

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL A. USHER
(CRD #734581),

Greeley, Colorado,

Respondent.

Disciplinary Proceeding
No. C3A980069

Hearing Officer - AHP

Amended Hearing Panel Decision¹

May 21, 1999

Digest

The Department of Enforcement filed a complaint alleging that Respondent Michael A. Usher violated NASD Rule 2110 by conducting a securities business while his and his broker-dealer's registrations were suspended. The NASD Hearing Panel granted summary disposition on the issue of liability, and, following a hearing on sanctions, ordered that he be censured, fined \$25,000, and barred as a general securities principal. The Hearing Panel also ordered Usher to disgorge \$3,914.70, the amount of commissions he earned while he was suspended.

¹ As issued on May 20, 1999, the Hearing Panel Decision did not state clearly on page 11 that the amount ordered to be disgorged is in addition to the fine. This Amended Hearing Panel Decision clarifies that point and orders Usher to pay interest on the amount to be disgorged.

Appearances

Roger D. Hogoboom, Jr., Esq., Senior Regional Counsel, Denver, Colorado, and Rory C. Flynn, Esq., Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

Michael A. Usher, *pro se*.

I. Procedural Background

On November 23, 1998, the Department of Enforcement (Enforcement) filed the Complaint in this proceeding against Michael A. Usher (Usher). The Complaint alleged that Usher conducted a securities business while his and his broker-dealer's registrations with the National Association of Securities Dealers, Inc. ("NASD") were suspended for failure to pay an arbitration award. (Complaint ¶ 13.)² Usher filed a letter response to the Complaint on December 18, 1998, in which he generally denied all of the allegations in the Complaint and requested a hearing. Usher also specifically denied that he processed any trades while he was suspended, and he further denied that he received written notification that the NASD had suspended Gilbert Marshall & Company (Gilbert Marshall), the broker-dealer with which he was associated.

On January 29, 1999, Enforcement filed a motion for summary disposition, which was supported by 17 exhibits, a statement of undisputed facts, and a declaration of Andrew Friedman, a Compliance Specialist in NASD Regulation, Inc.'s Denver office. Usher filed a timely response, including a statement of disputed facts.

² Gilbert Marshall filed a Form BDW on June 4, 1997, and it was not named as a respondent in the Complaint.

On February 23, 1999, pursuant to the Order Following Initial Pre-Hearing Conference dated December 31, 1998, Enforcement filed pre-hearing submissions, including “Joint Stipulations” signed only by Enforcement’s counsel. During the Final Pre-Hearing Conference on March 4, 1999, the Hearing Officer questioned Usher about the stipulations. Usher admitted that he joined in the stipulations with two minor corrections. The Hearing Officer ordered Enforcement to file an amendment to the Joint Stipulations incorporating Usher’s comments. Enforcement filed the amendment on March 8, 1999.³

The Hearing Panel then considered Enforcement’s motion for summary disposition, and, on March 11, 1999, issued an order granting the motion on the issue of liability. The Hearing Panel reserved judgment on the issue of sanctions and ordered the hearing be held on that issue alone.

The hearing on sanctions was held on March 16, 1999, before a Hearing Panel composed of the Hearing Officer and two current members of the District Committee for District 3. At the hearing, Usher testified on his own behalf but offered no exhibits. Enforcement called no witnesses and offered 18 exhibits: the 17 exhibits that it had submitted with its motion for summary disposition and Exhibit 18, a copy of the Initial Decision dated March 5, 1999, issued by an Administrative Law Judge for the Securities and Exchange Commission (“SEC”) in the case In re Sky Scientific, Inc., Michael A. Usher, et al., Administrative Proceeding No. 3-9201.⁴ Enforcement offered the Initial

³ References to the “Joint Stipulations,” as amended, are cited as “Stip. ¶[number].”

⁴ References to Enforcement’s exhibits are cited as “Ex.[number].” Usher stipulated to the admissibility of the Exs 1-17. Ex. 18 was marked and retained as a Supplemental Document pursuant to Rule 9267(b).

Decision to supplement Usher's disciplinary history. However, the Hearing Panel excluded Exhibit 18 on the ground that it was not yet final. Under the NASD Sanction Guidelines non-final regulatory actions are considered irrelevant to the issue of sanctions.⁵

II. Summary Disposition

Rule 9264 provides a means by which any party may seek a summary disposition of any or all of the charges in a disciplinary proceeding. Rule 9264(d) provides that the Hearing Panel "may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law."

In this case, the Hearing Panel found that the exhibits offered by Enforcement, which Usher stipulated to, established that there was no genuine issue regarding any material fact concerning Usher's liability. However, in light of the fact that Usher was unrepresented, the Hearing Panel concluded that Usher should have the opportunity to present evidence on the issue of sanctions. Accordingly, the Hearing Panel deferred assessing sanctions until the close of the hearing.

III. Findings of Fact

Enforcement and Usher stipulated to the underlying, material facts in this proceeding. Based on their stipulations the Hearing Panel makes the following findings of fact.

⁵ See NASD Sanction Guidelines 3 (2d ed. 1998).

A. Michael A. Usher

Usher has been in the securities business for 18 years. He started his career in August 1981 with Hanifen, Imhoff Inc. In late 1983, he helped start Gilbert Marshall where he served as a principal until June 1997 when the firm closed. (Ex. 3.) While at Gilbert Marshall, Usher was registered as a General Securities Representative, a General Securities Principal, a Financial and Operations Principal, a Compliance Registered Options Principal, a Registered Options Principal, and a Senior Registered Options Principal. (Ex. 3.) At all times relevant to this proceeding, Usher was the President of Gilbert Marshall. (Stip. ¶ 1.) He is currently associated with Adams Davis Co. (Tr. 37.)

Usher has been the subject of several other disciplinary actions that are relevant to the assessment of sanctions in this proceeding. First, in August 1997, under the terms of a Decision and Order of Acceptance of Offer of Settlement, Usher was censured, fined \$15,000, and suspended for six months from association with any NASD member in any principal capacity, excluding the capacities of Financial and Operations Principal and Registered Options Principal. (Ex. 16, at 9.) Usher had been charged with failing to provide truthful information to the NASD in response to requests for information made pursuant to Rule 8210 and deficient supervision. Second, in July 1997, the Colorado Division of Securities suspended his sales representative's license in Colorado for 60 days and suspended him from acting as a supervisor in Colorado for one year. (Ex. 16, at 21.) These sanctions arose from allegations that Usher failed to supervise the personnel in Gilbert Marshall's Denver office who were accused of failure to execute trades, fraud, and violation of SEC Rule 15g-2. (Ex. 16, at 20.) Usher was also censured, fined \$25,000, and required to requalify as a general securities principal in settlement of an

NASD disciplinary action arising from the same violations. (Ex. 16, at 22.) Third, in December 1995, Usher entered into a consent agreement in settlement of charges brought by the State of Indiana that he, Gilbert Marshall, and others engaged in dishonest sales practices. The settlement assessed a civil penalty in the amount of \$7,500. (Ex. 16, at 23.) Fourth, in or about June 1995, the State of Alabama permanently barred Usher. In that case, Usher was charged with deficient supervision of brokers who sold securities in Alabama before the brokers were registered. (Ex. 16, at 25.)⁶

B. Transaction of a Securities Business While Suspended

On or about March 3, 1997, an NASD arbitration panel, in the matter of Richard Weisinger v. Gilbert Marshall & Co., NASD Arbitration No. 95-01220, entered an award against Usher and Gilbert Marshall in the amount of \$37,500. (Exs 5, 6; Stip. ¶ 3.) On March 4, 1997, the award was served on Usher's attorney. (Stip. ¶ 3.)

On April 8, 1997, claimant's attorney notified the NASD's Arbitration & Mediation Department that the award had not been paid. (Ex. 7.) Accordingly, the NASD notified Usher's attorney that if the award was not paid timely (or a motion to vacate the award was not filed), the NASD would institute summary suspension proceedings. (Ex. 8.) Usher's attorney received the letter on April 11, 1997. (Stip. ¶ 5.)

On April 24, 1997, the attorney for the claimant again wrote to the NASD and advised that the award was still not paid. (Ex. 9.) Consequently, on April 30, 1997, the NASD sent Usher and Gilbert Marshall separate letters initiating suspension proceedings against them. The letters advised them that if the award was not paid before May 23,

⁶ Usher's CRD record also includes entries for violations while he was employed by Hanifen, Imhoff, Inc. However, because the record does not indicate clearly the nature of the charges against Usher and their disposition, and because the incidents date back to 1983, the Hearing Panel did not consider them.

1997, their registrations would be suspended effective that day. (Ex. 10.)⁷ Usher admits that he received the letter addressed to him on May 5, 1997, but he did not pay the award until May 30. (Stip. ¶¶ 7, 12; Ex. 12.) Usher also admits that Gilbert Marshall continued to do business the week following the Memorial Day holiday, May 27-30, 1997, during which time Gilbert Marshall's and Usher's registrations were suspended. (Stip. ¶ 11.) During those four days, Gilbert Marshall generated approximately \$6,700 in gross commissions. (Stip. ¶ 11.)

Although Usher admitted receiving the April 30, 1997, letter addressed to him, at the hearing he testified that he did not recall receiving the letter sent to him for Gilbert Marshall. (Tr. 35.) He also contended that he could not find a copy of the letter in the firm's files. (Tr. 35.) Usher argued that had he received and read it, he would not have allowed Gilbert Marshall to conduct business until the award was paid. (Tr. 33.) On the other hand, Usher admits that the certified return receipt for the letter sent to Gilbert Marshall was signed by Marla Merkl, the firm's receptionist. (Tr. 50-51; Ex. 10, at 6.) Usher also argued that written notice was not sufficient. Because he was in contact with the NASD and had advised an attorney in its Arbitration & Mediation Department that he was trying to work out a payment plan, Usher felt he also was entitled to a verbal warning that both he and Gilbert Marshall would be suspended effective May 23, 1997, unless the award was paid by that date. (Tr. 32-34.)

The Hearing Panel discredits Usher's testimony that he did not receive and read the April 30 suspension letter sent to Gilbert Marshall. It is implausible that Usher did not

⁷ Although the letters referred to canceling their registrations, the NASD treated them as suspension proceedings.

receive the letter. It was addressed to him and there were only four employees at Gilbert Marshall. (Tr. 50.) Furthermore, copies of the two letters were also sent by certified mail, return receipt requested. Usher signed for two copies and the receptionist signed for the other two. (Ex. 10, at 5, 6.) As a result, to credit Usher's testimony the Hearing Panel would have to conclude that both copies of the letter addressed to Gilbert Marshall—received a week apart—miscarried once they arrived. Usher offered no explanation of why or how that could have occurred. Finally, the Hearing Panel observes that Usher did not offer corroborating evidence from anyone else employed by Gilbert Marshall at the time.

IV. Conclusions of Law

A. *Jurisdiction*

The NASD has jurisdiction over Usher and the matters alleged as violations in the Complaint. Usher was registered with the NASD when the alleged violations occurred and when Enforcement filed the Complaint.⁸

B. *Engaging in a Securities Business While Suspended*

Gilbert Marshall's order tickets confirm what Usher concedes. Gilbert Marshall continued to conduct a securities business after it was suspended. (Ex. 14.) In addition, 16 of the 28 tickets name Usher as the account executive. (Ex. 14, at 1-16.)

Usher asserts that he personally ceased working as a broker when he received—on May 30—a copy of the memorandum the Arbitration & Mediation Department sent to the membership group advising that Usher and Gilbert Marshall had not paid the award and requesting that their suspension be entered in the Central Registration Depository. (Tr.

⁸ See Article V, Section 4 of the NASD's By-Laws.

35.) He also asserts that most of the trades effected between May 23 and May 30 were unsolicited. (Tr. 36.) However, neither of these arguments in any way mitigates the fact that the transactions were effected while he and Gilbert Marshall were suspended.⁹ Without doubt, Usher and Gilbert Marshall violated NASD Conduct Rule 2110 that requires registered persons to observe high standards of commercial honor and just and equitable principles of trade.

C. Disgorgement

Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment.¹⁰ Because it is an equitable remedy, it is not necessary to prove the precise amount of the illegally obtained profits. A reasonable approximation of the profits causally connected to the violation is sufficient.¹¹ However, disgorgement may only be ordered against those who actually received the illegally obtained profits.¹² As the National Adjudicatory Council said in a recent decision: “The SEC approves of disgorgement sanctions when we can identify ‘direct financial gain obtained by a wrongdoer as a result of his or her wrongful activities.’”¹³

Here, Enforcement requests that Usher be ordered to disgorge \$6,700, the entire amount of gross commission Gilbert Marshall earned while suspended. In the Hearing Panel’s view, this is an incorrect measure. From the stipulations, it is not evident that

⁹ See In re Troy A. Wetter, Administrative Procedure File No. 7926, 55 S.E.C. Docket 648 (Oct. 21, 1993).

¹⁰ See, e.g., SEC v. First City Financial Corp., Inc., 890 F.2d 1215, 1230 (D.C. Cir. 1989).

¹¹ Id. at 1231.

¹² See Hateley v. SEC, 8 F.3d 653, 655 (9th Cir. 1993); In re Kenneth L. Lucas, Exchange Act Release No. 33922, 1994 SEC LEXIS 1319, at *14 (April 19, 1994).

¹³ District Business Conduct Committee for District No. 10 v. Lawrence P. Bruno, Jr., Complaint No. C10970007 1998 NASD Discip. LEXIS 51, at *33 (NAC July 8, 1998) quoting In re F.B. Horner & Assocs., Inc., 50 S.E.C. 1063, 1069 n.19 (1992), aff’d, 994 F.2d 61 (2d Cir. 1993).

Usher actually profited by the full amount collected by Gilbert Marshall. Indeed, many of the order tickets show other account representatives. Instead, the Hearing Panel finds that the proper measure of disgorgement is the amount of commissions Usher earned on his accounts and reflected on the order tickets. Those gross commissions total \$3,914.70. (Ex. 14, at 1-16.)

V. Sanctions

The NASD has not published sanction guidelines for engaging in a securities business while suspended. Enforcement argues, however, that the Hearing Panel should be guided by the recommended sanctions for allowing a statutorily disqualified person to associate with a firm prior to approval. That guideline recommends a fine of \$5,000 to \$50,000 and a suspension or bar for supervisory principals.¹⁴ In addition, Enforcement argues that this is an egregious case and that stiff sanctions are required in light of Usher's disciplinary history. Enforcement asks that Usher be censured, fined \$25,000, and barred as a general securities principal.

The Hearing Panel, after careful consideration of the undisputed facts and Usher's disciplinary history, agrees that the sanctions requested by Enforcement are appropriately remedial. Usher received four copies of the suspension notices. Nevertheless, he continued to conduct business, and he allowed Gilbert Marshall to continue to conduct business, until May 30, 1997. Usher presented no facts that mitigate the seriousness of his action. In fact, Usher's defenses are nothing more than an attempt to shift responsibility to the NASD by arguing that the written notice he received was insufficient and that the attorney in the NASD Arbitration & Mediation Department should have provided a

¹⁴ NASD Sanction Guidelines at 41 (2d ed. 1998).

verbal warning in addition to the notices that were sent by certified mail. The Hearing Panel finds his explanations particularly troublesome because they mirror Usher's general pattern of refusing to accept responsibility as a supervising principal. In each of his prior disciplinary actions, Usher likewise points to others as the cause of his troubles. (Tr. 28-31, 38, 43, 44, 45, 57.) This pattern supports Enforcement's request that Usher be barred as a general securities principal. This is Usher's fifth disciplinary action involving deficient appreciation of his responsibilities as a general securities principal. The Hearing Panel concludes therefore that it is in the public interest to prohibit Usher from serving in that capacity in the future.

The Hearing Panel also agrees that a substantial fine is appropriate to serve as a deterrent to Usher and others. Disregarding a suspension notice is a serious matter. It challenges the authority of the NASD to regulate its members for the protection of the investing public. Moreover, Usher's disciplinary record indicates that a substantial fine is warranted.

VI. Order

Therefore, having considered all of the evidence Enforcement submitted, Respondent Michael A. Usher is censured, fined \$25,000, and barred as a general securities principal.¹⁵ The Hearing Panel also orders Michael A. Usher to disgorge \$3,914.70, plus interest thereon at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), from May 30, 1997, until paid.

¹⁵ 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.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date of service of the decision constituting final disciplinary action of the NASD; provided, however, that the bar shall become effective upon service of the decision constituting final disciplinary action of the NASD.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Michael A. Usher (via FedEx overnight delivery and first class mail)
Roger D. Hogoboom, Jr., Esq. (via first class mail and e-mail)
Rory C. Flynn, Esq. (via first class mail and e-mail)