

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MARKET
REGULATION,

Complainant,

v.

JAMES STEWART MEAGHER
(CRD No. 2328325),

Respondent.

Disciplinary Proceeding
No. 20110305098-02

Hearing Officer–DW

DEFAULT DECISION

January 16, 2018

Respondent is barred from associating with any FINRA registered firm in any capacity for (1) fraudulently marking the close in several securities; (2) misappropriating customer funds; and (3) providing false testimony in an on-the-record interview. Respondent is also ordered to pay restitution in the amount of \$13,195.

Appearances

For Complainant: John Warshawsky, Esq., and James J. Nixon, Esq., Department of Market Regulation, Financial Industry Regulation Authority.

For Respondent: No appearance.

DECISION

FINRA's Department of Market Regulation ("Market Regulation") brought this disciplinary proceeding against James Stewart Meagher ("Meagher") on September 1, 2017. Market Regulation's Complaint alleges that Meagher improperly engaged in the fraudulent and manipulative trading activity known as "marking the close," whereby Meagher allegedly transacted several securities purchases shortly before market close at prices above the prevailing market price at the time, resulting in a higher closing price of those securities and additional compensation paid to Meagher based upon the increased value of securities held in inventory in his firm's proprietary trading account. The Complaint also alleges that Meagher fraudulently misappropriated money given to him by a customer for a stock purchase. And Meagher allegedly

provided false information about the money he received from his customer in response to questioning by FINRA investigative staff. To date, Meagher has not answered.

On December 1, 2017, Market Regulation filed a motion for entry of a default decision and imposition of sanctions (the “Motion”). The Motion is accompanied by a memorandum of law, the Declaration of John Warshawsky (“Warshawsky Decl.”), and seven exhibits.¹ To date, Meagher has not filed a response.

For the reasons set forth below, I find Meagher in default and grant Market Regulation’s Motion.

I. Findings of Fact and Conclusions of Law

A. Meagher’s Background

Meagher has been associated with a number of FINRA-regulated broker-dealers since entering the securities industry more than 20 years ago. Between October 2009 and May 2012, Meagher was associated with FINRA member Chardan Capital, working as a wholesale market maker and proprietary trader.² After leaving Chardan Capital, Meagher registered with World Trade Financial Corporation in November 2012, and continued his association with that firm until December 2014.³ Meagher subsequently was associated with Monarch Bay Securities, LLC, from February 2015 until May 2016, when he was terminated for reasons not relevant here.⁴ Meagher has not been associated with a FINRA member firm since his May 2016 termination.⁵

B. Jurisdiction

FINRA has jurisdiction over Meagher pursuant to Article V, Section 4(a) of FINRA’s By-Laws. Market Regulation filed its Complaint within two years after the end of Meagher’s association with a FINRA member firm, and Meagher is charged with violating FINRA Rules while associated with a FINRA member firm.⁶

C. Meagher Defaulted by Failing to Answer the Complaint

Market Regulation served Meagher with the Complaint and Notice of Complaint on September 1, 2017, and the Complaint and Second Notice of Complaint on October 2, 2017.⁷ In

¹ Citations to Market Regulation’s exhibits are noted as “CX-___.”

² Complaint (“Compl.”) ¶ 5; Warshawsky Decl. ¶ 3.

³ Compl. ¶ 5; Warshawsky Decl. ¶ 3.

⁴ Compl. ¶ 5; Warshawsky Decl. ¶ 3, 4; CX-1.

⁵ Compl. ¶ 5; Warshawsky Decl. ¶ 3.

⁶ Compl. ¶ 5; Warshawsky Decl. ¶ 5.

⁷ Warshawsky Decl. ¶¶ 6, 15.

accordance with FINRA rules, Market Regulation served both notices by first-class and certified mail to Meagher's current address as reflected in the Central Registration Depository ("CRD"), and also to additional addresses for Meagher and his former counsel identified by Market Regulation staff.⁸ Meagher therefore had constructive notice of this proceeding.⁹

Because he failed to answer or otherwise respond to the Complaint or Second Notice of Complaint, Meagher is in default. By his default Meagher admits the Complaint's allegations pursuant to Rules 9215(f) and 9269(a).

D. Meagher Improperly Marked the Close

The first cause of the Complaint alleges that Meagher engaged in securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. These antifraud provisions prohibit fraudulent or manipulative practices in connection with the offer, purchase, or sale of a security.¹⁰ Manipulation, defined as "the creation of deceptive value or market activity for a security," is misconduct that "is at the core of the conduct that the securities laws were designed to prevent."¹¹ Manipulative conduct violates the antifraud provisions of the federal securities laws when undertaken with scienter.¹² Scienter is the "intent to deceive, manipulate or defraud."¹³ Scienter may be established by a showing of recklessness that involves an "extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers and sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it."¹⁴

Here, Meagher allegedly engaged in a form of manipulation known as "marking the close," or "the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market."¹⁵ To establish a violation, Market Regulation must show that Meagher "(i) engaged in conduct evidencing a scheme to mark the

⁸ *Id.* at ¶¶ 6-15, 20.

⁹ *See, e.g., Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *20 n.21 (NAC June 3, 2014), *aff'd*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 (July 27, 2015).

¹⁰ *Kirlin Securities, et al.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *42 (Dec. 10, 2009). Fraudulent conduct is also inconsistent with just and equitable principles of trade and therefore violates FINRA Rule 2010.

¹¹ *Kirlin Securities*, 2009 SEC LEXIS 4168, at *42.

¹² *Id.* at *46.

¹³ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193.

¹⁴ *Rockies Fund, Inc. v. SEC*, No. 04-1255 2005 U.S. App. LEXIS 24521, at *12 (D.C. Cir. Nov. 15, 2005) (citing *Steadman v. SEC*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977))). Proof of scienter is not required to establish that a misrepresentation or omission violates Rule 2020.

¹⁵ *Donald L. Koch*, Exchange Act Release No. 72179, 2014 SEC LEXIS 1684, at *32 (May 16, 2014) (quoting *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 1995 SEC LEXIS 3308, at *6 (Dec. 6, 1995)).

close—*i.e.*, trading at or near the close of the market so as to influence the price of a security—and (ii) acted with scienter, defined as a mental state embracing intent to deceive, manipulate, or defraud.”¹⁶

I find that Meagher marked the close. Over a four-month period beginning in November 2011, he made stock purchases in four companies: Omega Navigation Enterprises, Inc., Virtual Medial Centre, Inc., Toron, Inc., and Source Gold Corp.¹⁷ Meagher made each of his eleven purchases in these securities on the final trading day of the month.¹⁸ He made each purchase shortly before the close of the market at a price higher than the previous trade.¹⁹ And in each instance, Meagher’s purchase price was higher than the best offer price available in the market.²⁰ Meagher nevertheless routed his purchases to firms offering inferior prices.²¹ When his own firm’s electronic systems warned Meagher that he was not purchasing at the most favorable price, he manually overrode the warning system and made the higher-priced purchases anyway.²²

Each of Meagher’s purchases was recorded as the closing price for the securities, and was used by Meagher’s firm to value the securities in proprietary accounts he managed.²³ The month-to-month change in market values of the securities held in these proprietary accounts was a component of Meagher’s compensation.²⁴ Beginning in April 2011, trading losses had resulted in reductions in Meagher’s compensation, to the point where he received no compensation at all in the months leading up to the relevant transactions, from September through November 2011.²⁵ Meagher marked the close for the purpose of artificially inflating the price of the securities in order to reduce his prior losses and increase his compensation.²⁶ In so doing, Meagher acted with scienter.²⁷

¹⁶ *Koch*, 2014 SEC LEXIS 1684, at *33.

¹⁷ Compl. ¶ 11.

¹⁸ *Id.*

¹⁹ *Id.* at ¶¶ 11-12.

²⁰ *Id.* at ¶ 12.

²¹ *Id.*

²² *Id.*

²³ *Id.* at ¶ 13.

²⁴ *Id.* at ¶ 7.

²⁵ *Id.* at ¶¶ 8-9.

²⁶ Compl. ¶ 13; Warshawsky Decl. ¶ 24.

²⁷ See *Kocherhans*, 1995 SEC LEXIS 3308, at *7 (respondent “acted with the requisite scienter since he bought [the relevant] stock for the purpose of increasing its closing price and avoiding margin maintenance calls”).

Accordingly, I find that Meagher violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010²⁸ by marking the close.

E. Meagher Defrauded an Investor

The second cause of the Complaint also alleges securities fraud. After leaving his firm, Meagher allegedly engaged in a deceptive scheme to misappropriate investor funds, in violation of Exchange Act Section 10(b), Rule 10b-5, and FINRA Rules 2020 and 2010.

Shortly after leaving his firm in May of 2012, Meagher solicited an investor, JA, to purchase shares of Facebook through an initial public offering.²⁹ The investor wired \$25,080 to Meagher with the understanding that the funds would be used to purchase Facebook stock at the offering price of \$38 per share.³⁰ Meagher combined his own funds with \$22,000 of the investor's money to purchase 1,750 shares of Facebook.³¹ Meagher kept the remaining \$3,080 that the investor gave him.³² Later that month, Meagher sold all of the shares at prices between \$32.53 and \$30 per share.³³ But Meagher did not disclose to the investor that the stock had been sold.³⁴

Instead, Meagher deposited all of the proceeds from the stock sales into his personal account and used the funds to pay personal expenses.³⁵ Later, in November 2012, the investor told Meagher to sell his Facebook stock and return the proceeds.³⁶ On November 15, 2012, Meagher falsely told the investor that he sold the stock at the then-market price of \$21 per share.³⁷ Meagher told the investor that his sales proceeds were \$13,860, when in fact the investor's share of the proceeds was \$17,115.³⁸ And Meagher only wired the investor \$7,000.³⁹

²⁸ Committing fraud and other violations of the federal securities laws and FINRA Rules is inconsistent with the high standards of ethical conduct required by Rule 2010. *See Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 182 (2d Cir. 1966).

²⁹ Compl. ¶ 16.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; Warshawsky Decl. ¶ 25.

³³ Compl. ¶ 17.

³⁴ *Id.*

³⁵ *Id.* at ¶¶ 18-19; Warshawsky Decl. ¶ 25.

³⁶ Compl. ¶ 21.

³⁷ *Id.* at ¶ 22.

³⁸ *Id.* at ¶ 24.

³⁹ *Id.*

Despite the investor's requests, Meagher never paid him the remaining \$10,115 of his sales proceeds, or the \$3,080 that Meagher never invested.⁴⁰

Meagher defrauded the investor. The Supreme Court interprets the antifraud provisions of the federal securities laws to reach all deceptive acts or practices in connection with the purchase or sale of a security, including when "a broker . . . accepts payment for securities that he never intends to deliver, or . . . sells customer securities with intent to misappropriate."⁴¹ The facts here demonstrate that Meagher did both—he diverted some of the funds given to him by the investor to purchase stock in the Facebook IPO, secretly intending to keep that money for his own purposes. And after using a portion of the investor's money to buy the stock, he later sold the position without disclosure and misappropriated most of the proceeds. The law is clear that each time Meagher "exercised his power of disposition for his own benefit, that conduct, without more, was a fraud."⁴² Moreover, the evidence adequately establishes that he acted with scienter. Accordingly, I find that Meagher violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5 and FINRA Rules 2020 and 2010⁴³ by misappropriating investor funds.

F. Meagher Provided False and Misleading Testimony in the Investigation

The final cause of the Complaint alleges that Meagher gave false on-the-record testimony in the investigation of this matter, in violation of FINRA Rules 8210 and 2010. Rule 8210 requires an associated person provide information orally or in writing with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding. To establish a violation of Rule 8210 for giving false statements under oath, Market Regulation must show by a preponderance of the evidence that a respondent's testimony was given in connection with "an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules,"⁴⁴ and that respondent's answer to the questioner's inquiry was false. Although Market Regulation must prove the alleged falsehood, it need not establish that Meagher made the false statement with the intent to deceive. Scienter is not an element of the violation.⁴⁵

According to the Complaint, on November 19, 2014, FINRA staff questioned Meagher in an on-the-record interview regarding the Facebook IPO investment.⁴⁶ Meagher falsely claimed

⁴⁰ *Id.* at ¶¶ 25-26; Warshawsky Decl. ¶ 26.

⁴¹ *SEC v. Zandford*, 535 U.S. 813, 819 (2002).

⁴² *Zandford*, 535 U.S. at 821 (quoting *United States v. Dunn*, 268 U.S. 121, 131 (1925)).

⁴³ As explained in footnote 28 above, violations of the antifraud provisions also violate FINRA Rule 2010.

⁴⁴ Rule 8210(a).

⁴⁵ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008) (citing *Richard J. Rouse*, 51 S.E.C. 581 (1993) (rejecting the view that scienter is a requirement for a violation of Rule 8210)).

⁴⁶ Compl. ¶ 27.

that the money he received from the investor was a personal loan and not funds advanced for investment.⁴⁷ He also falsely claimed that he had fully repaid the loan.⁴⁸

These allegations sufficiently establish that Meagher made materially false statements in connection with the investigation. In so doing, he violated FINRA Rules 8210 and 2010.⁴⁹

II. Sanctions

A. Marking the Close

For marking the close, the FINRA Sanction Guidelines recommend a fine of \$25,000 to \$292,000 and a suspension in any or all capacities for up to two years when the conduct is intentional or reckless. In egregious cases, the Sanctions Guidelines further recommend consideration of a greater fine and a bar.⁵⁰ On the facts presented here, I conclude that a bar is the appropriate sanction.

Meagher's conduct was egregious. One of the principal considerations for determining sanctions is whether the respondent received a benefit from the misconduct, including the increased valuation of inventory.⁵¹ This is precisely what Meagher did, acting intentionally for the purpose of fraudulently inflating the value of his inventory to enrich himself. And Meagher's conduct is also aggravated by the fact that it was not an isolated incident, but went on for months and involved several different securities.⁵² Further, there do not appear to be any mitigating circumstances that would justify a sanction short of a bar in this case. Consequently, a bar is appropriate and will be imposed. In light of the bar, I will not impose a fine for the misconduct.⁵³

B. Misappropriation of Customer Funds

For fraudulent misrepresentations or omissions, the FINRA Sanction Guidelines recommend a fine of \$10,000 to \$146,000 and a bar when the conduct is intentional or reckless.⁵⁴ Because the conduct here involves a fraudulent scheme to convert investor assets, the Guideline provision for conversion or improper use of funds or securities is equally applicable to Meagher's misconduct. In cases of conversion, the Guidelines recommend barring a respondent

⁴⁷ Compl. at ¶¶ 28, 38; Warshawsky Decl. ¶ 28.

⁴⁸ Compl. at ¶¶ 28, 38; Warshawsky Decl. ¶ 28.

⁴⁹ A violation of FINRA Rule 8210 constitutes conduct inconsistent with just and equitable principles of trade and therefore also violates FINRA Rule 2010. *See, e.g., CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 n.36 (Jan. 30, 2009).

⁵⁰ FINRA Sanction Guidelines at 57 (2017), <http://www.finra.org/Industry/Sanction-Guidelines>.

⁵¹ Guidelines at 57 (Principal Consideration 2).

⁵² Guidelines at 57 (Principal Consideration 4).

⁵³ Guidelines at 10 (“Adjudicators generally should not impose a fine if an individual is barred and the Adjudicator has ordered restitution or disgorgement of ill-gotten gains as appropriate to remediate the misconduct.”).

⁵⁴ Guidelines at 89.

regardless of the amount converted.⁵⁵ No fine is recommended because a bar is the standard sanction.⁵⁶

Meagher's theft from a customer is egregious misconduct, and no mitigating factors are apparent. Consequently, a bar is appropriate and will be imposed. In light of the bar, I will not impose a fine for the misconduct. However, Meagher will be ordered to pay restitution of the \$3,080 advanced to him by the investor but never invested, as well as the \$10,115 in stock sale proceeds due the investor after accounting for the \$7,000 Meagher already repaid.⁵⁷ Thus, the total amount of restitution is \$13,195.

C. Failure to Respond to Requests for On-the-Record Testimony

The Sanction Guidelines recommend a bar when a respondent fails to respond truthfully to a request for information unless there are mitigating factors.⁵⁸ Here, Meagher lied to investigators during his on-the-record interview in order to escape liability for misappropriating investor securities and money. I find no mitigating factors. Accordingly, I will bar Meagher for this violation as well.

III. Order

Meagher is barred from associating with any FINRA member firm in any capacity for (1) marking the close in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 and FINRA Rules 2020 and 2010; (2) engaging in a fraudulent scheme to misappropriate investor securities and money, also in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 and FINRA Rules 2020 and 2010; and (3) providing false testimony in violation of FINRA Rules 8210 and 2010. The bars shall become effective immediately if this Default Decision becomes FINRA's final disciplinary action.

In addition, Meagher shall pay customer JA⁵⁹ \$13,195 in restitution, plus interest at the rate established for the underpayment of income taxes in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), from May 29, 2012, until paid.

⁵⁵ Guidelines at 36.


⁵⁶ Guidelines at 36.

⁵⁷ Guidelines at 4 (General Principle 5).

⁵⁸ Guidelines at 33.

⁵⁹ JA is identified in an Identification of Aliases Contained in the Complaint filed by Market Regulation on September 1, 2017.

In the event that JA cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed property, or abandoned property fund for the state of JA's last-known address. Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to staff of FINRA's Department of Enforcement, District 10, no later than 90 days after the date when this decision becomes final.



David Williams
Hearing Officer

Copies to:

James Stewart Meagher (via overnight courier and first-class mail)
John Warshawsky, Esq. (via email and first-class mail)
James J. Nixon, Esq. (via email)
Justin Chretien, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)