BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of The Department of Enforcement, Complainant, vs. Timothy J. Ryan Kingston, New York, Respondent.	DECISION Complaint No. CAF010013 Dated: April 25, 2003

Held, findings that respondent effected four unauthorized transactions and engaged in fraudulent conduct as to those transactions affirmed; and sanctions affirmed.

For the Complainant Department of Enforcement: Jeffrey P. Bloom, Esq., Leo F. Orenstein, Esq., of the Department of Enforcement of NASD.

For the Respondent Timothy J. Ryan: pro se.

Opinion

Timothy J. Ryan ("Ryan") has appealed a July 1, 2002 Hearing Officer default decision under Procedural Rule 9311. After considering this case on the basis of the written record, we find that Ryan violated NASD Conduct Rule 2110 by executing four unauthorized transactions and that his actions involved fraudulent conduct with respect to all of those transactions, in violation of Conduct Rule 2120, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and SEC Rule 10b-5. We order that Ryan be barred from associating with any member firm in any capacity.

I. Background

Ryan first entered the securities industry in 1984 as a general securities representative. Ryan was associated with 12 member firms before becoming associated with Security Capital

Trading Inc. ("Security Capital" or "the Firm")[1] as a general securities principal and general securities representative. Ryan left Security Capital in March 1999, and associated with three member firms thereafter. Ryan is not presently associated with any NASD firm in any capacity.

II. Facts

A. Transactions in the Corporation X and Corporation Y Accounts

The Department of Enforcement filed a complaint against Ryan, Security Capital, and Ronald M. Heineman ("Heineman"), the Firm's president, on July 23, 2001. Cause one of the complaint alleged that Security Capital, acting through the Firm's president, terminated a firm commitment initial public offering ("IPO") for Galacticomm Technologies, Inc. ("Galacticomm") without justification, in violation of Conduct Rule 2110. Because Security Capital and Heineman settled the allegations against them, the NAC's review of this matter is limited to the allegations in cause two regarding Ryan's alleged misconduct. Cause two of the complaint alleged that Ryan effected four unauthorized trades, two purchases each in accounts established in the names of Corporation X and Corporation Y, in violation of Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act, and SEC Rule 10b-5. The trades at issue were purchases that Ryan effected in September 1998 as part of the Galacticomm IPO.

At the time of the transactions, Corporation X and Corporation Y were affiliated companies. Corporation X was one of a group of companies controlled by trusts that had been established by a European family, and Corporation Y was an international private banking corporation.

FE was the managing director of a company that served as an advisor to Corporation X. FE testified in his on-the-record interview that Corporation X's primary business was its investment in Galacticomm. According to FE, despite the fact that Corporation X was a major shareholder and had recommended to Galacticomm's management that the company spend more time developing its business before moving forward with its plans for an IPO, Galacticomm decided that it was prepared to go forward with the IPO. As a result, early in the summer of 1998, Corporation X advised Galacticomm's management that Corporation X would not commit any additional money to fund the company if it proceeded with its plans for an IPO.

On September 21 or 22, 1998, Ryan contacted FE by telephone to solicit Corporation X's purchase of 50,000 shares in the Galacticomm IPO. FE testified in his on-the-record interview that Ryan claimed that all of the shares in the Galacticomm offering had fully sold but that Galacticomm also needed to sell the shares authorized by the "green shoe" in order for the IPO to

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[1] In July 2001, the Firm began operating under the name Vertical Capital Partners, Inc.

close.[2] FE characterized the call from Ryan as an "aggressive sales call." FE testified that Ryan was "very energetic" and "pushed very hard" for some form of commitment from FE during the course of the conversation. Ryan led FE to believe that if the green shoe shares were not sold, the offering would be terminated.

FE testified that he became concerned during his conversation with Ryan that the Galacticomm offering in fact might not have sold out, notwithstanding Ryan's representation to the contrary. Based on that concern, FE advised Ryan that before he would recommend the purchase of Galacticomm IPO shares to Corporation X, Ryan had to first provide him with evidence that the offering had in fact fully sold. FE advised Ryan that Corporation X's agreement to purchase also would be contingent on Ryan supplying him with information that would help FE understand why the green shoe had to be sold in order for the offering to be completed. FE also advised Ryan that Corporation X's agreement to purchase would be further contingent on Ryan's being able to supply evidence that the Galacticomm shares would be unrestricted and freely tradable, since Corporation X's initial investigation of the issue indicated that the shares would not be freely tradable. FE testified that he also made it clear to Ryan during his September 21, 1998 telephone call with him that, if Corporation X ultimately agreed to purchase Galacticomm IPO shares, Ryan would have to obtain written confirmation from Corporation X in the form of signed subscription documents to complete any transaction. FE confirmed some of these instructions in an electronic mail message to Ryan dated September 23, 1998. FE never agreed to purchase Galacticomm IPO shares for Corporation X.

Although Corporation X did not place an order to purchase Galacticomm IPO shares, Ryan placed an order for the purchase of 50,000 Galacticomm shares and 50,000 Galacticomm warrants in the name of Corporation X on September 23, 1998. FE testified that he learned of the purchases when Security Capital contacted him about paying for the trades in the amount of $300,000. FE further testified that he was unaware that an account had been opened at Security Capital for Corporation X and that information on the new account form, including the spelling of his name, was incorrect.

After FE learned that Ryan had entered an order on behalf of Corporation X, he and his company's counsel contacted Ryan on September 28, 1998. Ryan, FE, and the attorneys representing Corporation X, Security Capital, and Galacticomm participated in the call. FE advised Ryan that Corporation X did not intend to pay for the shares of Galacticomm because Corporation X had not committed to purchase the shares. During the course of the September 28, 1998 call, Security Capital agreed to reverse the transactions.

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[2] The term "green shoe" refers to the clause in an underwriting agreement that provides that, in the event of exceptional public demand, the issuer will authorize additional shares for distribution by the underwriting syndicate. Barron's Dictionary of Finance and Investment Terms at 229 (4th ed. 1995).

Ryan testified in his on-the-record interview that the transactions that he had effected on behalf of the Corporation X account were unsolicited and authorized. Ryan also testified that he had not seen the September 23, 1998 electronic mail message that FE testified that he had sent to Ryan and that confirmed the conditions that had to be fulfilled for FE to recommend to Corporation X the purchase of Galacticomm IPO shares. Ryan testified that his review of the document during his on-the-record interview did not refresh his memory about any of the conditions that FE had discussed with him prior to the purchases at issue.

We next address the trades in the Corporation Y account. During the relevant period, RJ was an executive in the corporate financing and trust division of Corporation Y, a European private banking group that had a number of clients that had made a substantial investment in Galacticomm. Corporation Y's clients were promissory note-holders in Galacticomm.

RJ testified in his on-the-record interview that on September 23, 1998 he received telephone calls from Ryan and Galacticomm representatives, seeking to have the Corporation Y promissory note-holders purchase Galacticomm IPO shares. According to RJ, Ryan and Galacticomm representatives advised him that they needed Corporation Y to buy shares of the Galacticomm IPO in order to complete the IPO. RJ testified that either Ryan or the Galacticomm representatives suggested during these calls that the Corporation Y promissory note-holders convert their notes into common stock. RJ further testified that he advised Ryan and the Galacticomm representatives that Corporation Y promissory note-holders would be willing to convert their promissory notes into Galacticomm common stock but only if certain conditions were satisfied. The principal condition was that the Corporation Y promissory note-holders would not invest any additional funds to purchase Galacticomm IPO shares; instead, the money that Galacticomm owed Corporation Y's clients on their promissory notes would be used to purchase Galacticomm IPO shares on behalf of the promissory note-holders. RJ confirmed these instructions to Ryan in a facsimile dated September 23, 1998.[3] Another condition that RJ discussed during his September 23, 1998 conversation with Ryan and Galacticomm representatives was that the Galacticomm shares had to be freely tradable.

RJ testified that Ryan acted contrary to his specific instructions by effecting purchase orders that required the Corporation Y promissory note-holders to invest additional funds to pay for 50,000 Galacticomm shares and 50,000 Galacticomm warrants. RJ testified that he first became aware that the purchase orders had been executed when he received a facsimile from

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[3] The facsimile stated that: "The following entities who are all bridge note holders have agreed to receive the repayment of the bridge notes as a result of the listing and to simultaneously reinvest the proceeds (capital only) into the common stock of Galacticomm Technologies Inc. in terms of the public offering." The facsimile further noted that the total value of the promissory notes was $300,000.

Security Capital on September 28, 1998 that sought payment of $305,000 for the transactions. RJ further testified that he was surprised to receive notice that Corporation Y owed money for the purchases given that it was his understanding from his conversations with Ryan and the Galacticomm representatives that the promissory note-holders' interests would be converted into shares of Galacticomm common stock and that, therefore, the note-holders would not be making any additional payments for the shares. When RJ called Security Capital the next day to discuss the transactions, he was advised that the offering had failed.[4] Ryan maintained in his on-the-record testimony that RJ had authorized the purchase of Galacticomm IPO shares in the name of the Corporation Y promissory note-holders.

B. Ryan's Failure to Participate in Proceedings Before the Hearing Panel

On July 23, 2001, Enforcement served Ryan with the complaint in this matter by regular first-class and certified mail at his address as reflected in NASD's Central Registration Depository ("CRD"). On August 17, 2001, the certified mailing was returned without identifying any reason for the return. The first-class mailing was not returned.

Ryan did not file an answer to the complaint, which was due on August 20, 2001. On August 29, 2001, Enforcement served Ryan with a "Second Notice of Complaint," along with copies of the complaint and notice of the complaint, by first-class and certified mail, at his CRD address. The certified mailing was returned without any information about the reason for the return. The first-class mailing was not returned.

As noted in the second notice of complaint, Ryan was required to file an answer to the complaint on or before September 15, 2001. Following the events of September 11, 2001, the Office of Hearing Officers issued an order dated September 14, 2001, extending all deadlines for affected cases until further order of the assigned Hearing Officer. Shortly thereafter, Enforcement advised the Hearing Officer that Ryan had advised staff that he planned on going to the post office to retrieve the second notice of complaint.[5] Consequently, the Hearing Officer issued an order on September 28, 2001 granting Ryan an extension to October 8, 2001 to answer the complaint.

Ryan failed to file an answer by the October 8, 2001 deadline; nevertheless, he participated in the initial pre-hearing conference that was held on October 30, 2001. During the

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[4] RJ contacted Security Capital the next business day, rather than on the date that he learned of the trades, because of the time differences between Europe, where RJ was located, and the United States, where Security Capital was located.

[5] The record includes a declaration by the Enforcement attorney who handled the proceedings below that Ryan had advised him by voice mail message about his plans to retrieve the complaint.

pre-hearing conference, Ryan requested an additional extension of time to file his answer. The Hearing Officer granted Ryan's request and extended to November 8, 2001 the date by which Ryan could file an answer to the complaint. Ryan failed to file an answer or any responsive pleading by the November 8, 2001 deadline.

By order dated November 14, 2001, the Hearing Officer found Ryan in default, in accordance with Procedural Rule 9269(a)(1). On June 17, 2002, Enforcement filed a motion for entry of a default decision as to Ryan, which was sent to Ryan at his CRD address. Ryan did not file an opposition to the motion.

On July 1, 2002, the Hearing Officer issued a default decision against Ryan. The decision and notice of the decision were mailed to Ryan at his CRD address. The Hearing Officer ruled that Ryan had defaulted by failing to file an answer to the complaint in this matter, and that the record evidence supported the allegations in the complaint. The Hearing Officer barred Ryan from associating with any member firm in any capacity.

Ryan has appealed the default decision.

III. Discussion

We first consider whether Ryan has demonstrated good cause for his failure to participate in the proceeding before the Hearing Officer. See Procedural Rule 9344. We then address whether the Hearing Officer properly determined that Ryan was in default under Procedural Rule 9215(f). Finally, we conduct an independent review of the evidence to determine whether the record supports the Hearing Officer's findings of violation.

A. Ryan's Failure to Show Good Cause

Procedural Rule 9344(a) provides that if an appealing party did not participate in the disciplinary proceeding before a Hearing Officer and fails to show good cause for the failure to participate, the matter will be considered on the basis of the written record and other documents. Under Procedural Rule 9344(a), "failure to participate" is established if a respondent fails to answer or otherwise respond to a complaint. Here, the facts show that Ryan failed to participate in the proceedings below because he failed to answer or otherwise respond to the complaint in this matter. See Procedural Rule 9344(a)(1).

We have determined that Ryan has not demonstrated good cause for his failure to participate in the proceedings below.[6] Ryan asserts three grounds for his failure to participate in the proceedings before the Hearing Officer. We address each of Ryan's arguments below.

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[6] In Notice to Members ("NTM") 99-77, NASD informed members that Hearing Officers and the NAC would consider the following factors when determining whether a respondent has

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Ryan claims that he believed he had answered the complaint on the basis of his receipt of a motion for a more definite statement filed by the two other respondents in this matter -- Security Capital and Heineman -- that stated that "[r]espondents" had answered the complaint. Ryan contends that he presumed he was included in the reference to "[r]espondents" because the law firm that filed the motion also allegedly had represented him in initial discussions with NASD. The plain language of the motion clearly indicates, however, that the term "[r]espondents" refers only to Security Capital and Heineman.

Further, even if Ryan mistakenly believed at the time the motion was filed in August 2001 that an answer had been filed on his behalf, his conduct after that time establishes that he knew that he was still obligated to file an answer. Ryan requested and was granted an extension of time to file his answer during the pre-hearing conference that he participated in on October 30, 2001, which occurred approximately two months after the motion was filed. Thus, the record establishes unequivocally that by the time that Ryan participated in the pre-hearing conference in October 2001, he was aware that in fact he had not filed an answer to the complaint.

We next address Ryan's claim that he did not participate in the proceedings below because he had received notice that the two other respondents and Enforcement were involved in settlement negotiations and that, on that basis, he believed that the allegations against him were part of those settlement negotiations. There is no basis in the record for Ryan's contention. The record includes three orders that the Hearing Officer issued in May, June, and July 2002, to stay the proceedings for the purpose of settlement negotiations between the two other respondents and Enforcement. Each order clearly indicates that the stay proceedings were applicable only to respondents Security Capital and Heineman. Ryan's claim is further undermined by the fact that he was in default during the entire period the proceedings were stayed as to respondents Security Capital and Heineman.[7] There was no reasonable basis for Ryan to conclude that he was

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shown good cause for failing to participate in a disciplinary proceeding: (1) whether the respondent notified CRD of any change of address; (2) the length of time that has passed between the issuance of the default decision and the respondent's appeal or motion to set aside; and (3) the reasons for the respondent's failure to participate in the proceeding before the Hearing Officer. We note that Ryan does not claim on appeal that the address listed in CRD was incorrect. Additionally, the record indicates that Ryan filed his appeal in a timely matter.

[7] Ryan had notice that he was in default approximately five months prior to the date of the first stay order (May 20, 2002). NASD sent a November 14, 2001 default order to Ryan at his CRD address, which is the address at which Ryan received documents throughout the proceedings in this matter.

somehow included in the settlement efforts between the two other parties and Enforcement, given the unambiguous evidence to the contrary.

Ryan's third ground for not participating in the proceedings below is that he could not afford to hire legal counsel and was therefore not able to communicate effectively with NASD during the proceedings. The lack of legal counsel, however, is not a valid reason for not participating in disciplinary proceedings. There is no right to counsel in NASD disciplinary proceedings. See Phyllis J. Elliot, 51 S.E.C. 991, 996 n. 17 (1994); Department of Enforcement v. Bond, Complaint No. C10000210, 2002 NASD Discip. LEXIS 6 * 6-7 (NAC Apr. 4, 2002). Moreover, the NASD is not required to supply an attorney to a respondent in a disciplinary proceeding if the respondent cannot afford to hire one. See Lake Securities Inc., 51 S.E.C. 19, 23-24 (1992).

Because Ryan has failed to show good cause for his failure to participate in the proceedings below, we have considered this appeal on the basis of the written record, including the briefs on appeal, in accordance with Procedural Rule 9344.[8]

B. Ryan Defaulted

We also affirm the Hearing Officer's entry of default against Ryan. Under Procedural Rule 9215(f), a Hearing Officer may issue a default decision against a respondent who does not file an answer or otherwise respond within the time required after a second notice of complaint has been sent to the respondent. The record establishes that Ryan failed to file an answer to the complaint despite having received adequate notice of the complaint in this matter. We note as a preliminary matter that Ryan does not claim on appeal that his CRD address was incorrect.

It is well settled that Procedural Rule 9134(b)(3) provides for constructive notice by mailing a complaint to a respondent's most recent address as listed in CRD. See Paul John Hoeper, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37 at * 5 (NAC Nov. 2, 2001). The complaint and notice of complaint were sent to Ryan on two separate occasions at his CRD address and the first-class mailings were not returned. Thus, Ryan received constructive notice of the complaint. Although proof of actual notice is not required, there also is evidence that Ryan received actual notice of the complaint in this matter. See, e.g., Department of Enforcement v. Bond, supra, at * 8. The record establishes that Ryan called and left a message for Enforcement staff that he would be retrieving the second notice of complaint at the post office, and that he subsequently participated in the initial pre-hearing conference that was held on October 30, 2001. Furthermore, we note that notice of the pre-hearing conference was sent to Ryan at his CRD address.

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[8] We affirm and adopt as our own the NAC Subcommittee's denial of Ryan's motion for oral argument on appeal.

Because we conclude that the Hearing Officer's entry of a default decision was proper, we also have conducted an independent review of the evidence and determined that the record supports the Hearing Officer's findings.[9]

C. The Evidence Supports the Hearing Officer's Findings of Violation

We conclude that there is independent evidence supporting the Hearing Officer's finding that Ryan executed four unauthorized transactions. The record establishes that Ryan effected two transactions in the account of Corporation X and two transactions in the account of Corporation Y that were unauthorized. Although representatives from Corporation X and Corporation Y had discussed with Ryan the possibility of purchasing shares in the Galacticomm IPO, they had advised Ryan that any purchases would be contingent on certain conditions first being satisfied. Further, the record contains evidence that the customers timely confirmed in writing to Ryan the principal conditions for purchases of Galacticomm IPO shares.[10] Ryan completely disregarded the conditions that FE and RJ had articulated to him for the purchase of shares in the Galacticomm IPO, and then placed orders for those purchases without seeking approval from either customer. Thus, the transactions were not authorized. We affirm the Hearing Officer's finding that Ryan effected four unauthorized transactions, in violation of Conduct Rule 2110.[11]

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[9] The SEC has indicated that when a default decision is appealed, the record should contain sufficient independent evidence to support the findings of violation so that the SEC can discharge its review function under Section 19 of the Securities Exchange Act of 1934. See James M. Russen, Jr., 51 S.E.C. 675 (1993) (noting approvingly in default case that NASD, rather than simply basing its conclusions on the complaint's allegations, had reviewed the record evidence and determined that it supported a finding of violation).

[10] FE spoke to Ryan on September 21 or 22, 1998, and sent him an e-mail confirming the conditions on September 23, 1998. RJ spoke to Ryan on September 23, 1998, and sent Ryan a facsimile the same day confirming the conditions.

[11] It is well settled that unauthorized trading in a customer's account is a violation of the requirement under Conduct Rule 2110 that members observe just and equitable principles of trade. See Robert Lester Gardner, 52 S.E.C. 343 (1995); Department of Enforcement v. Baxter, Complaint No. C07990016, 2000 NASD Discip. LEXIS 3 (NAC Apr. 19, 2000). Conduct Rule 2110 is applicable to Ryan under Rule 115(a), which provides that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

We also affirm the Hearing Officer's finding that Ryan engaged in deceptive conduct with respect to the unauthorized transactions in the accounts of Corporation X and Corporation Y, in violation of Conduct Rule 2120, Section 10(b) of the Exchange Act, and SEC Rule 10b-5.

Registered representatives violate the antifraud provisions of the federal securities laws when they make misrepresentations about an issuer while soliciting customers to purchase that issuer's securities.[12] As to Corporation X, we find that Ryan made material misrepresentations to FE while Ryan was soliciting FE to purchase shares in the Galacticomm IPO. Ryan told FE that all the shares in the Galacticomm offering had been sold and that the shares that Ryan proposed to sell to Corporation X were part of the "green shoe." This information was material to a reasonable investor because it indicated that the market judged the offering to be worth the purchase price.[13] Ryan's statement, however, was false. The Galacticomm offering was not fully subscribed and Ryan was soliciting Corporation X to purchase 50,000 shares in order to sell a substantial part of the offering. We conclude that Ryan made a material misrepresentation in connection with the purchase of a security and that he acted with scienter.[14]

As to Corporation Y, the evidence establishes that Ryan effected the unauthorized transactions in the account of Corporation Y by engaging in deceptive conduct in violation of the antifraud provisions of the securities laws.[15] Ryan effected the transactions in the account of

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[12] See SEC v. Hasho, 784 F. Supp. 1059 (S.D.N.Y. 1992) (finding that the unauthorized trades violated the antifraud provisions of the securities laws because they were the result of material deception, misrepresentation or non-disclosure); District Bus. Conduct Comm. v. Granath, Complaint No. C02970007, 1998 NASD Discip. LEXIS 19 (NAC Mar. 6, 1998) (finding that respondent violated NASD's antifraud rule (Conduct Rule 2120) because he knew that the trading accounts were abandoned, that the account holders would not receive trade confirmations, and that the trades would be concealed).

[13] See Basic v. Levinson, 485 U.S. 224, 231-32 (1988).

[14] A finding of fraud requires evidence that the respondent acted with scienter, which is defined as the mental state of knowingly intending to deceive, manipulate, or defraud. See Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Scienter is also established when there is evidence that a respondent acted with severe recklessness. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (citing cases from 11 circuit courts of appeals holding that recklessness suffices to show scienter).

[15] See SEC v. Hasho, 784 F. Supp. 1059 (S.D.N.Y. 1992) (finding that the unauthorized trades violated the antifraud provisions of the securities laws because they were the result of material deception, misrepresentation or non-disclosure); District Bus. Conduct Comm. v. Granath, Complaint No. C02970007, 1998 NASD Discip. LEXIS 19 (NAC Mar. 6, 1998)

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Corporation Y in direct violation of RJ's instructions. Instead of using the money that Galacticomm owed to the Corporation Y promissory note-holders to purchase Galacticomm IPO shares, Ryan charged Corporation Y's account $305,000 for the purchase of the Galacticomm shares. Ryan's attempt to collect the $305,000 was deceptive because he had falsely agreed to offset Galacticomm's debt for newly issued Galacticomm shares when he had no intention of honoring this agreement. Because the trades that Ryan effected in Corporation Y's account "were the result of, and were accompanied by, material 'deception' . . . they violated the antifraud provisions of the securities laws." Hasho, supra, at 1110 (quoting Bischoff v. G.K. Scott & Co., Inc., 678 F. Supp. 746, 750-51 (E.D.N.Y. 1986)). Thus, we find that Ryan acted with the requisite scienter with respect to the unauthorized transactions in the account of Corporation Y.

In sum, we find that Ryan entered purchase orders for the Corporation X and Corporation Y accounts without authorization in violation of Conduct Rule 2110.[16] We also find that Ryan violated Conduct Rule 2120, Section 10(b) of the Exchange Act, and SEC Rule 10b-5.

IV. Sanctions

The Hearing Officer ordered that Ryan be barred from associating with any member firm in any capacity for engaging in unauthorized transactions, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rules 2110 and 2120. We affirm the sanction based on our finding that Ryan's misconduct was egregious.

The NASD Sanction Guideline ("Guideline") for unauthorized transactions recommends a fine of $5,000 to $75,000 and a suspension from 10 to 30 days for cases involving customer losses.[17] In egregious cases, the Guideline suggests a longer suspension (of up to two years) or a bar. The Guideline identifies the following categories of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading, i.e, unauthorized trading that is egregious because of the sheer number of unauthorized trades executed; (2) unauthorized trading accompanied by aggravating factors; and (3) qualitatively egregious unauthorized trading. See, e.g. Department of Enforcement v. Hellen, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC

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(finding that respondent violated NASD's antifraud rule (Conduct Rule 2120) because he knew that the trading accounts were abandoned, that the account holders would not receive trade confirmations, and that the trades would be concealed).

[16] In making this finding, we also reject as unsupported by the record Ryan's claim that the transactions at issue were unsolicited.

[17] Guidelines (2001 ed.) at 102 (Unauthorized Transactions). We note that there were no customer losses in this matter because Corporation X and Corporation Y did not pay for the unauthorized transactions.

Jun. 15, 1999). In Hellen, the NAC identified two factors as relevant to determining whether the unauthorized trading was or was not qualitatively egregious: (1) "the strength of the evidence that the trades at issue were unauthorized"; and (2) "the evidence relating to the respondent's motives." Id. at * 18.

We find that the evidence supports a finding that Ryan's unauthorized trading is qualitatively egregious. With respect to the first Hellen factor, there is compelling evidence that the trades were unauthorized. FE and RJ both provided sworn testimony that they advised Ryan that certain conditions first had to be fulfilled for Corporation X and Corporation Y to authorize purchases of shares in the IPO. Although FE and RJ confirmed their instructions in writing to Ryan, he failed to satisfy any of the conditions set forth in those instructions and did not advise FE and RJ that he would be purchasing shares in the Galacticomm IPO for the accounts of Corporation X and Corporation Y.

With respect to the second Hellen factor -- which instructs us to review evidence related to a respondent's motives -- the record shows that Ryan intentionally executed the unauthorized purchases at issue for his own monetary benefit. Ryan testified in his on-the-record interview that he was "looking forward to a pretty big payday . . . [that] would have been considerably north of [$]50,000" if the Galacticomm IPO had closed successfully. The record demonstrates that Ryan effected the trades in question in violation of the customers' instructions in order to realize the substantial commissions that he expected to receive.

We also have identified the following aggravating factors: (1) that Ryan made material misrepresentations to FE and that he made a false promise to RJ while soliciting them to purchase Galacticomm shares for Corporation X and Corporation Y, respectively; and (2) that Ryan opened the Corporation X account without authorization.

In consideration of these factors, we have concluded that Ryan's misconduct was unmistakably egregious and that a bar is therefore justified.[18]

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[18] The sanction is consistent with the applicable Guideline for Unauthorized Transactions. See Guidelines (2001 ed.) at 102.

In conclusion, Ryan is barred from associating with any NASD member in any capacity.[19] The bar imposed herein is effective as of the date of this decision.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

[19] We also have considered and reject without discussion all other arguments advanced by Ryan.