

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Beerbaum & Beerbaum Financial
and Insurance Services, Inc.
Petaluma, CA,

and

Hans N. Beerbaum
Petaluma, CA,

Respondents.

DECISION

Complaint No. C01040019

Dated: May 19, 2006

Hans Beerbaum acted as a general securities principal without the proper registration while employed by Beerbaum & Beerbaum Financial and Insurance Services, Inc. Held, Hearing Panel's findings and sanctions affirmed.

APPEARANCES

For the Complainant: Mark Graves, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondents: Hans N. Beerbaum, Pro Se

DECISION

Beerbaum & Beerbaum Financial and Insurance Services, Inc. ("Beerbaum Financial" or "the Firm") and Hans N. Beerbaum ("Beerbaum") (together, "respondents") appeal a Hearing Panel decision pursuant to Procedural Rule 9311. The Hearing Panel found that respondents violated Membership and Registration Rule 1021 and Conduct Rule 2110 when Beerbaum acted

as a general securities principal (“principal”) for the Firm without being registered as such. The Hearing Panel barred Beerbaum in all capacities and fined the Firm \$15,000. After a complete review of the record, we affirm the Hearing Panel’s findings of violations and the imposed sanctions.

I. Background

Beerbaum first entered the securities industry in 1980. He registered with Beerbaum Financial in 1986 as a general securities representative and principal. The Firm terminated his registrations in February 1996. From March 1996 to December 1997, Beerbaum was associated with Walnut Street Securities, Inc. (“Walnut Street”) as a general securities representative and principal. Beerbaum again registered with the Firm as a general securities representative and principal in February 1998. As is discussed in greater detail below, Beerbaum was suspended as a principal during the period from July 5, 2002, to June 3, 2004.

Beerbaum Financial became an NASD member in February 1986. The Firm operates as a broker-dealer and is located in Petaluma, California. The Firm also sells life and disability insurance and offers document translation services. Beerbaum is the sole controlling shareholder of the Firm and serves as its president, chief executive officer, chief compliance officer, and chief financial officer.

II. Procedural History

The Department of Enforcement (“Enforcement”) filed a one-cause complaint against respondents on June 29, 2004. The complaint alleged that from July 5, 2002, through June 3, 2004, Beerbaum acted as a principal for the Firm without the necessary registration, in violation of Membership and Registration Rule 1021 and Conduct Rule 2110.

The Hearing Panel held a one-day hearing on November 10, 2004. Enforcement presented one witness, an NASD compliance specialist. Beerbaum testified on his own behalf. On April 18, 2005, the Hearing Panel issued its decision in which it found that Beerbaum acted as a principal for the Firm without registration and the Firm allowed him to act as an unregistered principal, as alleged in the complaint. This appeal followed.

III. Facts

Enforcement filed an earlier complaint against respondents in June 2001. The June 2001 complaint alleged that from March 4, 1996, to January 23, 1998, the Firm, acting through Beerbaum who was not registered with the Firm, conducted business; provided supervision; and prepared and filed reports required by SEC Rule 17a-5 that were signed by Beerbaum as principal of the Firm. The June 2001 complaint further alleged that Beerbaum was actively engaged in management of the Firm’s securities business. On February 15, 2002, an NASD Hearing Panel (“2002 Hearing Panel”) found that respondents violated Rules 1021 and 2110 when Beerbaum, without proper registration, acted as a principal for the Firm while he was solely registered with Walnut Street. The 2002 Hearing Panel found that Beerbaum, without

proper registration as a principal, supervised another registered representative; acted as the Firm's president; and filed Financial and Operational Combined Uniform Single ("FOCUS") reports and an amendment to the Uniform Application for Broker-Dealer Registration ("Form BD") on behalf of the Firm. The 2002 Hearing Panel fined the Firm and Beerbaum \$2,500 each. The 2002 Hearing Panel further ordered Beerbaum to requalify as a principal within 90 days after the decision became final. The 2002 Hearing Panel's order stated that, if Beerbaum was unable to requalify during the 90-day period, he would be suspended as a principal until he requalified. The decision became final on April 4, 2002.

Beerbaum did not requalify to act as a principal until he passed the principal examination nearly two years after he was suspended under the terms of the 2002 Hearing Panel's order. Beerbaum first attempted the principal examination on July 31, 2002, three months after the 2002 Hearing Panel decision became final. He failed the examination and did not attempt to retake it until August 13, 2003, when he failed again.¹ On November 11, 2003, Beerbaum again attempted the principal examination, but was unsuccessful. Because Beerbaum had failed the examination three times, he was required to wait six months before taking it again. On his fourth attempt, Beerbaum passed the examination on June 2, 2004.

During the suspension period from July 5, 2002, through June 3, 2004, Beerbaum engaged in numerous activities on behalf of the Firm while he was solely registered as a general securities representative. Beerbaum signed the Firm's annual audit report on August 31, 2002, and August 31, 2003, as president of the Firm. Beerbaum admitted that he knew he was violating NASD rules by signing the reports, but stated that when he signed he "made certain to list his title as president, not principal." According to Beerbaum, he told his accountant that he was not authorized to sign the reports, but his accountant informed him that he had to sign the reports as the Firm's president. Beerbaum stated that he signed the reports to avoid late filing penalties and viewed signing the reports as "the lesser of two evils." In addition, from October 23, 2002, through April 22, 2004, the Firm filed electronically seven FOCUS reports with Beerbaum designated as the principal submitting the reports. Beerbaum stated that he "may have created" the reports, but contended that Gary Lee ("Lee") was the principal responsible for the

¹ On August 22, 2003, NASD issued a warning letter to Beerbaum that stated "if you do not pass the [principal] test you should file a Form BDW [Uniform Request Withdrawal from Broker-Dealer Registration ("Form BDW")] to withdraw your membership since the firm is not meeting the qualification for membership in that its sole owner and officer is not a registered principal of the firm." The Firm, however, did not file a Form BDW. On August 27, 2003, Beerbaum requested an extension to become registered as a principal. NASD granted Beerbaum's request in a letter dated September 2, 2003. The letter advised respondents that NASD would take steps to cancel the Firm's membership due to the Firm's failure to meet membership requirements if Beerbaum was not registered as a principal by October 24, 2003. The September 2, 2003 letter, however, did not alter the terms of the 2002 Hearing Panel's order requiring Beerbaum to requalify as a principal.

FOCUS reports because the reports listed Lee as the contact person.² Beerbaum admitted that he was listed as the principal on the FOCUS reports dating back to 1994. He contended, however, that he was unable to see his name on the electronic reports and was unaware that he needed to replace his name with Lee's.

Beerbaum also filed a partial Form BDW and an amendment to the Firm's Form BD as the Firm's president and authorized signatory. On December 19, 2002, Beerbaum filed a partial withdrawal on Form BDW as a result of the Firm's withdrawal of its registration in Utah. On February 5, 2003, Beerbaum filed an amendment to the Firm's Form BD to reflect the 2002 Hearing Panel decision rendered against him and the Firm. Beerbaum testified that he postponed amending these forms until he was suspended as a principal because the Firm's Internet connection was slow.

On February 4, 2003, Beerbaum updated and verified a contact report for the Firm contained in the Central Registration Depository ("CRD"®). The contact report listed Beerbaum as the Firm's chief executive officer, executive representative, chief financial officer, contact for compliance issues, and supervisor in charge of training registered representatives. Beerbaum does not dispute that the contact report listed him in these capacities while he was suspended as a principal. He testified, however, that the contact report was "not something we look at on a regular basis because things hardly ever change and . . . since we are on dial-up [Internet access], changing anything is so time consuming we don't even think of doing it."

On April 24, 2003, Beerbaum signed, as the Firm's president, the Firm's Anti-Money Laundering Program Compliance and Supervisory Procedures ("AML Procedures"). Beerbaum discounts the importance of the AML Procedures as applied to his Firm. Beerbaum testified that he "approved the AML Program [and his] name is on the form, but we really don't take this issue very seriously because money laundering is not something that we have suspected from our clients."

Respondents do not dispute that Beerbaum supervised Lee and received override commissions from Lee's transactions while Beerbaum was suspended as a principal. Beerbaum claimed that the overrides from Lee's business were used to "defray corporate expenses" and that "none of the income went into [Beerbaum's] pocket." Beerbaum testified that the overrides were "not large enough to make a big deal over."

IV. Discussion

Membership and Registration Rule 1021(a) requires that all individuals acting as principals be registered. The rule defines "principal" as an associated person who is "actively engaged in the management of the member's . . . securities business, including supervision,

² Lee first registered with the Firm as a general securities representative in June 1987 and as a principal in May 1996.

solicitation, conduct of business or the training of persons associated with a member for any of these functions.” Membership and Registration Rule 1021(b). The definition of principal includes officers and directors of corporations who are actively engaged in management. *NASD Notice to Members 99-49* (clarifying the definition of principal contained in Rule 1021).

It is undisputed that Beerbaum engaged in, and the Firm permitted him to engage in, activity that required Beerbaum to be registered as a principal while his principal registration was suspended. First, Beerbaum signed two of the Firm’s annual audit reports as the Firm’s president and filed an amendment to the Firm’s Form BD and a partial withdrawal of the Firm’s registration. Second, the CRD contact report listed Beerbaum as the Firm’s chief executive officer, executive representative, chief financial officer, contact for compliance issues, and supervisor in charge of training registered representatives. These designations alone require a principal registration as the Firm’s sole owner and officer. *See NASD Notice to Members 99-49*; Rule 1021(b). Beerbaum also supervised Lee. Beerbaum was therefore required to be registered as a principal to engage in such supervision. *See, e.g., Douglas Conrad Black*, 51 S.E.C. 791, 794 & n.10 (1993) (supervising a registered representative requires registration as a principal). Third, Beerbaum signed the Firm’s AML Procedures as the Firm’s president and senior manager, which demonstrates that Beerbaum was actively engaged in the management of the Firm. *See* Conduct Rule 3011 (requiring that a firm’s AML program be approved by a member of a firm’s senior management). Fourth, Beerbaum filed the Firm’s FOCUS reports, which is also the function of a principal. *See* Membership and Registration Rule 1022. Beerbaum attempts to shift the responsibility for the FOCUS filings to Lee because Lee was listed on the FOCUS reports as the contact person for the filings. Beerbaum acknowledged, however, that he was the principal designated for submitting the FOCUS reports and that Lee never saw the FOCUS reports before they were filed, but Beerbaum did.

Respondents contend that management of the Firm, including responsibility for the FOCUS filings, automatically shifted to Lee when Beerbaum’s principal registration was suspended and that Lee subsequently served as the managing principal.³ A change in management, however, is not automatic and requires a firm to engage in certain formalities, including amending the firm’s Form BD. Respondents took no action to effectuate any change to the Firm’s management. Moreover, the Hearing Panel did not find respondents’ contention credible. We will not disturb that finding here. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) (stressing that deference is given to initial decision maker’s credibility determination based on “hearing the witnesses’ testimony and observing their demeanor”).

³ Lee stated, in correspondence with Enforcement during the course of this investigation, that he automatically became the managing principal of the Firm when Beerbaum’s principal registration lapsed.

We affirm the Hearing Panel’s findings that Beerbaum functioned as a principal without the required registration and that the Firm allowed him to act in this capacity, in violation of Rules 1021 and 2110.⁴

V. Sanctions

The Hearing Panel barred Beerbaum from associating with any member in any capacity and fined the Firm \$15,000. We affirm the imposed sanctions.

The NASD Sanction Guidelines (“Guidelines”) for registration violations recommend a fine of \$2,500 to \$50,000 and a suspension of the responsible individual in any or all capacities for up to six months.⁵ In egregious cases, the Guidelines recommend suspending the firm with respect to any activities or functions for up to 30 business days and the responsible individual for up to two years or a bar.⁶ In determining the proper remedial sanction, the Guidelines for registration violations also recommend that adjudicators consider the nature and extent of the unregistered person’s responsibilities.⁷ Here, Beerbaum’s responsibilities for the Firm were significant, and we therefore find this to be an egregious case. The evidence shows that Beerbaum was the Firm’s sole owner and officer and the principal responsible for running the Firm. We find Beerbaum’s extensive responsibilities for the Firm while he was suspended as a principal to be a significant aggravating factor with respect to sanctions.

In determining the appropriate sanctions, we have also considered the “General Principles Applicable to All Sanction Determinations” contained in the Guidelines.⁸ The second General Principle suggests that adjudicators consider relevant disciplinary history when determining sanctions.⁹ We find aggravating that respondents ignored the 2002 Hearing Panel decision that found respondents in violation of the same NASD rules at issue in the present case and required Beerbaum to requalify before acting as a principal. In addition, several of the activities that

⁴ A violation of NASD’s Membership and Registration rules also constitutes a violation of Conduct Rule 2110. *See Michael F. Flannigan*, Exchange Act Rel. No. 47142, 2003 SEC LEXIS 40, at *2 n.1 (Jan. 8, 2003). NASD Rule 115 extends NASD rule requirements to persons associated with a member.

⁵ Guidelines (2001 ed.) at 52 (Registration Violations).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 3-8 (General Principles Applicable To All Sanction Determinations).

⁹ *Id.*

respondents engaged in here were identical to activities that the 2002 Hearing Panel decision found violative (e.g., filing FOCUS reports and amending the Firm's Form BD, acting as president of the Firm, and supervising a registered representative, all without appropriate principal registration) and evidence intentional and knowing violations of NASD's rules.¹⁰ Moreover, throughout the course of these proceedings Beerbaum argued that he had made a good faith effort to take the examination, but that the examination was "a waste of everyone's time," a "farce," and "irrelevant" to the Firm's business. In our view, Beerbaum fails to appreciate the importance of NASD's registration requirements, which, in turn, reflects on his ability to remain in the securities industry and supports barring him.¹¹ See, e.g., *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995) (stating that the securities industry "presents a great many opportunities for abuse and overreaching, and depends heavily on the integrity of its participants"); *Dist. Bus. Conduct Comm. v. Pecaro*, Complaint No. C8A960029, 1998 NASD Discip. LEXIS 13, at *22 (NBCC Jan. 7, 1998) ("We deem it essential to the well being of the investing public that persons engaged in a firm's securities business strictly adhere to the proper registration requirements.").

Respondents argue that barring Beerbaum would adversely affect the Firm's customers and its employees because the Firm is quite small and would likely cease operating. We have considered that Beerbaum Financial is a very small firm, employing three staff persons, including Beerbaum and Lee. The General Principles advise that adjudicators may consider firm size to ensure that disciplinary sanctions imposed are remedial and not punitive.¹² Given the totality of the circumstances, however, we do not find that the Firm's small size offsets the gravity of Beerbaum's misconduct; therefore, we conclude that a bar is appropriate under the facts of this case. We also affirm the \$15,000 fine against the Firm.

Accordingly, we bar Beerbaum from acting in any capacity and fine the Firm \$15,000 for their violations of Membership and Registration Rule 1021 and Conduct Rule 2110.

¹⁰ See Guidelines at 10 (Principal Considerations In Determining Sanctions, No. 13).

¹¹ Beerbaum's disregard for regulatory requirements is further evidenced by a story involving him and the IRS that he recounted before the Hearing Panel. Beerbaum testified that, on the advice of a loan officer, Beerbaum falsified his income on a mortgage application in order to qualify for a mortgage. According to Beerbaum, the IRS investigated the discrepancy between his reported income on his tax return and on the mortgage application, but did nothing further. Beerbaum argued that the Hearing Panel, like the IRS, should not sanction him. The Hearing Panel found Beerbaum's testimony extremely troubling and supported barring him in all capacities. We agree with the Hearing Panel that Beerbaum's admitted disregard of the law is disquieting.

¹² Guidelines at 3.

VI. Conclusion

We affirm the Hearing Panel's findings that Beerbaum acted as principal for the Firm without being registered as a principal and that the Firm allowed him to act as a principal in violation of Rules 1021 and 2110. Accordingly, we bar Beerbaum in all capacities and fine the Firm \$15,000. We affirm the Hearing Panel's imposition of hearing costs against respondents in the amount of \$1,620. We impose appeal costs of \$2,000 and transcript costs of \$521. The bar will be effective immediately upon service of this decision.¹³

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

¹³ We also have considered and reject without discussion all other arguments of the parties.

Pursuant to NASD Procedural Rule 8320, any member that 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 nonpayment. 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 nonpayment.