

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 10,

Complainant,

vs.

Jawahar K. Doshi
Bayside, NY,

Respondent.

DECISION

Complaint No. C10960047

District No. 10 (NY)

Dated: January 20, 1999

Pursuant to Procedural Rule 9310, Jawahar K. Doshi ("Doshi") has appealed the May 5, 1998 decision issued by the District Business Conduct Committee for District No. 10 ("DBCC") in this matter. After a review of the entire record, we find that Doshi guaranteed a customer against loss and also gave untruthful testimony during an on-the-record interview conducted by NASD staff. We hereby impose a censure and a \$22,500 fine and bar Doshi from association with any member firm in any capacity.

Background. Doshi became registered with the Association as a general securities representative on January 19, 1982, and as a general securities principal on December 13, 1989. During the relevant time, Doshi was employed by Landmark International Equities Corp. ("Landmark") and was Landmark's Vice President. He is not presently employed in the securities industry.

Facts

This matter came to the attention of NASD staff in August 1993 by way of a customer complaint. Doshi's customer, SH, through counsel, complained in correspondence to the NASD that Doshi had induced him to keep a securities account with Landmark by guaranteeing him against all losses in return for 25 percent of the profits in the account. In support of his complaint, SH provided the NASD with a tape and transcript of a telephone conversation between Doshi and himself. SH did

not establish the date of this conversation, but from the text of the conversation, it appears to have taken place in the late Winter or early Spring of 1993, during the time that SH was Doshi's client.

In the taped conversation, SH complained to Doshi about losing money in an account that held "OEX" options. SH and Doshi referred to the account as "the OEX account." SH complained that he had wanted to limit his losses to \$1,000, and that Doshi had not followed his instructions to close the account after he had lost \$9,000 of a \$15,000 investment. After further discussion, Doshi offered to take "full responsibility" for any losses in the OEX account in return for 25 percent of the profits earned after June 1, 1993. Doshi stated: "...okay I am gonna charge you 25% of the profit and the loss is mine. Loss is entirely mine." Doshi stated:

And I cannot take a check, I have to take cash money out as a reward. I cannot take it by law, okay and whatever profit is yours, and it will come back, everything will come back, whatever the loss will come back.

Doshi told SH that he could not put his offer in writing "because of law violation," and that SH would have to take his word "[b]ecause if I give this written I could lose my NSD (sic) license, not allowed by law, otherwise there is not problem. I have no problem, my word is more than enough for everybody." Doshi told SH that he would start this arrangement whenever SH wanted. He reiterated that the arrangement would be oral "[b]ecause if letter goes in hands of NSD (sic) I lose license one minute. Because they do not allow any kind of guarantees." Therefore, Doshi stated, the agreement would not be committed to writing, and the 25 percent would be paid in cash.

When SH asked how long it would take to recoup his losses, Doshi responded that he did not know, but that if there were a loss in the account, the loss would be his, not SH's. Doshi offered to keep an accounting, so that SH could see all of the profits and losses in the account. Doshi told SH that if he lost money "it's not your loss but I will only settle once a year. You know if you start on April 1, it will be April 1, 1994 and that profit or loss we'll settle it once a year."

At an interview conducted by District No. 10 staff on May 21, 1995, Doshi testified that he did not recognize either of the voices on the tape. Doshi, who was by then involved in an arbitration with SH, contended that SH and his attorney had "cooked up" the entire matter. When asked whether he had made any deals with SH, Doshi stated that during one of his numerous conversations with SH, he offered to "take responsibility" for trading OEX options, meaning that he would "watch the trades and take him out with profit or loss at the appropriate time."

In a letter dated February 6, 1995, Doshi admitted to NASD staff that the voice on the tape was his. The February 6 letter stated: "Regarding the tape recording provided by [SH], I confirm that it is my voice on the cassette." Doshi also confirmed in his answer to the complaint and at the DBCC hearing that the voice on the tape was his. Doshi's counsel stated at the hearing:

Apparently the evidence is such that it cannot be refuted. Mr. Doshi has taken the position . . . that the conversation was his. The transcript speaks for itself. I don't think that there's any proper defense that we could put forth, nor should we put forth a defense just for the purpose of doing so.

Further, in his notice of appeal to us, Doshi admitted that he "agreed to guarantee his customer, SH, against losses in return for a share in profits." He also admitted that he responded untruthfully to NASD staff on May 31, 1995. Nonetheless, Doshi has asked us to modify or reverse the DBCC's findings on the ground that the NASD's investigation and subsequent proceedings were conducted unfairly. He also asks that the sanctions be reduced on the basis of his inability to pay.

Discussion

After a thorough review of the record, including the parties' submissions on appeal, we affirm the DBCC's findings as to both causes. It is undisputed that Doshi participated in a telephone conversation with SH in which he agreed to guarantee SH against losses in return for a 25 percent share of SH's profits in the OEX account. It is also undisputed that in the May 31, 1995 interview with NASD staff, Doshi denied that he recognized either his or SH's voice on the tape. He also denied that he had offered to guarantee SH against losses in the OEX account in return for a share of the profits.

On appeal, Doshi admits that he agreed to guarantee his customer, SH, against losses in return for a share in profits and that he also "made a false statement" in his first interview with NASD staff. He states in his notice of appeal that he initially "denied the conversation" because he hoped that he could prove that the tape was inaccurate and because he was wrongly advised that "*any general denial I made could be later modified or admitted by a voluntary statement without harming my case.*" (Emphasis in original).

Doshi now, however, asks that we set aside the DBCC's findings and either set aside or modify the DBCC's sanctions on the ground that the NASD's investigation and proceedings were conducted unfairly. We have examined each of Doshi's contentions and find them to be without any merit. For the following reasons, we find that Doshi was treated fairly during the course of the NASD's proceedings against him.

Doshi claims that John A. Herbst ("Herbst"), the Senior Compliance Examiner for District 10, acted improperly. Doshi complains that had Herbst established the losses in all of SH's accounts at Landmark, he would have seen that the OEX loss as to which SH complained was such a small percentage of SH's total holdings that Doshi would have had no motivation to offer SH a guarantee against loss. We find, however, in light of Doshi's admission that he offered SH a guarantee against loss, that evidence relating to Doshi's claimed lack of motivation for doing so is irrelevant.

Doshi also questions the probative value of SH's affidavit, in which SH swore to the validity of the tape, on the ground that Herbst helped SH to draft the text of the affidavit. We find this contention to be immaterial, since Doshi has admitted that it he was he who was talking to SH in the taped conversation and made the offer. Doshi also contends that it was improper for Herbst to speak with SH's attorney during the pendency of SH's arbitration proceeding against Doshi, ostensibly because Herbst gave SH information about the investigation that could help SH in his arbitration proceeding. This allegation is totally unfounded. Herbst was not precluded from speaking with SH's attorney during the course of the NASD's investigation, and he did so for the purpose of furthering the investigation. Further, an examination of the record shows no improper contact. When SH's attorney called Herbst to ask about the April 1995 interview, Herbst merely told him that the interview had been continued because the NASD did not have a copy of the tape. Herbst then asked him for a copy.

Doshi also contends that the conditions at the May 1995 interview were so unfair that his admission that he offered SH a guarantee against loss should be ignored. We find no merit whatsoever in this contention. Doshi claims that his initial denial that the voice on the tape was his took place because he was not represented by counsel and he wanted to maintain the ability to present "appropriate defenses." In his notice of appeal, however, Doshi admitted that he was advised by NASD staff on May 31, 1995, of his right to have his attorney present, and that he "freely waived that right."¹ This admission is consistent with the record. When Doshi appeared without counsel for the May 31, 1995 interview, he voiced his objection to the fact that NASD staff had refused to provide him with the complete tape of his conversation with SH. He stated: "Even though they did not submit this tape, I am here voluntarily to reply to your questions." Herbst advised Doshi that he was entitled to be represented by counsel, and Doshi replied: "I understand that." Herbst asked Doshi whether he was

¹ We note that the Securities and Exchange Commission ("SEC") has made it clear that there is no constitutional or statutory right to counsel in NASD disciplinary proceedings. Further, the NASD Code of Procedure in effect during the relevant time permitted the participation of counsel in disciplinary proceedings, but did not afford a right to representation. See In re Falcon Trading Group, Ltd., Exchange Act Rel. No. 36619 (Dec. 21, 1995); In re Sheen Financial Resources, Inc., Exchange Act Rel. No. 35477 (March 13, 1995).

represented by counsel, and Doshi replied: "No, I am not being represented by anybody. I am just here on my own." Herbst also advised Doshi that he could stop the proceedings at any time so that he could obtain counsel, and Doshi replied: "Definitely."

Doshi also complains that it was unfair for NASD staff to ask him to identify his voice after playing only a portion of the tape. This contention has no merit since Doshi has admitted that he was able to identify his voice on May 31, but chose not to do so in order to have time to establish his defenses. Doshi further contends that he only admitted that the voice on the tape was his in order to negotiate an "Acceptance, Waiver, and Consent" ("AWC") settlement. He appears to contend that NASD staff tricked him into making this admission because it had already determined to issue a complaint. The record shows, however, that Doshi made his admission in January 1996, and the complaint was not issued until June 1996.

Doshi implies that the tape may have been altered, and that Herbst failed adequately to investigate this possibility. Doshi has not, however, provided the NASD with any examples of where such alterations may have occurred. He merely contends that he does not recognize certain names that Doshi himself represented to SH as his customers and that Herbst failed to establish whether these individuals were, in fact, Doshi's customers. Doshi does not, however, deny that he mentioned these individuals in his conversation with SH. If these individuals were not his customers, as he claims, it is within his power to tell the NAC why he mentioned those names. Doshi's mention of these names does not belie the guarantee that he admits that he made or that his failure to respond truthfully.

Thus, we find that all of Doshi's defenses are without merit. Doshi has admitted that it was he on the tape with SH and that he made the offer of a guarantee. He has also admitted that he did not answer NASD staff truthfully at his interview on May 31, 1995.

Sanctions

Notwithstanding our affirmance of the DBCC's findings of violation, we have concluded that a modification of the sanctions imposed by the DBCC is warranted by the circumstances of this case. The DBCC censured Doshi, barred him from associating with any member firm in any capacity, and imposed a \$30,000 fine. We affirm the censure and bar, but we reduce the \$30,000 fine to \$22,500 (\$2,500 for cause one and \$20,000 for cause two). In imposing these sanctions, we have considered Doshi's requests on appeal that we allow him "voluntarily [to] agree to resign permanently" instead of being barred, and that we rescind the \$30,000 fine. We have also considered the financial statement that Doshi submitted in support of his contention that his financial circumstances would "force [him] to get into serious defaults" if he had to pay the \$30,000 fine imposed by the DBCC.

We first address the issue of the bar. Doshi has argued on appeal that his offer of a guarantee against loss does not warrant a bar. We are, however, imposing a bar because Doshi did not respond truthfully to NASD staff on May 31, 1995, when he denied that the voice on the tape was his. He stonewalled the NASD's investigation until January 1996, when he apparently decided to admit to the violation for purposes of negotiating a settlement.

Pursuant to Procedural Rule 8210, Doshi was required to report orally, on the record, with regard to the NASD's investigation of SH's complaint. As the Commission has often stated, "NASD members and associated persons must cooperate fully with NASD information requests so that it may perform its self-regulatory functions effectively." In re Robert A. Quiel, Exchange Act Rel. No. 39056 at 4 (Sept. 11, 1997). Because the 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." In re Brian L. Gibbons, Exchange Act Rel. No. 37170 (May 8, 1996); In re Michael David Borth, 51 S.E.C. 178, 180 (1992) (person associated with a member firm has a duty to cooperate with NASD investigators). In the instant matter, Doshi made an intentional and deliberate decision to withhold information in order to buy additional time.² Doshi's failure to respond truthfully on May 31, 1995 violated Conduct Rule 2110 and Procedural Rule 8210.

We find no mitigation for Doshi's failure to respond truthfully. He willfully attempted to delay the NASD's investigation and to conceal the fact that he had offered SH a guarantee against loss. This information was key to the NASD's investigation. Doshi's explanation for his failure to answer truthfully is self-serving and not worthy of consideration as a mitigating factor. The NASD Sanction Guideline for failure to respond truthfully suggests that in the absence of mitigation, a bar should be standard. Accordingly, we affirm the bar imposed by the DBCC.

We next address the fines imposed on Doshi by the DBCC. We reduce the \$10,000 fine for offering the guarantee against loss to \$2,500, the minimum suggested by the applicable NASD Sanction Guideline. Since this matter involves one offer of a guarantee to one customer and no loss to the customer, we believe that the minimum fine is appropriate. As we have stated above, we find no mitigation in Doshi's failure

² Doshi states on appeal that he was "wrongly advised" to deny that the voice on the tape was his. He does not, however, identify the person who ostensibly gave him that advice. We note that even reliance on advice of counsel would not operate as a defense. See, e.g., In re Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994) ("reliance on counsel is immaterial to an associated person's obligation to supply requested information").

to respond truthfully; therefore, we have concluded that the \$20,000 fine suggested in the Sanction Guideline is appropriately remedial for that misconduct.³

In determining the appropriate level of fines, we have also considered the financial statement submitted by Doshi in the course of his appeal. Doshi reported no income in 1997, but he is not unemployed. He testified that his wife owns two corporations and that he works for his wife in those corporations. Doshi has, however, chosen to work for his wife for no salary. Doshi also reported that his wife pays yearly expenses, including room and board, medical expenses, insurance premiums, and automobile expenses. Notwithstanding his reliance on his wife for employment and living expenses, Doshi declined to disclose his wife's financial circumstances on the financial statement on the basis that she "rightfully views the business and the assets built from her own earnings as entirely her own." We find these representations to be somewhat disingenuous, since Doshi works for his wife, has chosen to receive no salary, and has an arrangement with his wife under which she apparently pays for all of his living expenses. We also note that Doshi personally owns a condominium, on which he has placed a positive net value. Accordingly, we have concluded that Doshi does have financial resources available to him to pay an NASD fine which, we note, he may pay in installments.⁴

³ The recommended sanctions are consistent with the applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1996 ed.) at 28 (guaranteeing a customer against loss) and 22 (failure to respond truthfully to NASD requests for information).

⁴ We have omitted references to specific amounts which, however, are part of the record.

Accordingly, Doshi is censured, fined \$22,500, and barred in all capacities. Pursuant to Rule 9360, the bar shall be effective upon service of this decision.⁵

On Behalf of the National Adjudicatory Council,

Alden S. Adkins, Senior Vice President and
General Counsel

⁵ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.