This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-13 (CAF990007).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. CAF990007
v.	:	
	:	Hearing Officer - SW
Respondents.	:	

ORDER GRANTING RESPONDENTS' MOTION FOR RECONSIDERATION

On June 3, 1999, Respondents _____ and _____ filed a motion for reconsideration of the Hearing Officer's May 21, 1999 Notice, evidencing an intent to treat Respondents' assertion of the Fifth Amendment privilege against incrimination as an admission pursuant to Rule 9215(b). On June 16, 1999, the Department of Enforcement ("Enforcement") filed an Opposition to Respondents' Motion for Reconsideration. On June 22, 1999, the Hearing Officer heard oral arguments on the issue.

Both Parties focused on whether the Fifth Amendment privilege could be, or should be, invoked in an NASD disciplinary proceeding. The cases are clear; invoking the Fifth Amendment privilege is not a defense to a charge of failing to respond to a request for information issued pursuant to Rule 8210.[1] It is also clear that if a Respondent

[1] In re Vladislav Steven Zubkis, Exchange Act Release 40409 (1998).

invokes the Fifth Amendment privilege at an NASD proceeding, the Hearing Panel may draw an "adverse inference."[2]

The Hearing Officer, however, is focused on the narrow issue of whether the assertion of the Fifth Amendment privilege in an answer filed in this proceeding should be deemed a denial or an admission of the allegations of the Complaint. Pursuant to Rule 9215(b), unless otherwise ordered by the Hearing Officer, an answer shall specifically admit, deny, or state that the Respondent does not have and is unable to obtain sufficient information to admit or deny, each allegation in the complaint.

There are no reported NASD decisions setting forth the effect of Rule 9215(b) upon a party's assertion of the Fifth Amendment privilege against self-incrimination in response to an allegation contained in a complaint. The legislative history surrounding Rule 9215(b) is sparse.[3] The Hearing Officer looked for guidance to the standards that the federal courts developed under the Federal Rules of Civil Procedure.

Rule 9215(b) is substantially similar in form and purpose to Rule 8 of the Federal Rules of Civil Procedure ("FRCP").[4] FRCP 8 requires a party to admit or deny the allegations of a complaint and provides that failure to deny an allegation is deemed an admission. However, at least two federal courts of appeal have concluded that when a defendant in a civil proceeding invokes properly his Fifth Amendment privilege against

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[2] In District Business Conduct Committee for District 10 v. Mangan, Complaint No. C10960162, 1998 NASD Discip. LEXIS 33, *11-12 (1998).

[3] The Securities and Exchange Commission Rules of Practice and the Federal Rules of Civil Procedure served as important references in drafting the NASD Code of Procedure. Exchange Act Release No. 38545 (April 24, 1997), 1997 SEC LEXIS 959 (1997).

[4] SEC Rule of Practice 220(c) is also similar to FRCP 8 and Rule 9215(b). See 17 CFR 201.220(c). There are no relevant cases construing the meaning of SEC Rule 220(c).

compulsory self-incrimination[5] in lieu of answering the averments contained in the pleading of his adversary, the court should treat his claim of privilege as the equivalent of a specific denial and put the plaintiff to his proof of the matter covered by the denial.[6] The courts of appeal reasoned that, because of the importance of the Constitutional privilege against self-incrimination, a plaintiff may not rest a judgment on defendant's constitutionally protected silence alone.

The NASD appears to have agreed with such reasoning. In Lawrence H. Abercrombie, Exchange Act Release No. 16285 (1979), 1979 SEC Lexis 491 (1979), the National Business Conduct Committee found that asserting the Fifth Amendment privilege in an NASD proceeding should not be treated as a failure to answer and, therefore, should not be treated as an admission sufficient to sustain a default decision.

In light of the Abercrombie case, and the existence of the federal courts of appeal cases at the time of the adoption of the NASD Code of Procedure, the Hearing Officer is persuaded that the adoption of the language of FRCP 8 in Rule 9215(b) was not intended to change the outcome of the Abercrombie case.

Accordingly, in light of the possible criminal prosecution of the Respondents, the Hearing Officer has determined to use her discretion under Rule 9215(b) to treat

[5] For a plaintiff to invoke the Fifth Amendment privilege properly, there must be a reasonable likelihood that the answers to particular allegations might incriminate him in a future criminal proceedings. A blanket refusal to answer or respond is not sufficient. See North River Insurance Company, Inc. v. Stefanou, 831 F.2d 484, 487 (4th Cir. 1987), 1987 U.S. App. LEXIS 13857 (1987).

[6] See National Acceptance Co. of Am. v. Bathalter, 705 F.2d 924 (7th Cir. 1983), 1983 U.S. App. LEXIS 28695 (1983); and Rogers v. Webster, 776 F.2d 607 (6th Cir. 1985), 1985 U. S. App. LEXIS 23823 (1985).

Respondents' claim of privilege to the specific allegations as a denial of the allegations.[7]

SO ORDERED.

_____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
June 28, 1999

[7] This ruling does not insulate Respondents from a motion for summary disposition. In an NASD proceeding, once the moving party has demonstrated the absence of a genuine issue of fact, the nonmoving party must go beyond the pleadings and come forward with specific facts showing there is a genuine issue for hearing. An adverse inference may be drawn from an assertion of the Fifth Amendment privilege, which when coupled with and considered with the moving party's proper and relevant evidence may lead to an adverse holding.