

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES AND EXCHANGE ACT OF 1934
Rel. No. 49255/February 13, 2004
Admin. Proc. File No. 3-11191

In the Matter of the Application of

TONI VALENTINO
18680 Long Lake Drive
Boca Raton, Florida 33496

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Failure to Respond

A general securities representative formerly associated with a member firm failed to appear for two on-the-record interviews. Held, association's findings of violation and sanctions imposed are sustained.

APPEARANCES

Toni Valentino, pro se.

Marc Menchel, Alan Lawhead, James Wrona, and Vickie Olafson,
for NASD.

Appeal filed: July 22, 2003
Last brief received: October 15, 2003

I.

Toni Valentino, formerly associated as a general securities representative with Gruntal & Co., L.L.C. ("Gruntal"), an NASD member firm, appeals from NASD disciplinary action. NASD found

that Valentino violated NASD Procedural Rule 8210 1/ by failing to appear for two on-the-record interviews requested by NASD staff. For this violation, NASD barred Valentino from association with any NASD member firm in any capacity. 2/ We base our findings on an independent review of the record.

II.

NASD staff first sought an on-the-record interview of Valentino in November 2000. At that time, NASD was investigating the private placement and trading of the securities of Pallet Management Systems, Inc. ("Pallet") by D.L. Cromwell Investments, Inc. ("Cromwell"), a member firm. NASD determined that, while Valentino was associated with Gruntal, one of her brokerage customers had purchased 185,000 units of Pallet from Cromwell in a private placement and later sold 160,800 of these units back to Cromwell. In addition, NASD determined that Valentino's husband, Lloyd Beirne, served as president and partial owner of Cromwell. 3/ NASD concluded that Valentino was likely to have information relevant to its investigation.

By a letter dated November 30, 2000, NASD requested an on-the-record interview of Valentino in connection with its inquiry into the trading activity of Cromwell in Pallet securities. The letter scheduled Valentino's appearance for January 4, 2001, at NASD's Washington, D.C., office and warned Valentino that her failure to appear could "constitute grounds for disciplinary or other action."

Valentino's counsel, at that time Herbert Jacobi, informed NASD that Valentino's infant daughter would be undergoing ear surgery on January 3 to remedy recurrent ear infections and requested that NASD reschedule the interview. By letter dated December 13, 2000, NASD agreed to reschedule the interview for January 24, 2001. In its letter, NASD repeated that Valentino's failure to appear could constitute grounds for disciplinary action.

1/ Procedural Rule 8210 requires persons subject to NASD's jurisdiction to provide information and to testify if requested with respect to an investigation, complaint, examination or proceeding authorized by NASD.

2/ NASD also assessed hearing, appeal, and transcript costs.

3/ Beirne was the subject of an NASD investigation as well as a federal criminal grand jury investigation.

On January 12, 2001, Valentino's counsel notified NASD by fax that the surgery for Valentino's daughter had been rescheduled for January 16 and requested that Valentino's January 24 testimony be taken in Florida so that Valentino could remain near her daughter during her recovery. Counsel suggested that, in the alternative, Valentino's interview could be scheduled to occur in Washington at a later date, "some time in the middle of February." On January 19, before NASD responded to this request, Valentino's counsel informed NASD by telephone that the surgery had been postponed until March. After this telephone call, NASD faxed a response informing counsel that the interview would take place as scheduled on January 24 in its Washington office.

Two days prior to the January 24 interview date, Valentino's counsel again requested, by fax, that the January 24 interview be rescheduled. Counsel explained that Valentino was unwilling to travel to Washington for the interview while medical testing was continuing to be performed on her daughter. NASD's faxed response agreed to yet another rescheduling but, this time, requested that Valentino's counsel provide a list of dates between January 25 and February 21, 2001, when Valentino would be available for the interview. Valentino's counsel promptly responded requesting that the interview take place on February 20 in NASD's Florida office. NASD agreed to schedule the interview for the February 20 date but insisted that the interview occur in Washington. NASD observed that it had been extremely flexible in allowing Valentino to reschedule her testimony on three occasions and stated it would not agree to reschedule the interview again.

Nevertheless, Valentino's counsel informed NASD, by fax dated February 12, that Valentino would not attend the February 20 interview unless it was held in Florida. The letter stated that, "My client has concluded that her maternal obligations to her infant child far outweigh NASD Procedural Rule 8210(1)."

On February 20, NASD, by fax to counsel with a copy mailed to Valentino, informed them that Valentino was in violation of NASD Procedural Rule 8210 for her failure to appear for the interview scheduled that day. NASD noted its repeated efforts to accommodate the surgery of Valentino's daughter. NASD requested that, by February 23, counsel provide a list of five dates between March 12 and April 6 when Valentino could be present for an on-the-record interview to occur in Florida. However, counsel did not respond with potential dates, and NASD, by letter dated May 9, scheduled Valentino's on-the-record interview for June 28 at its Florida office. NASD yet again advised Valentino that her

failure to appear could constitute grounds for disciplinary action. However, by a fax sent June 18, Valentino's counsel informed NASD that he had a scheduling conflict, an obligation to another client, and could not attend the June 28 interview. By fax dated July 6 with a copy mailed to Valentino, NASD again agreed to reschedule the interview. NASD's response provided a list of potential interview dates and requested that, by July 13, counsel select at least three days when Valentino and he would be available for testimony in Washington. NASD further stated that NASD "sanction guidelines indicate that a bar should be the standard sanction for failing to testify." Counsel did not respond.

Instead, on July 17, Martin Russo, an attorney representing Valentino's husband, wrote to NASD to explain, among other things, that Jacobi, Valentino's counsel, had been named in a criminal complaint and therefore would not be able to continue to represent her. Russo stated that Valentino would contact NASD when she had retained new legal counsel. Russo also stated that Valentino would not be available for an interview during the first two weeks of August.

NASD received no response to its July 6 letter regarding possible interview dates. By letter addressed to Valentino dated August 13, NASD rescheduled yet another on-the-record interview for August 28 in its Washington office. In its letter, NASD again advised Valentino that a bar is the standard sanction for failing to appear for an on-the-record interview.

On August 24, Adam Mitzner informed NASD that he had been retained as Valentino's new legal counsel. He indicated that he could not make the August 28 interview date, because he would be on vacation. He explained that he needed time to familiarize himself with Valentino's case and would contact NASD shortly after his return from vacation, September 6.

On September 21, Valentino's counsel contacted NASD by telephone and explained that Valentino was not willing to fly to Washington because of her fears resulting from the terrorist attacks of September 11, 2001. On October 9, NASD informed Valentino, through counsel, that the interview would not be relocated and provided a list of five days in October on which the interview could take place in Washington. Since counsel did not respond, NASD scheduled the interview for October 25 in its Washington office. Counsel notified NASD, by fax dated October 12, that Valentino would not attend the October 25 interview because of her September 11 fears as well as the fact that "Ms. Valentino is the primary care giver to her two young

children and it is very difficult for her to leave the Florida area where she lives." By letter dated October 18, NASD agreed to yield to Valentino's concerns and relocated the October 25 interview to its Florida office.

After this accommodation was made, counsel contacted NASD, by telephone on October 19 and by confirming fax dated October 22, to inform NASD that Valentino would not appear for the October 25 interview in Florida. Counsel explained that Valentino would not appear because "the Second Circuit [Court of Appeals] is considering an appeal which has direct bearing on Ms. Valentino's decision whether to testify" and requested that NASD adjourn the testimony until the Second Circuit ruled on that appeal. ^{4/} The NASD's October 23 response stated that the outcome of the appeal, in which Valentino was not a party, did not have a direct bearing on Valentino's testimony and refused to adjourn her testimony. NASD repeated that Valentino's failure to appear could result in disciplinary action.

Valentino failed to appear for the October 25 interview in Florida, and on October 26, NASD served Valentino with a Notice of Intent to Suspend under NASD Procedural Rule 9541(b) for her refusal to attend two on-the-record interviews in violation of Procedural Rule 8210. The Hearing Panel found that Valentino violated NASD Procedural Rule 8210 and barred her from association with any NASD member firm in any capacity. The National Adjudicatory Council affirmed the Hearing Panel's findings and the sanctions it imposed. This appeal followed.

III.

NASD Procedural Rule 8210 requires persons subject to NASD's jurisdiction to provide information and to testify if requested with respect to, among other things, its investigations.

Here, Valentino has stipulated that she failed to appear for both the February 20, 2001, and October 25, 2001, on-the-record interviews scheduled by NASD and challenges only the sanctions imposed. Accordingly, we find that Valentino, by failing to appear for these interviews, violated NASD Procedural Rule 8210.

^{4/} This appeal was brought by Cromwell and its employees, including Beirne, in part to challenge NASD's ability to compel testimony. D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 132 F. Supp. 2d 248 (S.D.N.Y. 2001), aff'd, 279 F.3d 155 (2d Cir.), cert. denied, 537 U.S. 1028 (2002).

IV.

We may reduce or lift 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. 5/ NASD Sanction Guidelines with respect to NASD Procedural Rule 8210 provide that a bar should be the standard sanction when an individual fails to respond in any manner to requests for information. 6/

The Guidelines further provide that, in cases where mitigation exists, a suspension in any or all capacities for up to two years should be considered as an appropriate sanction. Valentino argues that certain mitigating circumstances require a reduction of the sanctions imposed on her. As discussed below, we reject Valentino's arguments.

Valentino contends that she refused to participate in the February 20 investigative interview unless it was held in Florida because she needed to attend to her infant daughter suffering from chronic ear infections. As we have repeatedly held, members and associated persons may not impose conditions, such as the location of an interview, under which they will respond to NASD requests for information. 7/ We previously have found that

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

6/ NASD Sanction Guidelines (2001 ed.) at 39.

7/ See Joseph Patrick Hannan, 53 S.E.C. 854, 859 (1998) (finding applicant could not impose conditions on NASD's requests for information and rejecting applicant's contention that he could not appear in "downtown Los Angeles" for a deposition because he had no accrued leave).

See also Brian Prendergast, Securities Exchange Act Rel. No. 44632 (August 1, 2001), 75 SEC Docket 1525, 1541 (rejecting respondent's claim that he could refuse to testify in order to deprive potential litigants of the interview transcript); Michael J. Markowski, Exchange Act Rel. No. 43259 (Sept. 7, 2000), 73 SEC Docket 625, 632, aff'd, 274 F.3d 525 (D.C. Cir. 2001), cert. denied, 537 U.S. 819 (2002) (stating that "[u]nwarranted delay erodes the NASD's ability to carry out its regulatory responsibilities"); Richard J. Rouse, 51
(continued...)

family health concerns do not mitigate a failure to respond to NASD requests pursuant to Rule 8210 where the failure continues over a protracted period of time. 8/ Moreover, the record, including Valentino's own statements before the hearing panel and in her brief before us, does not indicate that her daughter's condition was so serious that Valentino could not travel to Washington for a short period within a reasonable time frame.

NASD made every effort to accommodate Valentino by rescheduling the interview on three occasions and agreeing to the February 20 date that Valentino's counsel recommended. 9/ Moreover, after Valentino missed the February 20 interview, NASD offered to reschedule the interview, giving her the opportunity to select five possible interview dates. Valentino chose not to respond to the offer and caused additional delay. It was not until June 18, after NASD set a June 28 interview in early May, that her attorney offered a new excuse for Valentino's inability to attend an interview -- the attorney's scheduling conflict. We find, under the circumstances presented here, that any medical condition of Valentino's daughter that may have existed does not mitigate Valentino's failure to appear for the February 20 interview.

Valentino also contends that she relied on the advice of counsel that she should not appear for the October 25 interview. She argues that her reliance on counsel should be considered in mitigation. She suggests that, because of her counsel's poor advice, she did not understand the consequences of her refusal. This contention is unavailing.

We have repeatedly held that reliance on counsel does not excuse an associated person's obligation to supply information or

7/ (...continued)
S.E.C. 581, 585-86 (1993) (finding that "members cannot be permitted to impose conditions under which they will provide information to the NASD").

8/ See John A. Malach, 51 S.E.C. 618, 620 (1993) (finding unsubstantiated "personal problems" do not excuse respondent's failure to furnish information to NASD over the course of a two-year period).

9/ We also note that Valentino's attorney often waited until the last minute to notify NASD that Valentino could not attend scheduled interviews.

testimony or otherwise cooperate with NASD investigations. 10/ Nor, in this instance, should it mitigate the sanctions imposed.

When Valentino registered with NASD, she agreed that she understood and consented to abide by its rules, including the requirement to provide information requested by NASD for its investigations. NASD specifically and repeatedly warned Valentino in correspondence addressed directly to her that failure to appear could result in disciplinary action against her, including the "standard sanction" of a bar. Under these circumstances, even assuming Valentino sought and received advice from counsel not to attend the October 25 interview, she cannot claim that she relied on such advice in good faith. 11/ In fact, Valentino testified before the Hearing Panel that, in determining whether to testify, she was weighing a concern regarding her continued ability to work in the securities industry if she failed to testify against a concern about the potential consequences to her husband if she proffered testimony. Any purported reliance on counsel cannot mitigate her failure to appear for the October 25 interview.

Valentino failed to appear for the two scheduled interviews. NASD gave Valentino ample notice of the scheduled interview dates and agreed to her requests to reschedule the interviews on a number of occasions. We find that Valentino engaged in dilatory tactics to evade questioning by NASD. 12/

10/ Joseph G. Chiulli, Exchange Act Rel. No. 42359 (Jan. 28, 2000), 71 SEC Docket 1544, 1553. See also Sundra Escott-Russell, Exchange Act Rel. No. 43363 (Sept. 19, 2000), 73 SEC Docket 1265, 1270 (finding that respondent "was not relieved of her obligation to respond to NASD's requests by her lawyer's advice").

11/ A claim of reliance on counsel must be predicated on a showing that Valentino made complete disclosure to counsel, sought advice on the legality of her proposed conduct, received advice that her proposed conduct was legal, and relied in good faith on counsel's advice. SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314 n. 28 (D.C. Cir. 1981).

12/ Cf. Jonathan Garrett Ornstein, 51 S.E.C. 135, 140 (1992) (finding applicant's dilatory tactics in failing to respond to written information requests, refusing and not claiming certified mail, and failing to timely notify NASD of his new mailing address, violated NASD rules).

Valentino's attempts to delay and ultimately avoid her appearance are especially troubling given the importance of Rule 8210. Because NASD does not have subpoena power, compliance with its rules requiring cooperation in investigations is essential to enable NASD to carry out its self-regulatory functions. 13/ NASD should not have to bring disciplinary proceedings, as it was required to do here, in order to obtain compliance with its rules governing its investigations. 14/ The standard sanction of a bar is warranted.

Accordingly, having found that Valentino failed to appear for two on-the-record interviews after numerous attempts to schedule the interviews over an eleven-month period and having found no mitigating factors, we find the bar imposed by NASD to be consistent with NASD sanction guidelines and neither excessive nor oppressive.

An appropriate order shall issue. 15/

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

Jonathan G. Katz
Secretary

13/ Michael David Borth, 51 S.E.C. 178, 180 (1992).

14/ Robert A. Quiel, 53 S.E.C. 165, 168 (1997).

15/ 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
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 49255 / February 13, 2004

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TONI VALENTINO
18680 Long Lake Dr.
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For Review of Action Taken by

NASD

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
Toni Valentino, and NASD's assessment of costs, be, and they
hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary