

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

Market Regulation Committee,

Complainant,

vs.

Vladislav Steven Zubkis
Bonita, CA,

Respondent.

DECISION

Complaint No. CMS950129

Market Regulation Committee

Dated: August 12, 1997

This matter was appealed pursuant to Procedural Rule 9310. We find that respondent Vladislav Steven Zubkis ("Zubkis") failed to respond to Association requests for information, in violation of Conduct Rule 2110 and Procedural Rule 8210 (formerly Article III, Section 1 and Article IV, Section 5 of the Association's Rules of Fair Practice). Accordingly, we order that he be censured, fined \$20,000, and barred in all capacities.

Background

Zubkis entered the securities industry in 1987, when he briefly worked for The Stuart-James Co., Inc. without becoming registered. Thereafter, he was briefly associated as a general securities representative with several other firms. He was registered as a general securities representative with Barrett Day Securities, Inc. ("Barrett Day") between March of 1990 and March 30, 1993. He was unregistered during the remainder of 1993 and 1994.

On March 29, 1995, the NASD received a Uniform Application for Securities Industry Registration or Transfer ("Form U-4") by which Zubkis sought registration with Fletcher & Faraday, Inc. ("Fletcher & Faraday"). On April 17, 1995, however, the NASD received a Uniform Termination Notice for Securities Industry Registration ("Form U-5") announcing his termination effective March 28, 1995. As discussed below, the question whether Zubkis also had been associated with former member firm Cartwright & Walker Securities, Inc. ("Cartwright & Walker") without being registered is a subject of dispute in this matter.

Record Evidence

Record Evidence - Jutland Investigation and Zubkis' CRD Filings. The complaint resulted from an investigation concerning trading activities involving the securities of Jutland Enterprises, Inc. ("Jutland"). Caryl Svenson ("Svenson"), an NASD Market Regulation Department analyst, testified that the price of Jutland stock had fluctuated and that Zubkis had apparent affiliations with certain brokerage accounts that appeared to have served as sources of Jutland stock. The complaint alleged that Zubkis was, among other things, in the business of stock promotion, and that he used the offices of La Jolla Capital Corporation ("La Jolla") and encouraged certain of its registered representatives to solicit public customers to purchase stock in Jutland.¹

Svenson testified that on January 25, 1995, she attempted to conduct a telephone interview of Zubkis (the "January 25 Interview"). During the January 25 Interview, Svenson asked Zubkis questions regarding the brokerage accounts in question and whether he had compensated certain registered representatives for soliciting customers to purchase Jutland. Zubkis refused to answer any of her questions.²

Examiner Patricia Tingley ("Tingley") testified that during early 1995, she was employed by the NASD's District No. 2 office in Los Angeles and was engaged in a review of Cartwright & Walker's net capital. On March 13, 1995, Tingley met with Richard Gavzie ("Gavzie"), a registered representative in that firm's San Diego office. According to Tingley, Gavzie told her that Zubkis deposited money into the account that Gavzie used to pay the rent for Cartwright & Walker's branch office.

On March 14, 1995, Tingley questioned Gavzie about his registration to sell securities in various states. He referred her to Zubkis, dialed Zubkis' number, and put Tingley on the line with Zubkis. Tingley spoke with Zubkis for about an hour. Zubkis did not refuse to answer any of her questions. Zubkis told her that he had paid representatives of Cartwright & Walker to promote two stocks, Stella Bella and Metro Wireless. Zubkis also said that he had paid Scoville Walker ("Walker"), the president of Cartwright & Walker, more than \$500,000 in 1994 that was supposed to be used to pay registered representatives, but was never disbursed. Zubkis also said that Walker had expected Zubkis to pay phone bills. Zubkis said that because Cartwright & Walker representatives were not being paid, he "took care of them" financially.

¹ No proof was presented on this initial point, and no findings were made on it.

² The MRC noted that during the January 25 Interview, the Market Regulation Department analyst did not inform Zubkis that the interview was being conducted pursuant to Procedural Rule 8210, although she did inform him that she was an analyst in the Market Regulation Department. The MRC found that NASD Regulation staff is not required to cite Procedural Rule 8210 in order to hold a person liable for failure to cooperate with an NASD Regulation investigation, although it would be good practice to do so. We affirm this finding.

On March 29, 1995, the NASD received the Form U-4 for Zubkis' registration with Fletcher & Faraday.³ On March 30, 1995, the NASD processed the Form U-4 and noted that it was complete. The top of the form indicated that the "employment date" was March 28, 1995. Zubkis had signed the Form U-4 and indicated that he signed it on March 27, 1995. Yury Sapir ("Sapir"), an officer of Fletcher & Faraday (and, incidentally, Zubkis' brother-in-law), also signed the Form U-4 and indicated that he signed it on March 28, 1995.⁴

According to the records of the Central Registration Depository ("CRD"), on March 30, 1995, the District Business Conduct Committee for District No. 10 issued a complaint against Zubkis. That complaint alleged that he had violated Article III, Sections 1, 2, and 4 of the Rules of Fair Practice (now Conduct Rules 2110, 2310, and 2440) by making misrepresentations and omissions of material facts to customers, executing unauthorized purchases, recommending unsuitable purchases, and charging unfair prices.⁵

Tingley testified that she reviewed Cartwright & Walker's financial records and that between November 1994 and January 1995, about 90 percent of the firm's trades were in Stella Bella stock. On April 3, 1995, Tingley testified, she reviewed with Gavzie bank records that she had obtained from him. Gavzie indicated that certain deposits made by Zubkis late in 1994 were for Gavzie's prospecting for sites for Stella Bella operations. Gavzie also indicated that deposits made between December 27, 1994 and the end of February 1995, totaling \$38,000, were made by Zubkis to cover branch expenses of Cartwright & Walker.

³ After the MRC hearing, a member of the NASD's Membership, Quality & Service Team 5 ("Membership Department") submitted a declaration explaining the notations on the CRD forms as to the dates that the NASD received and processed the forms.

⁴ In the Form U-4, Zubkis agreed to submit to the jurisdiction of the NASD. The Form U-4 stated, directly above the signature line that bore Zubkis' signature:

I apply for registration with the jurisdiction and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.

⁵ This complaint, which was not discussed during the MRC proceedings, remains pending.

Tingley testified that she spoke with Zubkis on April 6, 1995 regarding the NASD's access to documents seized by the IRS. He did not refuse to answer questions. She drafted a letter in which he agreed that copies of those documents would be turned over to the NASD. He executed the letter.

On April 17, 1995, the NASD received and processed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") announcing Zubkis' termination from Fletcher & Faraday. Sapir signed the Form U-5 and indicated that he was signing it on March 28, 1995, that Zubkis' termination date had been March 28, 1995,⁶ and that the explanation for the termination was "broker decided not to join our firm." Zubkis' signature did not appear on the Form U-5. Neither Zubkis nor Sapir would answer staff questions about the Form U-5. As previously noted, Zubkis refused to give testimony to the NASD. At the MRC hearing, an NASD staff member testified that she and a Market Regulation attorney had attempted to telephone Sapir through his attorney to question him about the CRD filings, and had been informed that Sapir refused to answer questions about the Form U-5.⁷

On April 18, 1995, Svenson, the Market Regulation Department analyst, contacted Zubkis by telephone and advised him that she planned to send him a letter scheduling his testimony for May 18, 1995. Zubkis informed Svenson that he intended to assert his Fifth Amendment privilege against self-incrimination. On the following day, Svenson spoke with Zubkis and advised him that the letter requesting his testimony would be going out that day.

By letter dated April 19, 1995 (the "April 19 Letter"), Svenson requested that Zubkis provide testimony on May 18, 1995. The April 19 Letter further requested that Zubkis call to confirm his appearance for testimony and that Zubkis submit a written response by May 3, 1995 stating whether he intended to provide the scheduled testimony. Further, the April 19 Letter advised Zubkis that the request was being made pursuant to Procedural Rule 8210 and that his failure to appear might constitute grounds for disciplinary or other action by the Association. The April 19 Letter was sent by certified mail and facsimile transmission to Zubkis' address of record with the Central Registration Depository ("CRD") and to a facsimile number that Tingley had used in the past. The facsimile transmission report indicated that the letter was received. The certified mailing was returned unclaimed. Zubkis neither appeared for the scheduled testimony nor informed the staff of his intention not to appear.

By letter dated June 13, 1995 (the "June 13 Letter"), NASD staff again requested that Zubkis provide testimony. The June 13 Letter referenced Zubkis' failure to respond to the April 19 Letter and rescheduled the testimony for June 27, 1995. The June 13 Letter again advised Zubkis

⁶ The MRC decision erroneously recorded this date as "May 28."

⁷ According to the records of the CRD, Sapir remains registered with Fletcher & Faraday and has no disciplinary history.

that the request was being made pursuant to Procedural Rule 8210 and that his continued failure to respond might constitute grounds for disciplinary or other action by the Association. The June 13 Letter was sent via facsimile transmission and regular first-class mail to the same facsimile number and address as the April 19 Letter. The facsimile transmission report indicated that the letter was received.

By letter dated June 22, 1995 (the "June 22 Reply"), Zubkis, through counsel, stated that he would not provide the requested testimony, that the NASD lacked jurisdiction over him, and that he was invoking his Fifth Amendment privilege against self-incrimination. Zubkis did not appear for testimony on June 27, 1995.

Record Evidence - Zubkis' Association With Cartwright & Walker. As mentioned above, bank records and Tingley's testimony indicated that Zubkis made payments to Cartwright & Walker employees. In addition, documentary evidence from Zubkis' home showed that Zubkis had identified certain employees of Cartwright & Walker as employees of a company operated by Zubkis. In addition, the documents showed that Zubkis lent \$65,000 to Walker via a promissory note that explicitly stated that the note was not an obligation of Cartwright & Walker, although the funds were to be deposited directly into the account of Cartwright & Walker. Finally, the documents showed that Zubkis had copies of certain records of Cartwright & Walker at his home, including client lists. The staff was unable to confront Zubkis or Walker concerning the foregoing evidence, because both of them refused to cooperate with the staff.⁸

Discussion

We find that the record clearly demonstrates that, as the MRC found, Zubkis violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to requests for information.⁹ We note that because the NASD is not part of the Government, assertion of the Constitutional protection against self-incrimination does not serve as a defense to such allegations. See In re Edward C. Farni, II, Exchange Act Rel. No. 34106 (May 25, 1994).

Jurisdiction Over Zubkis. The complaint alleged that Zubkis signed the Form U-4 to become registered with Fletcher & Faraday on March 28, 1995. The complaint also alleged that in 1994,

⁸ According to the records of the CRD, effective July 3, 1995, pursuant to a May 1995 decision of the District Business Conduct Committee for District No. 10, Cartwright & Walker was expelled and Walker was barred because they failed to respond to requests for information concerning customer complaints.

⁹ The complaint alleged, and the MRC found, that on January 25, 1995, Zubkis refused to answer questions posed by telephone by NASD staff; that on April 18, 1995, Zubkis refused to give testimony; and that he failed to comply with a staff letter dated June 13, 1995, again requesting that he appear to provide testimony.

Zubkis paid bills for Cartwright & Walker, compensated its representatives in connection with their sale of securities, and participated in setting up branch offices for it. The MRC found that the NASD had jurisdiction over Zubkis on two grounds: 1) his execution of the Form U-4 to become registered with Fletcher & Faraday; and 2) his association with Cartwright & Walker.

Article IV, Section 4 of the Association's By-Laws, which is entitled "Retention of Jurisdiction," governs disciplinary jurisdiction. A person whose association with a member has been terminated continues to be subject to the filing of a complaint based on conduct commencing prior to termination of association for two years following termination of registration. Additionally, during this two-year period, such persons are required to comply with information requests made pursuant to Procedural Rule 8210.

Zubkis argues that the NASD lacks jurisdiction over him because by the time the requests for testimony were made and the complaint was filed, more than two years had elapsed since he had been associated with a member. Specifically, Zubkis notes that he terminated his registration with Barrett Day on March 30, 1993. Zubkis does not appear to oppose the assertion of jurisdiction over him at the time of the January 25 Interview, but no complaint was filed based on his refusal to answer questions until the following October.

Zubkis' Alleged Association With Cartwright & Walker. The MRC found that Zubkis was a "person associated with" Cartwright & Walker during the two-year period prior to the issuance of the information requests and the filing of the complaint. The MRC found that "significant circumstantial evidence" showed that in 1994 and early 1995, Zubkis' activities were "inextricably woven" with the securities business of Cartwright & Walker, which was then a member of the Association. The MRC noted that Zubkis paid Cartwright & Walker employees for selling securities and that a number of employees of Cartwright & Walker were also employees of Zubkis' company. In addition, although the promissory note for Zubkis' \$65,000 loan to Walker stated that the loan was a personal obligation of Walker and was not to be construed as an obligation of Cartwright & Walker, the MRC found that these funds were intended for that firm's operations. The MRC also noted that Zubkis "maintained" certain records of Cartwright & Walker at his home. Thus, the MRC found that Zubkis was an "associated person" of Cartwright & Walker.¹⁰ Based on the staff's "prima facie" showing, which Zubkis failed to rebut, that Zubkis was an "associated person" of the firm, the MRC found that the Association had jurisdiction over him.

¹⁰ Although certain of the evidence supporting this finding constituted hearsay statements by NASD staff regarding conversations they had with Zubkis and others, the MRC found the staff witnesses to be credible. The MRC also noted that the staff's statements were corroborated by documentary evidence in the record and that Zubkis had an opportunity to cross-examine the witnesses or rebut their testimony, but did not do so.

On appeal, Zubkis acknowledges that he employed "in his endeavors" individuals who were representatives of Cartwright & Walker and that he lent money to an individual, apparently Walker. As discussed below, however, Zubkis argues that the documentary evidence linking him to Cartwright & Walker was illegally obtained and should be suppressed.

We find that the preponderance of the evidence indicates that Zubkis was an associated person of Cartwright and Walker during the two years prior to the issuance of the complaint. We note that the evidence on this point is indirect and consists of hearsay testimony and documents unexplained by any testimony. We find, however, that this evidence is sufficiently persuasive for us to find that jurisdiction over Zubkis can be asserted based upon the Cartwright & Walker connection. The most relevant hearsay testimony is that of Tingley, who testified at the hearing, while subject to cross-examination by Zubkis' counsel, about her telephone conversation with Zubkis. We find that, given Zubkis' opportunity to rebut her testimony, and his failure to attempt to do so, the staff witness' hearsay testimony was credible.

We note that during late 1994 and early 1995, approximately 90 percent of Cartwright & Walker's transactions involved Stella Bella, the security that Zubkis was promoting and a firm of which he was the chief executive officer. We find that Cartwright & Walker executed numerous transactions in Stella Bella. We find that Zubkis made numerous large payments to Walker and to individual representatives of Cartwright & Walker to compensate them for their efforts to market the security. On this basis, we conclude that Zubkis was an unregistered "associated person" of Cartwright and Walker early in 1995, and that he therefore was subject to the NASD's jurisdiction throughout 1995.¹¹

¹¹ In addition, the MRC found that Zubkis' execution of the Form U-4 regarding his association with Fletcher & Faraday provided an adequate basis for jurisdiction. The MRC reasoned that, in signing the Form U-4, Zubkis explicitly certified that he would comply with the Association's Rules and submit to its jurisdiction in consideration of the Association's receiving and considering his application. The MRC cited DBCC v. Ashvin R. Shah, Complaint No. C8A920100 (NBCC Decision dated Nov. 13, 1995), aff'd, In re Ashvin R. Shah, Exchange Act Rel. No. 37954 (Nov. 15, 1996), in which we found that a respondent agreed to submit to NASD jurisdiction when he executed and filed his Form U-4 with the Association.

Although we do not base our findings on the execution of the Form U-4 or on Zubkis' association with Fletcher & Faraday, we note that the Form U-4 contained Zubkis' agreement that, by signing the form, he subjected himself to the jurisdiction of the NASD and, moreover, that the execution of the Form U-4 could support an inference that Zubkis in fact became associated with Fletcher & Faraday. We further note that the Form U-5's representation that Zubkis never worked at the firm was suspicious, given the delayed delivery of the form on April 17, 1995 and the fact that both Zubkis and Sapir refused to answer staff inquiries about the Form U-5 and instead invoked the Fifth Amendment when questioned.

Statute of Limitations Defense. Zubkis asserted that the complaint was barred by a statute of limitations "imposed by the Congress of the United States, its agents and/or agencies." The MRC noted that the complaint was filed on October 13, 1995, shortly after the cause of action arose.¹² The MRC found that no such limitation was applicable, given the promptness of the filing of the complaint. We find no basis in fact or law for the assertion of this defense. We note that no court has found any statute of limitations to be applicable to NASD disciplinary actions.

Suppression of Records Seized by IRS. Zubkis argues that although he granted the NASD permission to obtain copies of documents that the IRS had seized from his home, he intended to grant access to formal "books and records," but not to other types of papers. Zubkis requests that we "suppress" the evidence of the documents gathered at his home linking him to Cartwright & Walker.

We decline to suppress the evidence. We note, first, that suppression of evidence is a remedy afforded to defendants in criminal cases whose Constitutional rights have been violated. Because the NASD's proceedings against Zubkis are not criminal in nature, different remedies would be applicable in this matter. In any event, we find that use of the documentary evidence from Zubkis' home was unquestionably proper, since Zubkis signed a letter in which he granted the NASD "access to all books and records relating to Z3 Corporation, Stella Bella Corporation and any affiliated entities and individuals" and hand-wrote, "Please let me know if there is anything else I can do for you" at the bottom of the letter. We find that it would be unnatural and unduly technical to hold that the phrase "books and records" should be read narrowly in this context, and we note that Tingley, who drafted the letter, testified that she did not intend for it to be read narrowly.

Right to Bifurcated Proceedings. We reject Zubkis' claim that he should be entitled to a second opportunity to present evidence in his own defense if the NASD determines that it has jurisdiction over him and that ruling is sustained on appeal to the SEC and the courts of appeal. We note that the majority of the evidence and argument in this proceeding has related to the question whether

Zubkis argued in his appeal submission that any assertion of jurisdiction over him based on the Form U-4 would have had to have been contingent on the NASD's approval of his registration with Fletcher & Faraday. Zubkis cited Article III, Sec. 1(a)(1) of the NASD By-Laws, which requires that applications for NASD membership contain "an acceptance of and an agreement to abide by . . . the provisions, conditions, and covenants of the Certificate of Incorporation, the By-Laws, [and] the rules and regulations of the Corporation" While we agree that Zubkis' Form U-4 was never approved, we note that the By-Laws provision that Zubkis cites is inapplicable to applications for registration filed by individual persons. We note, moreover, that the fact that Zubkis' registration with Fletcher & Faraday was never approved is irrelevant to our analysis.

¹² The MRC decision erroneously stated that the complaint was issued "shortly before the cause of action arose."

the NASD has jurisdiction over Zubkis. We find that he should have presented whatever evidence he deemed relevant during the proceedings.

Sanctions

We note, under the NASD Sanction Guideline ("Guideline") for failure to respond,¹³ that Zubkis completely failed to respond to the multiple requests. We also find that, although the record contains no evidence of prior or other similar misconduct: 1) Zubkis had actual knowledge of the requests; 2) Zubkis wilfully delayed the investigation; 3) Zubkis had no reasonable explanation for his failure to provide the information; 4) Zubkis made no effort to comply with the requests; and 5) the information sought was of regulatory importance. Therefore, we find that the censure, bar, and \$20,000 fine imposed by the MRC were appropriately remedial.¹⁴

Accordingly, Zubkis is censured, fined \$20,000, and barred from association with any member of the Association in any capacity. In addition, he is assessed appeal costs of \$750. The bar is effective immediately upon the issuance of this decision.¹⁵

On Behalf of the National Business Conduct Committee,

Elisse B. Walter, Chief Operating Officer

¹³ See Guidelines (1993 ed.) at 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

¹⁴ The MRC stated that it had considered the following: 1) the finding that Zubkis intentionally sought to delay the Association's investigation by refusing to cooperate with the staff; 2) the finding that Zubkis did not provide a reasonable explanation concerning why he failed to provide the requested information; 3) the fact that the information sought was of regulatory importance; and 4) the fact that Zubkis lacked a disciplinary history.

¹⁵ 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.