she reconstructed some employee records from paper copies in office files. She did not know whether each employee had such paper records. Mannion testified as a fact witness that he became aware of the malfunction contemporaneously with his drafting of the April 25 letter. Mannion also said that he was not surprised by the malfunction given the state of Sahai's computer equipment.

On April 27, 2001, NASD staff requested that Sahai provide them with his source for Haas' address, as well as payroll records for AAS and for all of Sahai's employees. In the same letter, the staff also requested that Sahai provide NASD with social security numbers and employment applications for Haas, Patel, and Marra. The staff required a response by May 11.

On May 10, 2001, NASD staff reiterated its April 23 information request and required a response by May 21. On the same date, Mannion sent Sahai's signatures on his March 26, April 3, and April 18 responses. The parties agree that the two May 10 letters crossed in the mail. With respect to the April 23 request, Mannion asked for copies of the exhibits referred to in the request so that Sahai could provide responsive information about the customer authorizations. Mannion provided the address for Haas a second time and stated that addresses for the other employees were unavailable.

^{6/} NASD investigators were unable to contact Haas using the address Sahai provided. There is insufficient information in the record to explain why Haas could not be contacted at that address.

On May 14, 2001, NASD staff reiterated its April 27 request and set a response date of May 24. On May 14, Mannion wrote to NASD staff asking why the staff had sent him a letter saying he had not complied with the May 21 response date when the staff's deadline had not expired. Although it is not explicit from the letter itself, Mannion testified at the hearing that this letter was a response to the May 14 request from NASD. Mannion also testified that, to his knowledge, Sahai produced "all the information that Mr. Sahai could locate or had located on his behalf by his staff."

III.

Section 19(e)(2) of the Securities Exchange Act of 1934 governs our consideration of Sahai's appeal from NASD's decision on remand. ^{7/} Section 19(e)(2) provides that the Commission will sustain NASD's sanctions unless it finds, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. ^{8/}

Rule 8210 is an essential tool for NASD's enforcement responsibilities under the Securities Exchange Act of 1934. As we stated in our first opinion, "[i]t is well settled that, 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." ^{9/} The Commission has taken a broad view of the scope of Rule 8210, finding, for example, that recipients of requests under Rule 8210 must respond to the requests or explain why they cannot ^{10/} and may not set conditions on their compliance. ^{11/} Nor is NASD required to justify its information requests. ^{12/}

NASD in its Sanction Guidelines distinguishes two classes of violations of Rule 8210. If a member or associated person fails to "respond in any manner" to a request pursuant to Rule

^{7/} 15 U.S.C. § 78s(e)(2).

^{8/} Sahai does not claim, and the record does not show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

^{9/} Sahai, 85 SEC Docket at 873 n.24. See, e.g. Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000).

^{10/} Robert Fitzpatrick, 55 S.E.C. 419, 424 (2001), petition denied, 63 Fed. Appx. 20 (2d Cir. 2003).

^{11/} Michael David Borth, 51 S.E.C. 178, 182 (1992).

^{12/} Joseph Patrick Hannan, 53 S.E.C. 859, 860 (1998).

8210, the maximum recommended sanction is a bar or a \$50,000 fine. 13/ If the violation is one in which "mitigation exists, or the person did not respond in a timely manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a two-year suspension and a \$25,000 fine. 14/

NASD asserts that Sahai failed to respond "in any manner" to its letters of April 27 and May 14. Those letters asked for Sahai's source for Haas' address, AAS payroll records, and payroll records for all of Sahai's employees, as well as Haas', Marra's, and Patel's social security numbers, payroll records (or an explanation of how they were paid), and any employment applications. In arguing that a bar of Sahai is appropriate, NASD directs our attention to the Sanction Guidelines' Principal Considerations 1 and 2 for Rule 8210 violations, which require, respectively, evaluation of the nature of the information sought and, if the information was eventually produced, how much time and effort were required by NASD staff to obtain it. 15/ NASD argues that the information was critical to its investigation of the alleged forgery and was not provided. Moreover, to the extent information was provided, NASD argues that it was as the result of repeated requests and regulatory pressure, and that the delays in providing the information were egregious.

We agree that Sahai did not produce information or documents in response to the April 27 and May 14 requests for information. We agree further that the information requested was important to NASD's investigation of whether someone in Sahai's office executed, or was directed to execute, the allegedly forged documents. We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability. 16/

In this case, we would have expected such an explanation from Sahai to detail his efforts to obtain the information requested. Sahai stated only that he had searched his files and found no further documents. He did not identify the files reviewed. Moreover, despite Sahai's representation at his investigatory testimony that he would contact his accountant for information with respect to the former employees, there is no indication that he subsequently did so.

We must note, however, that, as Sahai asserts, he did comply with five of the seven requests to some extent. Sahai testified in an on-the-record interview and provided NASD staff with the corporate documentation of AAS and PFS requested in the February 15 request. Sahai also provided the names of all three former employees and the address of one of them in response to the February 15 request. He represented through counsel that he had no other information in his files relevant to the staff's inquiry. On the basis of the record, we cannot say

13/ NASD Sanction Guidelines, 39 (2006 ed.)

14/ Id.

15/ Id.

16/ Richard J. Rouse, 51 S.E.C. 581, 584 (1993).

that Sahai did not respond "in any manner." Imposing a bar as a sanction for that conduct, as NASD did on remand, is excessive when considered with the Sanction Guidelines, and, pursuant to Exchange Act Section 19(e)(2), we set the bar aside.

Application of the Sanction Guidelines' considerations suggests that Sahai's conduct should be sanctioned at the high end of the range because of his minimal and dilatory cooperation. Accordingly, we suspend Sahai for the longest period recommended in the Sanction Guidelines, two years. 17/ Moreover, because Sahai is no longer subject to a bar, we find it appropriate to impose the \$5,000 fine identified by NASD as appropriate for the unauthorized transaction, but not imposed.

Sahai claims that, by barring him for a violation of Rule 8210, NASD has violated the Eighth and Fourteenth Amendments to the United States Constitution by imposing an excessive sanction. Courts that have considered whether the limitations the Constitution imposes on governmental actors limit NASD's actions have concluded that, under these circumstances, NASD is a private actor and is not bound by the limitations imposed by the Eighth and Fourteenth Amendments. 18/ The fact that NASD has authority under Section 15A(b)(7) of the Securities Exchange Act of 1934 to discipline its members and may impose remedial sanctions does not convert it into a state actor. 19/

Sahai further asserts that he was treated more harshly than others similarly situated because of his national origin. Sahai has presented no evidence of such discrimination, and we discern none in the record. We have reduced the sanction for the reasons set forth above. 20/

17/ Sahai claims that he has been licensed for fifteen years with a clean disciplinary record and has suffered loss of reputation, income, and peace of mind as result of NASD's bar. Sahai also notes that NASD's order has operated as a "de facto" bar since its entry and further sanctions would be "excessive." We have considered these factors and, on balance, consider that a significant suspension is warranted by the facts in the record.

18/ See, e.g. Perpetual Securities, Inc. v. Tang, 290 F.3d 132 (2d Cir. 2002); Desiderio v. NASD, 191 F.3d 198 (2d Cir. 1999).

19/ 15 U.S.C. § 78o-3(b)(7). As the Perpetual court stated, "even if NASD is a private actor, 'state action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the state itself".'" Perpetual Securities, Inc., 290 F.3d at 137 (citations omitted). There is nothing in the record here to suggest any nexus between NASD and any state actor.

20/ If Sahai is alleging that he has been subject to unlawful selective prosecution in NASD's initiation and pursuit of this action against him, Sahai must prove that he was singled out
(continued...)

An appropriate order will issue. 21/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY).

Nancy M. Morris
Secretary

20/ (...continued)

for enforcement action while others similarly situated were not and that his selection as a target for enforcement was based on an unjustifiable consideration such as his race, religion, national origin, or the exercise of constitutionally protected rights. United States v. Huff, 959 F.2d 731, 735 (8th Cir. 1992); Maximo Justo Guevara, 54 S.E.C. 655, 665 (2000), pet'n denied, 47 Fed. Appx. 198 (3d Cir. 2002) (Table); Kim G. Girdner, 50 S.E.C. 221, 227 (1990). Sahai has made no showing on the record before us that he has been subject to such improper prosecutorial decisions. In fact, we note that the investigation and subsequent enforcement action was commenced in response to complaints from Sahai's customers.

21/ We have considered all of the arguments advanced by the parties. 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
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Washington, D.C.

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ORDER SUSTAINING SANCTIONS IN PART

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

ORDERED that the bar from association with any NASD member in all capacities imposed by NASD on Rooney A. Sahai be, and it hereby is, set aside; and it is further

ORDERED that Rooney A. Sahai be suspended in all capacities for two years, the suspension to commence on the date of this order; and it is further

ORDERED that a fine of \$5,000 be, and it hereby is, imposed on Rooney A. Sahai.

By the Commission.

Nancy M. Morris
Secretary