

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee for District No. 7, Complainant, vs. Ted D. Wells Kennesaw, Georgia, Respondent.	<u>DECISION</u> Complaint No. C07970045 District No. 7 (ATL) Dated: July 24, 1998
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This matter was called for review pursuant to NASD Procedural Rule 9312.¹ After a review of the entire record in this matter, we affirm the findings of the District Business Conduct Committee for District No. 7 ("DBCC") that Ted D. Wells ("Wells") effected an unauthorized transaction in violation of Conduct Rule 2110. We increase the sanctions imposed on Wells by adding a bar in all capacities to the DBCC's sanctions of a censure, and a \$5,000 fine.

Background

Wells entered the securities industry in July 1992 by becoming associated with a firm, which registered him as a general securities representative three months later. In August 1995, Wells became registered with Thomas F. White & Co., Inc. ("Thomas White" or "the Firm"). Thomas White terminated his employment in

¹ The National Business Conduct Committee ("NBCC") of NASD Regulation, Inc. ("NASD Regulation") called this case for review to determine whether the sanctions imposed by the District Business Conduct Committee for District No. 7 ("DBCC") were appropriate given the DBCC's finding that Wells effected an unauthorized transaction. This matter was decided by the National Adjudicatory Council ("NAC"), which, as approved by the Securities and Exchange Commission, became the successor to the NBCC on January 16, 1998.

September 1996.² He is not currently associated with any member of this Association.

Facts

Customer MW ("MW") opened an account at the Firm in October 1995, with Wells serving as his account executive. MW opened the account by transferring one securities position, 500 Intel Corp warrants, from another broker/dealer. The Intel warrants were valued at \$35 5/8 per warrant. During the first few months after MW opened the account, he conducted trading in other positions. From March until August 1996, however, MW's account had no trading.

On October 19, 1996, MW telephoned Wells' branch manager at the Firm. He told the manager, Michael George ("George"), that he had been reviewing his monthly account statement for September 1996 and had discovered that his 500 Intel warrants had been sold. He stated that he had not authorized the sale. MW's September 1996 account statement verified that his 500 Intel warrants were sold on September 19, 1996, at a price per warrant of \$56.

George investigated the situation by questioning Wells, discussing the complaint with MW, and conducting a conference call with both Wells and MW. The following facts were not disputed: Wells admitted that he had effected the transaction and had not spoken with MW either before or after doing so. Wells had not received prior instructions from MW to sell the warrants at a predetermined price or to sell the entire position at a predetermined value. MW had been very unhappy with Wells' handling of the account for more than six months and had complained to Wells several times. MW had not spoken to Wells in six months. When pressed by George, Wells explained that he had sold the warrants because he was about to start a new job and "needed to make some money."

When George began his investigation, Wells and MW disagreed about MW's instructions as to the warrants. MW claimed that the last time they spoke, he instructed Wells not to trade any of his positions. Wells claimed that he had occasionally traded in MW's account without calling him before the trade, and MW "had not minded." When George held the conference call, however, Wells admitted that MW had told him to hold the Intel position, but claimed he had sold the warrants to "lock in" a profit. After George concluded his investigation, the Firm reinstated MW's position in the Intel warrants, which had steadily increased in price, at a cost to the Firm of \$5,500.

² The complaint in this matter was prompted by Thomas White's filing of a Uniform Termination Notice for Securities Industry Registration, a Form U-5, which disclosed that a customer had complained about an unauthorized trade.

NASD Regulation Compliance Specialist Chris Haich ("Haich") investigated this matter. During Haich's investigation, he obtained a memo from George that contained the results of George's investigation. He also contacted Wells. Wells' statements to Haich were consistent with the facts as recounted by George in all but one respect: Wells claimed to Haich that several months before the sale, MW had instructed him to sell the position at a profit.

In his answer to the complaint, Wells waived his right to a hearing. The NASD Regulation regional attorney for District No. 7 ("Regional Attorney") advised Wells that the DBCC would rule on the merits of the complaint based solely on the written submissions of the parties. Although Wells was given the opportunity to submit written materials, he chose to submit nothing.

In response to the call for review in this case, Wells submitted no brief and did not attend the oral argument. Instead, he submitted a letter, in which he stated that he "ha[s] nothing to add to this case. All paperwork is in. I am out of the business and have no plans [to] get[] back in."

Discussion

After reviewing the evidence submitted by the Regional Attorney, the DBCC found that Wells sold MW's Intel warrants without authorization. We uphold the DBCC's determination.

We find that Wells had no authorization from MW to sell the Intel warrants. Wells did not have written authorization to exercise discretion in the account. He also did not have time or price discretion. He did not even speak with MW before effecting the sale.

The only point for our consideration is whether Wells was being candid when he admitted to George that MW had told him to hold the position and that he had sold the warrants because he needed money. We credit these statements and discredit Wells' statement to Haich that MW had instructed him to sell the warrants to make a profit. First, the undisputed facts -- that MW was unhappy with Wells and that the two had not spoken in six months -- support the conclusion that MW wanted Wells to leave the account alone. Second, we find Wells' admission during the conference call with MW more reliable than Wells' other statements because during the conference call, Wells was confronted by the one person who could verify what MW had said to him. Wells had no motive to depart from the truth in this situation. Therefore, we find that Wells effected an unauthorized transaction in violation of Conduct Rule 2110.

Sanctions

In imposing sanctions on Wells, we conclude that his misconduct is so reprehensible that we bar him from associating with any firm in any capacity in order to deter similar misconduct by others. The Securities and Exchange Commission has characterized unauthorized trading as "a fundamental betrayal of the duty owed by a salesman to his customers." In re Keith L. DeSanto, Exchange Act Rel. No. 35860 (June 19, 1995), aff'd, 101 F.3d 108 (2d Cir. 1996) (unpublished table decision). A registered representative's obligation to follow his customer's instructions serves as the essential foundation for the customer/registered representative relationship. In this instance, Wells not only violated his customer's instructions, but he did so at the customer's expense in order to "make some money" for himself. We conclude that Wells intentionally abrogated the duty he owed to his customer and we find that his conduct was despicable.

Viewing Wells' behavior in a different context, his conduct was tantamount to conversion because he essentially transferred funds, without authorization, from his customer to himself. We have repeatedly imposed a bar in conversion cases. See, e.g., In re Joel Eugene Shaw, 51 S.E.C. 1224, 1226-27 (1994) (SEC upholds NASD's imposition of a bar); In re Joseph H. O'Brien, II, 51 S.E.C. 1112, 1117 (1994) (same); In re Stanley D. Gardenswartz, 50 S.E.C. 95, 98 (1989) (in forgery and conversion case, SEC upholds NASD's imposition of a bar).³

We also find no mitigating factors here. Although Wells has no prior disciplinary history during his four years in the securities industry, this fact does not mitigate his misconduct in this instance. We also find no mitigation in Wells' discredited claim that he believed that MW had given him instructions to sell at a

³ We also find that Wells' actions fit squarely into the category of "egregious" conduct. See NASD Sanction Guidelines ("Guidelines") (1996 ed.) at 56 (Unauthorized Transactions). As opposed to egregious conduct that is based on quantitative factors, we find Wells' conduct egregious based on the reprehensible quality of his actions in this single instance. While several instances of unauthorized transactions can certainly be egregious conduct, see, e.g., DBCC v. Aaron Eugene Granath, No. C02970007, National Adjudicatory Council, at 8, 1998 NASD Discip. LEXIS 19, at *19-20 (NAC March 6, 1998) (imposing a bar when the respondent executed 23 unauthorized transactions); DBCC v. Adam S. Levy, No. C07960085, National Adjudicatory Council, at 6, 1998 NASD Discip. LEXIS 22, at *12 (NAC March 6, 1998) (imposing a bar when the respondent executed 16 unauthorized trades), we decline to limit our definition of egregious conduct to purely quantitative measures. When the evidence plainly proves that a registered representative has intentionally engaged in conduct that is tantamount to conversion, such conduct is easily characterized as "egregious" as that term is used in the Guidelines.

profit. We have found that MW actually told Wells to hold the position; thus, Wells' conduct was both in violation of NASD rules and against the express instructions of his customer.⁴

Accordingly, Wells is censured, fined \$5,000, and barred from associating with any member firm in any capacity. The bar is effective immediately upon the service of this decision.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

⁴ 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.

July 24, 1998

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Ted D. Wells
Kennesaw, Georgia

Re: Complaint No. C07970045: Ted D. Wells

Dear Mr. Wells:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange
Commission
450 Fifth Street, NW, Stop 6-9
Washington, DC 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley

Enclosure

cc: Alan M. Wolper, Esq.