NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C8B000001
v.	:	
	:	**Hearing Panel Decision**
MICHAEL E. ZULICK (CRD #1834341),	:	Hearing Officer - GAC
Akron, Ohio	:	
Respondent.	:	February 27, 2001

Digest

The Department of Enforcement ("Enforcement") filed a single cause Complaint alleging that Respondent Michael E. Zulick ("Respondent") violated NASD Conduct Rule 2110 by converting funds of member firm Shepard & Vrbanac Securities ("Shepard & Vrbanac" or "firm") for his own use. Based on the Hearing record, the Hearing Panel found that the Respondent violated Rule 2110 as alleged in the Complaint. The Hearing Panel barred Respondent from associating with any NASD member firm in any capacity.

Appearances

Shelly A. Goering, Esq., (Rory C. Flynn, Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

Anthony J. Hartman, Esq., on behalf of Michael E. Zulick.

DECISION

I. PROCEDURAL BACKGROUND

A. Complaint

Enforcement filed a single cause Complaint on January 26, 2000, charging the Respondent with violating NASD Conduct Rule 2110.[1] The Complaint alleged that from October 1994 to May 1995, Respondent Zulick converted to his own personal use, the funds of Shepard and Vrbanac. Specifically, the Complaint alleged that from January 1995 to May 1995, Respondent Zulick converted $6,826.18, in the form of six checks that were payable to Shepard & Vrbanac for order flow.[2] It further alleged that from October 1994 to November 1994, Respondent Zulick charged personal expenses totaling $12,739.47 to the firm's corporate credit card.[3] Finally, the Complaint alleged that from March 1995 to May 1995, Respondent Zulick wrote corporate checks to himself and to "cash" which he then used for his

[1] At the Hearing, Enforcement amended the exhibits to the Complaint. Specifically, Enforcement amended Complaint Exhibit B, changing the Wal-Mart charge of $155.26 and the James M. Ink charge of $220.13 from transaction date November 7, 1994 to transaction date of November 4, 1994. Enforcement also amended Complaint Exhibit C by deleting check 5097, written on April 4, 1995, check 5451, written on April 4, 1995 and check 5096 written on April 5, 1995. The final amendment in Complaint Exhibit C was check 5442, dated March 29, 1995 to Wal-Mart. That entry was amended to read "$300" instead of "$350." Based on those amendments, the new total for Schedule C is $18,712.80. These amendments are reflected on CX 10 (corresponding to Complaint Exhibit B, as amended) and CX 21 (corresponding to Complaint Exhibit C, as amended.) These amendments were made without objection from Respondent. Hearing Transcript ("Hearing Tr.") pp. 9-11.

[2] Complaint, ¶ 3a. The specific payment for order flow checks alleged to have been converted by the Respondent are listed in Complaint Exhibit A.

[3] Complaint, ¶ 3b. The alleged personal credit card charges paid with firm funds are listed in Complaint Exhibit B, as amended.

personal benefit and paid personal items with checks drawn on the firm's checking account, thereby converting $18,712.80 of firm funds to his own personal use.[4]

B. Answer

The Respondent filed an Answer on February 18, 2000, in which he denied that his actions constituted an improper conversion of funds. Specifically, Respondent stated that he took checks that were payable to the firm to preserve those assets for the capital needs of the firm.[5] Respondent stated that he "made no personal use of the funds derived from the order flow checks."[6] According to the Answer, Respondent "preserved the funds derived from the checks until Shepard & Vrbanac was placed in the hands of a receiver, at which point Respondent turned all of said funds over to the receiver."[7]

While admitting that "[m]ost but not all of the credit charges listed in [Complaint Exhibit B] related to a personal use by [the] Respondent," he claimed that all such charges "were made within Respondent's legitimate authority and were part of his compensation."[8] Respondent likewise acknowledged that "[m]ost but not all of the expenses listed [in the Complaint regarding payments with the firm's checks], related to personal use by Respondent."[9] Respondent stated that certain checks written to "cash," totaling $1,050.00, "were for petty

[4] Complaint, ¶ 3c. The checks that are alleged to have been used for personal expenses are listed in Complaint Exhibit C, as amended.

[5] Answer, ¶ 3(a).

[6] Id.

[7] Id.

[8] Answer, ¶ 3(b).

[9] Answer, ¶ 3(c).

cash retained by the Firm for minor office expenses."[10] The other payments, according to Respondent, "were made within Respondent's legitimate authority and were part of his compensation."[11]

C. The Hearing

The Hearing was held in Cleveland, Ohio, on June 27 and 28, 2000, before a Hearing Panel composed of the Hearing Officer, a current member of the District Committee for District No. 8, and a current member for the District Committee for District No. 4. Enforcement presented four witnesses: John Matsumoto, an Associate Director in NASD Regulation, Inc.'s ("NASDR") Cleveland District Office; Robert Vrbanac, owner of Shepard & Vrbanac; Howard Mentzer, Esq., a court-appointed receiver for Shepard & Vrbanac; and Thomas Collier, a certified public accountant who performed accounting services for the firm. Respondent testified on his own behalf and presented two additional witnesses: Alline Vrbanac, former spouse to Robert Vrbanac, and Respondent's mother; and Howard L. Calhoun, Esq., who represented Alline Vrbanac in the divorce proceeding.

The Hearing Officer admitted into evidence all 39 exhibits offered by Enforcement (CX 1-39) and all 26 exhibits offered by Respondent (RX 1-26).[12] The Parties also offered a Stipulation as to Authenticity of Documents ("Stipulation") regarding Complainant's exhibits CX

[10] Id.

[11] Id. In paragraph 3(c) to the Answer, Respondent mistakenly cited "Exhibit B" instead of Exhibit C to describe the firm's checking account expenses.

[12] Hearing Tr., p. 486.

1-38.[13] In lieu of oral closing arguments at the Hearing, the Parties submitted post-hearing briefs.

II. FACTS

A. Background

Shepard & Vrbanac has been a member firm for more than 30 years.[14] The firm, which is organized as a Subchapter S corporation,[15] operates as a discount broker in the unsolicited sales of stocks, corporate bonds and treasuries.[16] In 1978, Robert Vrbanac became a 50 percent owner of the firm,[17] and in 1987, purchased the remaining interest, thereby becoming the firm's sole owner. Robert Vrbanac served as the firm's President, Treasurer and Financial and Operations Principal ("FINOP").

In 1987, Robert Vrbanac invited Respondent Zulick, to join the firm on a part-time basis as a broker-trainee.[18] At the time, and throughout the period in which she was associated with the firm, Respondent's mother, Alline, was employed at the firm in a non-registered capacity, functioning only in administrative, clerical and ministerial capacities.[19] Respondent

[13] The Parties stipulated that Complainant's exhibits CX 1-38 "are authentic and that they can be admitted into evidence without foundation, except that [Respondent reserves] the right to object to their admissibility on any other bases, including relevancy or materiality."

[14] Hearing Tr., p. 107.

[15] Hearing Tr., pp. 107-108, 324.

[16] Hearing Tr., p. 393.

[17] CX 11, p. 4.

[18] According to Respondent, he was to work three and a half days per week for the firm and spend the balance of time completing his college education. Respondent was to be paid $1,000 per month plus have his educational costs paid by the firm. Hearing Tr., pp. 282-283.

[19] Hearing Tr., pp. 110, 131.

accepted the offer and became associated with Shepard & Vrbanac in March 1988.[20] Respondent became registered as a General Securities Representative in June 1988, and as a Registered Options Principal in July 1989. In January 1990, Respondent also became registered as a General Securities Principal.[21] Alline Zulick married Robert Vrbanac in 1990 (thus becoming Alline Vrbanac) and purchased a five percent interest in the firm. In 1991, Robert and Alline Vrbanac, acting as the firm's Board of Directors, elected Respondent to serve as President and Treasurer of the firm.[22] Although Respondent was named President and Treasurer, Robert Vrbanac continued to serve as the FINOP.[23]

In December 1992, Robert Vrbanac transferred stock in the firm to Alline Vrbanac, making her a 49 percent owner of the firm, with Robert Vrbanac retaining a 51 percent interest.[24] Robert and Alline Vrbanac retained that ownership structure throughout the period of violative activity alleged in the Complaint - October 1994, through May 1995. At no time did Respondent have an ownership interest in the firm.[25]

B. Respondent's Compensation Arrangement

According to Respondent, when he became the firm's President and Treasurer, his compensation was to be a base salary plus a bonus. Respondent testified that the bonus was to

[20] Hearing Tr., p. 283.

[21] CX 1, p. 3.

[22] Hearing Tr. pp. 284, 454, 457; CX 29-30. Respondent replaced Robert Vrbanac as President and Treasurer of the firm.

[23] Hearing Tr., pp. 109-110, 131. RX 17, p. 2.

[24] CX 11, p. 7.

[25] Hearing Tr., p. 323.

be "$6,000 a year regardless of the company's performance, plus a performance-based incentive bonus of 10 percent of the net corporate profit."[26] The $6,000 bonus "was unaffected by whether or not the company made any money."[27] Respondent was provided additional benefits including medical insurance, reimbursement for all medical expenses, an automobile and payment of related automotive expenses.[28] With the exception of the medical and automobile benefits, Respondent's form of compensation was never documented in a written employment contract.[29]

Respondent received his base pay and performance-based compensation for 1991 and 1992. He testified that when he received his performance-based compensation for 1992, in January 1993, Robert Vrbanac told him that instead of withdrawing such a large amount of funds from the firm at one time, Respondent should take the bonus payments over time.[30] Respondent testified that he, Robert Vrbanac and Alline Vrbanac agreed "that I would, from time to time, expend company funds, either on the charge card or by check, for personal items of my own that were to be offset against the bonus amounts that I was due."[31] Respondent

[26] Hearing Tr., pp. 285, 458. Robert Vrbanac believed that the $6,000 per year bonus would apply against the ten percent bonus based on performance. Hearing Tr., p. 114.

[27] Hearing Tr., p. 285.

[28] Hearing Tr., p. 285; RX 17.

[29] Hearing Tr. pp. 420-421.

[30] Hearing Tr., p. 290.

[31] Hearing Tr., pp. 290-291.

claimed that he was told also to use company funds for personal expenses to cover his 1991 and 1992 fixed $6,000 bonuses.[32]

On August 4, 1994, Robert Vrbanac filed for divorce from Alline Vrbanac.[33] Until that time, there is no evidence in the record that Respondent used the firm credit card or checking account to charge personal items to the firm as part of his compensation, despite Respondent's claim that he received that authority in January 1993. It was after August 4, 1994, that Respondent began expensing personal items to the firm and taking other funds belonging to the firm.

Respondent's contention that he was authorized to expense personal items to the firm's general account is supported only by his own testimony and that of his mother, Alline Vrbanac. Robert Vrbanac denied that he ever authorized Respondent to expense personal items to the firm in lieu of compensation.[34] Robert Vrbanac testified that Respondent was never denied the bonus money to which he was entitled, noting that he understood that Respondent "needed the bonus money to live on.... That's why he got the money immediately."[35] Further, Robert Vrbanac was not involved in preparing the payroll.[36] It was Respondent Zulick, as the firm's Treasurer, who worked with the accountant to prepare the payroll.[37] Respondent was a

[32] Hearing Tr., p. 291.

[33] CX 11, p. 2.

[34] Hearing Tr., pp. 113-117.

[35] Hearing Tr., p. 116.

[36] Hearing Tr., p. 115.

[37] Hearing Tr., pp. 186, 237, 297, 324-325.

signatory to the firm's checking account and often wrote checks on the firm's behalf. If Respondent was due compensation from the firm, he could have simply written a check or arranged for payment through the payroll process and properly recorded those funds as his compensation.

C. Respondent's Use of the Firm's Credit Card and the Ensuing Court Order

It is undisputed that between October 26, 1994 and November 21, 1994, Respondent charged at least $12,739.47 to the corporate credit card.[38] Enforcement asserted that the majority of the charges were for personal expenses of Respondent and not business expenses.[39] Respondent admitted that "[m]ost but not all of the credit charges ... related to a personal use by Respondent."[40]

Robert Vrbanac stated that at some point he became aware that Respondent was expensing personal items to the firm.[41] Robert Vrbanac claimed that even when he became aware of it, he did not realize the full extent of the spending[42] and believed that "there was nothing I could do about it."[43] However, the record shows that as a result of extensive spending at Shepard & Vrbanac, Robert Vrbanac requested that the domestic relations court involved in his divorce from Alline Vrbanac take action to preserve the assets of the firm since it

[38] CX 10.

[39] Although the Complaint alleged that all such charges were for personal expenses, Enforcement noted in its post-hearing brief that only "the majority of the items were for personal use." Complainant's Post-Hearing Brief, p. 4.

[40] Answer, ¶ 3(b); Hearing Tr., p. 328.

[41] Hearing Tr., pp. 173-174.

[42] Hearing Tr., pp. 173-175.

[43] Hearing Tr., p. 176.

represented marital assets.[44] Consequently, on February 13, 1995, a judgment order was issued in the divorce proceeding which stated, among other things, that the parties to the proceeding had agreed: (1) to have all corporate checks for any expenditures in excess of $350 approved and signed by both Robert and Alline Vrbanac; (2) to cancel all corporate credit accounts forthwith; (3) not to expend more than $350 in corporate funds without the joint approval of Robert and Alline Vrbanac; and (4) not to expend corporate funds for the personal use of Robert or Alline Vrbanac or any other person without joint approval of Robert and Alline Vrbanac.[45]

D. Respondent's Taking and Use of Payment for Order Flow Checks

With the corporate credit card account canceled as a result of the court order, Respondent looked to other firm assets to pay for personal expenses. Respondent admitted that he took six checks payable to Shepard & Vrbanac, totaling $6,826.18. He used the first two checks, dated January 31, 1995 and February 28, 1995, totaling $2,964.80, to pay part of the firm's credit card charges that contained his personal expenses.[46] Respondent deposited the other four checks, dated in March and April 1995, totaling $3,861.38, into his personal bank account.[47] Respondent took possession of the checks as they were received at Shepard & Vrbanac, before those funds were recorded on the firm's books and records. Respondent first claimed that he was justified in taking the payment for order flow checks, "in order to preserve

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[44] Hearing Tr., pp. 119-210.

[45] CX 22.

[46] Those checks were # 2970 for $1,192.64 and # 3129 for $1,772.16.

[47] Hearing Tr., pp. 73-74.

them for the capital needs of Shepard & Vrbanac."[48] Respondent then testified at the Hearing that he took the funds in order to be able to pay the firm's expenses.[49]

Respondent claimed that during periods of 1995, Robert Vrbanac took the firm's checkbook from its usual location and failed to make it available to Respondent or Alline Vrbanac to pay necessary company expenses, including the firm's payroll obligations and other firm bills.[50] Respondent testified that several times in early 1995, he and his mother discussed their concern about not having access to the checkbook and they "determined that it was necessary to build up some sort of monetary reserve to smooth out the erratic payment of obligations."[51] According to Respondent, during those discussions, they "didn't come to any conclusion as to how best to accomplish that."[52]

When a check from Tradetech, dated March 31, 1995, was received at the firm, Respondent decided on his own to take and hold the check before it was recorded on the firm's books and records. He attempted to reason that "if there weren't funds available, that we could use the funds represented by that check, cash it at the time."[53] During investigative testimony, Respondent told the NASDR staff that he did not tell anyone about his taking that

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[48] Answer, ¶ 3(a).

[49] Hearing Tr., pp. 309-311.

[50] Hearing Tr., pp. 307-308; RX 26.

[51] Hearing Tr., p. 309.

[52] Id.

[53] Hearing Tr., p. 309. Respondent offered no explanation as to why he used the two earlier Tradetech checks, dated January 31, 1995 and February 28, 1995, to help pay for the firm's credit card charges containing his personal expenses.

specific check and other Tradetech checks, until he had accumulated $7,835.24 in funds from Tradetech. He claimed in that investigative testimony that once he accumulated those funds, he told Alline Vrbanac and the firm's accountant, Howard L. Calhoun.[54] In contrast, at the Hearing, he testified that he informed his mother about the decision the business day after holding the first check.[55]

After diverting the first check from the firm, Respondent proceeded to hold three additional checks received from Tradetech, dated in March and April 1995. He then determined that the checks would go "stale" after a period of time, so in early May 1995, Respondent deposited the four Tradetech checks into his personal checking account.[56] Respondent testified that at the time he deposited these funds in his account, "I had a quantity of cash on hand that I always tried to keep for personal purposes. And what I did was offset the exact dollar amount of the check in cash."[57]

The evidence shows however, that Respondent used the funds deposited into his personal checking account to pay for other checks drawn on the account. On the day before he started making deposits of firm funds into his personal checking account, the balance in that

[54] Hearing Tr., pp. 372-373. Respondent is not charged with converting certain checks that he retained but did not deposit into his personal checking account. That accounts for the difference between the $7,835.24 referenced by Respondent, and the amount referenced in Complaint Exhibit A.

[55] Hearing Tr., p. 310. The Hearing Panel finds Respondent's investigative testimony to be more credible than his testimony at Hearing regarding when he told his mother and Calhoun about his taking of the Tradetech checks. The events were closer in time to the investigative testimony, and Respondent had less motive to testify falsely during the investigative testimony.

[56] CX 2; CX 4.

[57] Hearing Tr., p. 310.

account was $0.92.[58] By May 18, 1995, less than two weeks after he deposited the checks, the account had a balance deficit of ($68.13).[59]

The evidence also establishes that during the months of April and May 1995, while Respondent was holding these Tradetech checks, regular payroll and other business-related checks were written from the firm's general account.[60] Finally, contrary to Respondent's claim that it was necessary to withhold such funds to pay necessary corporate expenses, Respondent did not use the funds from Tradetech to pay any expenses other than personal expenses.

E. Respondent's Use of Checking Account for Personal Expenses

Despite Respondent's claim that his taking of the Tradetech checks became necessary at the end of March 1995 due to Robert Vrbanac's possession of the firm checkbook, the evidence shows that Respondent still had a supply of firm checks and used them to pay for personal expenses. On March 28, 1995, at least three days before he took the March 31, 1995 Tradetech check, Respondent began writing firm checks to pay for personal expenses. Between March 28, 1995 and May 27, 1995, Respondent wrote 64 checks on the firm's checking account, totaling $18,712.80, mostly for personal expenses.[61] Respondent again admitted that "[m]ost but not all of the expenses [paid by the 64 checks] ... related to personal use by Respondent."[62]

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[58] CX 5, p. 8.

[59] Hearing Tr. 354. CX 5, p. 9.

[60] CX 25, pp. 7-10; CX 26, pp. 6-9.

[61] CX 21.

[62] Answer, ¶ 3(c).

Respondent admitted that Robert Vrbanac informed him that the domestic relations court had instructed that checks could not be written in excess of $350 without two signatures.[63] Despite that warning, on several occasions, Respondent subverted the intent of the court order by writing multiple checks on the same day to the same payee in aggregate amounts that exceeded $350.[64] As to three checks that were simply written to "cash," Respondent argued that those checks, totaling $1,050, "were for petty cash retained by the Firm for minor office expenses."[65] However, two of those checks, totaling $700 were deposited directly into Respondent's personal checking account.[66]

F. Respondent's Recordkeeping

Respondent initially testified that he made a series of notes to himself, listing the amounts the firm owed to him, and the corresponding amounts that he had expended in order to "make sure that they were in balance."[67] Later, Respondent testified that he never kept any kind of formal accounting of the expenditures and what he believed he was owed. He admitted that he had earlier told NASDR staff that he had not kept "a ledger, a journal, [or] a balance sheet"

[63] Hearing Tr., pp. 344-346, 402-403. Respondent stated that he was "never shown a copy of this judgment order until the divorce came to trial sometime in December of '95.'" Hearing Tr., p. 345.

[64] For example, on March 28, 1995, Respondent wrote two checks to the same gun shop in the amounts of $331.50 and $250. The next day, Respondent wrote three checks to the same gun shop for $350, $350 and $218.71. On April 6, 1995, Respondent wrote two additional checks to the gun shop for $350 and $300. On April 14, 1995, Respondent wrote two checks for $350 each to a fabric store. The next day, Respondent wrote three checks in the amount of $350, $350, and $208.13 to that same fabric store. CX 21.

[65] Answer, ¶ 3(c).

[66] Hearing Tr., pp. 84-85, 331-333, 338-339.

[67] Hearing Tr., p. 295.

with respect to his expenses or earnings.[68] Instead, he characterized his actions as merely "keeping rough track."[69] Respondent further claimed that those notes were not preserved.[70]

G. The Naming of a Court-Appointed Receiver

The domestic relations court appointed Howard Mentzer ("Mentzer") to serve as receiver of the firm on June 9, 1995.[71] Soon after being appointed, Mentzer met with Robert Vrbanac, and then with Alline Vrbanac and Respondent Zulick.[72] During the conversations, Mentzer discussed, among other things, "what they thought the most important issues were to be addressed at that point in time."[73] Respondent failed to notify Mentzer at that meeting or any subsequent meeting that he was holding firm funds from Tradetech checks.[74] In fact, it was not until August 1995, when Mentzer had learned of the outstanding checks and was preparing a report regarding such outstanding assets that Respondent deposited funds from the Tradetech checks into the firm's account.[75]

H. Respondent's Termination From Shepard & Vrbanac

Respondent remained President and Treasurer at Shepard & Vrbanac until his employment with the firm was terminated on May 7, 1996, as part of the Final Entry issued by

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[68] Hearing Tr., p. 343.

[69] Hearing Tr., p. 343.

[70] Id.

[71] CX 11, p. 2.

[72] Hearing Tr., pp. 185-186.

[73] Hearing Tr., p. 186.

[74] Hearing Tr., pp. 187-188.

[75] Hearing Tr., pp. 192-200.

the domestic relations court handling the divorce of Robert and Alline Vrbanac.[76] As part of the Final Entry, the domestic relations court awarded full ownership of the firm to Robert Vrbanac.[77]

In July 1996, the Respondent became registered with NI Securities Corp. as a General Securities Principal and Representative and as a Registered Options Principal. Respondent remains associated with NI Securities Corp.[78]

III. RESPONDENT'S RULE VIOLATION

NASD Conduct Rule 2110 states that a member or associated person "in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." In this case, it is alleged that Respondent converted to his own use funds belonging to his member firm, to which he was not entitled. Conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." NASD Sanction Guidelines, p. 34 n. 2 (1998 ed.).

The NASD has held that "a registered person's 'business' includes his business relationship with his employer, as well as his commercial relationships with his customers." Department of Enforcement v. David L. Foran, 2000 NASD Discip. LEXIS 8 (September 1, 2000), *13, *citing*, Ialeggio v. SEC, No. 98-70854 (9th Cir. May 20, 1999). Thus, "Conduct Rule 2110 is not limited to securities-related conduct involving firm customers; instead it covers

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[76] CX 11, pp. 20-21.

[77] Id.

[78] Respondent is the only registered person at NI Securities, which is owned in part by Alline Vrbanac. Hearing Tr. pp. 470-471.

all unethical business-related conduct, including misconduct that did not result in customer harm." Foran at *19. In this case, as occurred in Foran, Respondent's actions related directly to his relationship with his employer, and therefore occurred in the conduct of his business.

In Foran, the NASD also noted that "[t]he fiduciary relationship of the corporate officer to the corporation forbids any act by which the corporate assets are wrongfully diverted from corporate purposes. Therefore, an officer drawing a corporate check payable to himself and endorsing and cashing it must account for the funds." Foran at *17. Indeed, the NASD further noted that even if an officer were a part owner of the firm (which Respondent was not), he would have needed the consent of all of the shareholders before using corporate assets to pay individual debts. Id. That opinion follows established caselaw that a corporate officer may not misuse his position to gain personal benefit at the expense of the corporation. *See, e.g.* John P. Maguire & Co. v. Herzog, 421 F.2d 419 (5th Cir. 1970). Thus, it is clear that Respondent could not use corporate assets to pay for personal expenses based either on his position as an officer of the firm, or with only permission from his mother, a minority shareholder of the firm.[79]

Respondent's Use of the Firm's Credit Card and Checking Account

Respondent claimed that his use of the corporate funds was both known to and authorized by the firm.[80] However, on the critical issue of Respondent's authority to use firm

[79] At the Hearing, the Respondent showed that both Robert and Alline Vrbanac routinely used firm funds to pay for personal expenses. Despite that, Respondent does not claim that his actions were justified by the fact that Robert and Alline Vrbanac also used corporate funds for personal expenses. Respondent's Post-Hearing Brief, p. 1. Even if Robert and Alline Vrbanac improperly expensed personal items, the SEC has held that "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner." In re Patricia H. Smith, Exchange Act. Re. No. 35898 (June 27, 1995), *citing* Donald T. Sheldon, Exchange Act Rel. No. 31475 (November 18, 1992), 52 SEC Docket 3826, 3838 n. 32, *aff'd*, 45 F.3d 1515 (11th Cir. 1995); C.A. Benson & Co., Inc., 42 S.E.C. 107, 111 (1964).

[80] Respondent's Post-Hearing Brief, p. 1.

assets to pay for personal expenses, the Hearing Panel found that the evidence presented showing Respondent's lack of authority, was far more credible than Respondent's testimony, and that of his mother, Alline Vrbanac.

First, unlike Robert and Alline Vrbanac, Respondent Zulick was not an owner and was therefore not entitled to take shareholder distributions from the firm.[81] Respondent acknowledged that he never had a written employment contract and had no documentation evidencing his claim that he was authorized to charge personal expenses to the firm as a form of compensation.[82] Respondent's description of the manner in which he was to be compensated through the unfettered use of the firm's credit card and checking account, represents a gross departure from the standards for compensation used in the securities industry.

Respondent's failure to maintain accurate ledgers of his personal expenses, versus his claimed compensation, would have made it impossible for him to properly compensate himself under his plan. Respondent testified that he only "kept rough track" of his personal spending versus his earned compensation, and that no such records were maintained. These records, had they ever existed, would have constituted the firm's business records and would have been required to determine Respondent's compensation. Such lack of documentation clearly shows that Respondent's claim lacks credibility since there was, in fact, no such arrangement.

Given this evidence, the Hearing Panel finds that no arrangement for the payment of personal expenses ever existed for Respondent and that he could not have reasonably believed

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[81] Hearing Tr., p. 324.

[82] Hearing Tr., p. 421.

that such form of compensation was either authorized, or in any way an appropriate manner to accept compensation from the firm.

The Hearing Panel also finds that when Robert Vrbanac determined that Respondent was charging certain personal items to the firm, his request to the domestic relations court to stem the spending should have put Respondent on notice that such spending was inappropriate. In any event, Robert Vrbanac's failure to confront Respondent directly to prevent such use is not a justification for Respondent's further abuse of the firm's assets for his personal gain.[83] Robert Vrbanac was not aware of the full extent to which Respondent had his personal expenses paid for by the firm. Nor did Robert Vrbanac authorize the use of the firm's assets to pay for such expenses, or approve of Respondent's actions.[84]

Based on a review of the evidence, the Hearing Panel finds that Respondent Zulick's contention that he had authority to charge personal expenses to the firm through the use of the corporate credit card and checking account lacks credibility.[85] The Hearing Panel therefore finds that Respondent used of the firm's credit card and checking account to pay for personal expenditures without firm authorization, and that such use constituted a conversion of Shepard & Vrbanac funds in violation of NASD Rule 2110.

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[83] Robert Vrbanac did eventually act to stop such spending by requesting that a receiver be named in the divorce proceeding.

[84] Hearing Tr., p. 177.

[85] The Hearing Panel also finds that the testimony of Alline Vrbanac, to the extent that it corroborates Respondent's testimony regarding the authorization for Respondent to expense personal items to the firm, also lacks credibility. Alline Vrbanac, who had been involved in a bitter divorce proceeding from Robert Vrbanac, clearly has an interest in protecting her son. The Hearing Panel finds Alline Vrbanac's testimony to lack credibility for many of the same reasons it finds Respondent's testimony lacks credibility. Such testimony goes against the weight of the evidence and the normal business practices in the securities industry.

Payment for Order Flow Checks

Even if Respondent unreasonably believed that he was authorized to charge personal expenses to the firm, his withholding and use of the Tradetech checks constitutes a distinct and even more egregious violation of conversion of firm funds under NASD Conduct Rule 2110.

On six occasions, Respondent took checks from Tradetech written to the firm, and diverted them from being recorded in the books and records of the firm. Respondent used the first two checks to pay for his personal expenses charged to the firm's credit card, and converted the funds from the other four checks by secretly diverting the into his own personal checking account. Respondent admitted that he used the Tradetech checks to pay for routine living expenses and personal bills.[86]

The Hearing Panel rejects Respondent's testimony of having "offset" the deposit with cash on hand as lacking credibility. If Respondent had almost $4,000 in cash at his home, he would not have allowed his checking account to run a debit balance.[87] The Hearing Panel also finds that Respondent's stated basis for diverting the checks from the firm lacks credibility. As noted, *supra*, Respondent never applied these funds to any legitimate business purpose. The funds were used strictly to pay for Respondent's personal obligations. The Hearing Panel finds that Respondent's taking of the six Tradetech checks without firm authorization or notification, his deposit of such funds in his personal checking account and use of such funds to pay for

[86] Hearing Tr., p. 357.

[87] The Hearing Panel likewise did not credit Respondent's testimony that he lost his personal checking account records and therefore did not know his account balance.

personal expenses, constituted conversion of Shepard & Vrbanac funds in violation of NASD Conduct Rule 2110.

By reason of the foregoing, Hearing Panel finds that the Respondent violated NASD Conduct Rule 2110 by failing to observe high standards of commercial honor and just and equitable principles of trade, by converting Shepard & Vrbanac funds for his own personal use, as alleged in the Complaint as amended.

IV. SANCTIONS

Enforcement requested that Respondent Zulick be barred in all capacities, and ordered to make restitution to Shepard & Vrbanac in the amount of $32,067.10, plus interest.[88] Enforcement urged the Hearing Panel to consider the NASD Sanction Guidelines ("Guidelines") for conversion of customer funds as most analogous.[89] Those Guidelines provide that in the case of conversion of funds, a respondent should be barred, regardless of the amount converted.[90] Notice to Members 99-86 amended the Guidelines by eliminating monetary sanctions in certain cases. The Notice states that, "if an individual is barred, NASD Regulation generally will order restitution or disgorgement of ill-gotten gains where appropriate, but generally will not otherwise impose a fine." The new policy specifically covers violations for conversion.

[88] Complainant's Post-Hearing Brief, pp. 20-21. The amount of restitution requested by Enforcement was derived from adding $12,739.47 in personal charges to the corporate credit card (CX 10), $18,712.80 in firm checks written to pay personal expenses (CX 21); and $614.83 in Tradetech funds that were not restored to the firm (Tradetech check no. 3422, CX 2).

[89] Complainant's Post-Hearing Brief, n. 19.

[90] NASD Sanction Guidelines, p. 34 (1998 ed.).

In support of its recommendation, Enforcement argued that the NASD has previously barred individuals for conversion of funds from their member firms.[91] In Tammy S. Kwikkel-Elliott, Complaint No. C04960004 (January 16, 1998), the National Business Conduct Committee ("NBCC") found that an individual who submitted false reimbursement requests to her employer should be barred from the securities industry. In that case, the NBCC found that "[a]lthough [respondent's] wrongdoing in this instance did not involve securities or customer funds, the willingness to acquire a sum of money through questionable means indicates a troubling disregard for basic principles of ethics and honesty which, on another occasion, might manifest itself in a securities- or customer-related transaction." In ordering that the respondent in that case be barred, the NBCC further noted that "we would be remiss in not acting decisively ... where evidence calls into question the honesty and the veracity of a person associated with a member firm." Id. Enforcement argues that Respondent Zulick likewise has "exhibited a troubling disregard for basic principles of ethics and honesty."[92]

Respondent argued that conversion of customer funds is not analogous to conversion of firm funds and that the imposition of a permanent bar would constitute an injustice to the Respondent.[93] Respondent further argued that Enforcement's request for the specific amount of restitution is unjustified, given Enforcement's failure to establish that all of the expenses listed in Complainant's exhibits CX 10 (for credit card expenses) and CX 21 (for corporate checks)

[91] Complainant's Post-Hearing Brief, pp. 20-21.

[92] Complainant's Post-Hearing Brief, p. 21.

[93] Respondent's Post-Hearing Brief, pp. 2-3.

were for personal use. Finally, according to Respondent, the issue of how much money, if any, is owed to the firm by Respondent, is currently being addressed through a different judicial forum, and need not be decided in this Hearing.[94]

The Hearing Panel finds that it properly may consider the Guidelines for conversion when setting sanctions in this case. In Foran, the NAC upheld the use of such Guidelines in a case involving the improper taking of firm funds. In that case, the NAC held that "[t]he guideline [for conversion] itself does not indicate that its use must be restricted to conversion or misuse of customer funds." Foran at *22. And while the theft of funds from a customer is an extremely serious offense, so too is any type of theft. The SEC has held that the fact that a theft or violation did not involve a customer should not be considered as mitigation in setting sanctions.[95] Even if Respondent believed that he was entitled to additional compensation from the firm, he was not justified in charging personal expenses to the firm to be carried as business expenses to the firm, as done in this case. Nor was he justified in withholding the Tradetech checks, depositing such funds in his personal account instead of the firm's account, or using any of such funds to pay for personal expenses. The Hearing Panel therefore finds it is necessary that Respondent Zulick be barred from associating with any member firm in any capacity.

The Hearing Panel also finds that Enforcement failed to prove the exact amount of personal expenses paid for by corporate funds, instead relying on stipulations or admissions by

[94] RX 19.

[95] *See* Leonard John Ialeggio, Exchange Act Rel. No. 34-40028 (May 27, 1998) (fact that respondent abused only his employer's trust is not mitigative). *See also*, Livada Securities Co., Exchange Act Rel No. 34-10894 (July 2, 1994) (fact of no customer losses does not mitigate violations).

the Respondent that most of the expenses listed in Complainant's exhibits CX 10 and CX 21 were personal expenses as opposed to business expenses. The Hearing Panel is therefore unable to impose an order for any specific amount of restitution as part of this Decision. There is also evidence that Shepard & Vrbanac previously brought a civil proceeding against Respondent, seeking the reimbursement of funds improperly taken and that the judgment rendered in that case is on appeal.[96] Finally, consistent with Notice to Members 99-86, the Hearing Panel will not impose a fine against the Respondent since he is being barred.

Based on a review of its findings, the principal considerations, as well as the aggravating and mitigating factors, the Hearing Panel therefore bars Respondent from associating with any NASD member firm in any capacity.

V. CONCLUSION

The Hearing Panel found that Respondent Zulick violated NASD Conduct Rule 2110 as alleged in the Complaint. The Hearing Panel barred Respondent from associating with any NASD member firm in any capacity. The Hearing Panel also assessed costs against the Respondent in the amount of $3,435.00, consisting of a $750.00 administrative fee and $2,685.00 for the cost of the Hearing transcript.[97] These sanctions shall become effective on a

[96] RX 19.

[97] The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

date set by the Association, but not earlier than 30 days after this decision becomes the final disciplinary action of the Association.

Hearing Panel

by: _____
Gary A. Carleton
Hearing Officer

Copies to:

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Via First Class Mail and Electronic Transmission
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