

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement,

Complainant,

vs.

Damien R. Douglas
Queens, NY,

Respondent.

DECISION

Complaint No. C10000026

Dated: March 25, 2002

In a default decision, the Hearing Officer found that the respondent executed 10 unauthorized transactions in the accounts of five customers and provided false, misleading, or inaccurate information to a customer. Respondent was fined \$60,000, ordered to pay \$29,886 in restitution, and barred from associating with any member firm in any capacity. Held, findings affirmed and sanctions modified.

Respondent Damien R. Douglas ("Douglas") has appealed a June 4, 2001 Hearing Officer default decision pursuant to NASD Procedural Rule 9311. After a review of the entire record in this matter, we find that Douglas violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), SEC Rule 10b-5, and NASD Conduct Rule 2110 by executing 10 unauthorized transactions in the accounts of five customers. In addition, we find that Douglas provided false, misleading, or inaccurate information in violation of Conduct Rule 2110. We order Douglas to pay restitution of \$29,886 and \$1,000 in appeal costs, but eliminate the \$50,000 and \$10,000 fines imposed by the Hearing Officer. Further, we order that Douglas be barred from associating with any member firm in any capacity.

Background

Douglas entered the securities industry in June 1992 as a general securities representative. From October 1993 to September 1998, Douglas was associated with eight member firms. During the time of the alleged violations, Douglas was associated with State Capital Markets Corporation (formerly known as State Street Capital Markets Corp.) ("State Street"). Douglas is not currently associated with any NASD member firm.

Factual and Procedural History

The Department of Enforcement ("Enforcement") filed the complaint in this matter on March 2, 2000, alleging that Douglas executed 10 unauthorized transactions while employed at State Street in the accounts of customers GB, TC, JL, RN and the joint account of JS and SS. The complaint also alleged that Douglas provided false, misleading or inaccurate information to customer TC. Douglas defaulted below, and the Hearing Officer entered a default decision. The following facts are based on the entire record in this matter.

A. Unauthorized Transactions

The complaint alleged that Douglas engaged in 10 unauthorized transactions as follows: On August 16, 1996, Douglas executed or caused to be executed the purchase of 1,000 U.S. Bridge of NY, Inc. ("U.S. Bridge") warrants at \$5.75 per warrant in the account of GB. GB did not authorize the transaction and, upon learning of the transaction, telephoned Douglas to complain. Douglas stated that the transaction was a computer error and would be corrected. A corrected confirmation was issued adjusting the number of warrants purchased from 1,000 to 850. Douglas, however, never fully corrected the transaction.

On August 21, 1996, Douglas executed or caused to be executed the purchase of 1,000 Fun Tyme Concepts, Inc. ("Fun Tyme") units at \$10.50 per unit in the account of customer TC. TC did not authorize this transaction. In addition, on August 23, 1996, Douglas executed or caused to be executed the purchase of 1,375 Cable & Co. Worldwide, Inc. ("Cable") warrants at \$4.25 per warrant in the account of TC. TC also did not authorize this transaction. On August 30, 1996, TC called Douglas to complain about the purchase of Cable warrants. Douglas' assistant stated that Douglas was unavailable, but the transaction was the result of a computer error. Twelve days later, TC spoke with Douglas, who stated that the Fun Tyme and Cable warrants transactions would be reversed. In fact, Douglas corrected neither transaction.

On August 16, 1996, Douglas executed or caused to be executed the purchase of 2,700 U.S. Bridge warrants at \$5.75 per warrant in the account of customer JL. JL did not authorize this transaction. The purchase was revised to 1,300 warrants without the knowledge or authorization of JL. On August 20, 1996, JL telephoned Douglas to question the purchase of U.S. Bridge warrants. Douglas informed JL that the transaction was a mistake and would be corrected. In addition, on August 23, 1996, Douglas executed or caused to be executed the sale of 200 shares of Integrated Devices Technology, Inc. at \$8.50 per share. JL did not authorize this transaction. On August 30, 1996, Douglas informed JL that he would fix the transaction. Douglas never corrected the two transactions.

On August 6, 1996, Douglas executed or caused to be executed the purchase of 2,000 U.S. Bridge warrants at \$5.625 per warrant and 1,000 Cable common shares at \$10.50 per share for the account of RN. RN did not authorize either of these transactions. On August 12, 1996, RN complained to Douglas about the transactions.

Douglas claimed that the transactions were erroneous and that he had many customers with RN's last name. Douglas never corrected the two transactions.

On August 2, 1996, JS and SS authorized Douglas to purchase 600 Fun Tyme units. On August 16, 1996, Douglas executed or caused to be executed the sale of 600 Fun Tyme units at \$10 per unit and purchased 1,100 U.S. Bridge warrants at \$5.75 per warrant. Neither customer JS nor SS authorized the sale of Fun Tyme units nor the purchase of U.S. Bridge warrants. In addition, on August 21, 1996, Douglas executed or caused to be executed the purchase of an additional 500 Fun Tyme units at \$9.75 per unit without the authorization of JS or SS. On September 3, 1996 and September 4, 1996, JS spoke with Douglas about the transactions. Douglas informed JS that he would "straighten out" the account and claimed that the purchase of the additional 500 Fun Tyme units was a mistake. Douglas never corrected the transactions.

B. Providing False, Misleading or Inaccurate Information

The complaint also alleged that Douglas provided false, misleading or inaccurate information to customer TC as follows: on August 2, 1996, customer TC agreed to purchase 1,000 Fun Tyme initial public offering units at \$6.25 per unit and 1,000 Fun Tyme after-market units at \$10.50 per unit. Customer TC received confirmations for these purchases. On August 12, 1996, however, TC's purchases were canceled without his authorization. Thereafter, Douglas provided false, misleading or inaccurate information to TC concerning the purchases by not informing him of the cancellations. On August 12, 1996, TC instructed Douglas to sell his position in Fun Tyme. Douglas agreed and stated that he would send the check from the sale via regular mail. On August 28, 1996, TC telephoned Douglas because he had not received the check. Douglas informed him that he would stop payment on the check and would send another check via overnight mail. At no time did Douglas inform TC that the initial Fun Tyme purchase had been canceled and that the Firm did not execute the sale transaction.

C. Douglas' Failure to Participate in the Proceedings Below

The complaint and notice of complaint were served on Douglas on March 1, 2000, via certified mail, return receipt requested, first class mail and Airborne Express to Douglas' most current residential address on record in the Central Registration Depository ("CRD Address").¹ On March 30, 2000, John F. Olsen ("Olsen"), counsel for Douglas, served an answer, notice of appearance, demand for a hearing, and a motion for a more definite statement on Enforcement. In the answer, Douglas denied the allegations in the complaint and asserted eight affirmative defenses. On April 5, 2000, Enforcement responded to Douglas' motion for a more definite statement by supplying the requested names of customers, rather than only their initials. Subsequently, the Hearing Officer denied Douglas' motion for a more definite statement as moot since Enforcement supplied Douglas with the customers' names. Olsen filed a notice of substitution of counsel on May 10, 2001 reflecting his employment with a new firm.

¹ The CRD address is Queens, NY.

On June 5, 2000, the Hearing Officer issued an order scheduling a pre-hearing conference for August 4, 2000. On June 13, 2000, Olsen requested that the Hearing Officer reschedule the pre-hearing conference. The Hearing Officer granted the motion and rescheduled the pre-hearing conference for August 14, 2000. At the pre-hearing conference, Olsen appeared on behalf of Douglas. On November 21, 2000, Enforcement made a motion to stay the proceedings based on settlements with three of the other respondents that had been named in the complaint.² The Hearing Officer granted the motion.

Enforcement received a letter, dated December 13, 2000, from Denis Kelleher, Esq. ("Kelleher") notifying NASD Regulation that Douglas had retained Kelleher to represent him in this action brought by Enforcement. The Hearing Officer issued a notice of pre-hearing conference that set a conference for January 4, 2001. The notice was sent via facsimile to Olsen and Kelleher. On January 8, 2001, Enforcement received a letter from Olsen notifying NASD Regulation that he no longer represented Douglas.

Kelleher sent a letter dated January 24, 2001 to the Hearing Officer stating that he was representing Douglas in an additional criminal matter. He stated that he was "relieved by . . . [the judge] as retained counsel and appointed pursuant to the Criminal Justice Act to represent Mr. Douglas in the criminal indictment." Kelleher stated "my ability to represent Mr. Douglas in the NASD disciplinary proceeding is somewhat limited." In the letter, Kelleher moved for a stay of the disciplinary proceeding. The Hearing Officer denied the motion on January 31, 2001.

The Hearing Officer issued a notice of pre-hearing conference on February 1, 2001, scheduling the conference for February 8, 2001. The Hearing Officer served the notice by facsimile to Kelleher. Neither Douglas nor Kelleher attended the conference. As a result, on February 8, 2001, the Hearing Officer issued an order to show cause why Douglas should not be found in default. On February 15, 2001, Kelleher submitted an "Affirmation in Opposition to Order to Show Cause." In the affirmation, he stated that "I am the attorney assigned to represent Damien Douglas in the matter of U.S. v. Dacunto." He further stated that "[t]he only reason for not participating in the February 8th conference call was due to . . . [a] trial conflict."

On March 13, 2001, the Hearing Officer issued a scheduling order, notice of status conference and notice of hearing for the proceeding. The status conference was set for March 22, 2001. The Hearing Officer served a copy of this order via first class mail and facsimile on Kelleher. Kelleher and Douglas failed to participate in the status conference. The Hearing Officer issued an order holding Douglas in default pursuant to Procedural Rules 9241(f) and 9269 for failing to attend the February 8, 2001 pre-hearing conference and the March 22, 2001 status conference. On April 25, 2001, Enforcement filed a motion for entry of a default decision. On May 14, 2001, Kelleher filed a "Declaration in Opposition of Motion For Entry of Default Decision." In this declaration, Kelleher argued that Douglas should have been personally notified of the status

² The complaint included allegations against 13 respondents.

conference and that Douglas was representing himself. The Hearing Officer granted the motion for entry of default decision and deemed the allegations in the complaint admitted.

D. Default Decision and Appeal

Based upon the allegations contained in the complaint, the Hearing Officer found that Douglas executed 10 unauthorized transactions in five customers' accounts in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rule 2110. The Hearing Officer found that Douglas' conduct was "egregious" because of aggravating misconduct. Specifically, the Hearing Officer noted that Douglas misrepresented that many of the questioned transactions were the result of computer mistakes or confusion. The Hearing Officer ordered sanctions of a bar, a \$50,000 fine, and restitution of \$29,886 because customers suffered quantifiable losses as a result of Douglas' misconduct.³ In addition, the Hearing Officer found that Douglas provided false, misleading or inaccurate information to customer TC in violation of NASD Conduct Rule 2110 and fined Douglas an additional \$10,000.

Douglas has appealed the issuance of the default decision and the sanctions imposed by the Hearing Officer.

Discussion

Douglas has appealed on the grounds that the default decision violated his right to due process, his right to present a defense, and his right to self-representation. Each of Douglas' arguments hinges on the same issue: whether the Hearing Officer should have served the notices of the pre-hearing conference and status conference on Douglas personally.

A. Notices Served on Douglas' Attorney

In NASD proceedings, service on counsel is proper service. "Whenever service is required to be made upon a person represented by counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative." Procedural Rule 9133(d). The exception to this rule applies only to the complaint or other document initiating the proceedings, not to the notices of the pre-hearing conference and status conference. See Procedural Rule 9134(b)(1) ("[I]f a natural person is represented by counsel or a representative, papers served on the natural person, excluding a complaint or a document initiating a proceeding, shall be served on the counsel or representative.").

The record shows that Kelleher was representing Douglas. On December 13, 2000, Kelleher filed a notice of appearance with Enforcement stating that he was

³ The individual customer losses were: (1) GB lost \$544; (2) TC lost \$11,088; (3) JL lost \$7,082; (4) RN lost \$2,243; and (5) JS and SS lost \$8,929.

representing Douglas in the NASD disciplinary hearing. Accordingly, the notices setting the February 8, 2001 and March 22, 2001 conferences were sent to Kelleher and not to Douglas.

Douglas argues that at the time the notices of pre-hearing conference and status conference were sent, Kelleher had withdrawn as his counsel. We disagree with this argument. For Kelleher to withdraw, he had to do so in writing and establish good cause. Procedural Rule 9142 states that an attorney's notice of withdrawal "shall be in writing, set forth the good cause for withdrawal, and, unless circumstances do not permit, be given at least 30 days prior to withdrawal." Kelleher never submitted such a withdrawal. Douglas contends that Kelleher's January 24, 2001 letter, in which Kelleher informed the Hearing Officer that he was limited in his ability to represent Douglas, was a notice of withdrawal. Douglas points out that Kelleher moved at the same time to stay the proceeding until the criminal case had been resolved.

Our reading of Kelleher's January 24th letter does not support Douglas' interpretation. First, Kelleher does not state that he is withdrawing from the disciplinary proceeding. His statement that "my ability to represent Mr. Douglas in the NASD disciplinary proceeding is somewhat limited" is neither explicitly, nor by reasonable inference, a withdrawal. Second, the portion of the January 24th letter that moves to stay the proceedings is not consistent with Kelleher withdrawing. The end of the letter states "[a]ccordingly, until the criminal matter is concluded, I move that this disciplinary proceeding be stayed," a motion that could only be made by Kelleher acting as Douglas' attorney.

Further, Kelleher's actions following his purported withdrawal on January 24th are inconsistent with his having withdrawn. On February 8, 2001, the Hearing Officer issued an order to show cause regarding Kelleher's failure to attend a pre-hearing conference on that date. On February 15, 2001, Kelleher filed an "Affirmation in Opposition to the Order to Show Cause." In this document, Kelleher stated that the "only reason for not participating in the February 8th conference call was due to my trial conflict." Kelleher did not state that he did not attend the conference because he was no longer representing Douglas. Only in counsel's May 14, 2001 "Motion in Opposition of Entry of a Default Decision" does he state that Douglas should have been personally notified and that Douglas was representing himself. Accordingly, we find that Kelleher did not withdraw from representing Douglas. As a result, the Hearing Officer's service of notice on Kelleher was proper.

B. Douglas Defaulted

We find that the Hearing Officer's entry of default against Douglas was otherwise proper. Under Procedural Rule 9269(a), a Hearing Officer may issue a default decision against a respondent that fails to appear at a pre-hearing conference pursuant to Procedural Rule 9241. It is undisputed that neither Douglas nor his counsel appeared for the pre-hearing conference on February 8, 2001 or the status conference on March 22, 2001. In addition, Douglas has not established good cause for his failure to appear at the

conferences. In determining whether a respondent has shown good cause, we will take into account such factors as: whether the respondent notified CRD of any address changes; the length of time that has passed between the issuance of the default decision and the respondent's appeal; and the reasons for the respondent's failure to participate in the proceeding before the Hearing Officer. See NASD Notice to Members 99-77 (Sept. 1999). The only reason Douglas has given for his failure to appear is that he did not receive proper notice. As discussed above, Douglas, through his attorney, received proper notice. Consequently, he has not shown good cause for his failure to participate in the proceedings below.

Even though the Hearing Officer properly entered the default decision against Douglas, we have conducted an independent review of the record. We find that there is sufficient evidence in the record to support the default decision. The record establishes that Douglas executed or caused to be executed 10 transactions in the accounts of customers GB, TC, JL, RN and the joint account of JS and SS. None of these transactions were authorized. In addition, when asked about the transactions by the customers, Douglas informed them that the transactions were mistakes and would be corrected. Contrary to his statements, however, Douglas corrected none of the transactions. Further, the record establishes that Douglas provided false, misleading or inaccurate information to customer TC. Douglas canceled two purchases without TC's authorization. Thereafter, Douglas provided false, misleading or inaccurate information to TC concerning the purchases. In addition, TC ordered Douglas to execute a sale transaction, which Douglas failed to do. Douglas did not inform TC that the purchases had been canceled and that the Firm did not execute the sale transaction.

Accordingly, we affirm the findings of the Hearing Officer. We find that Douglas effected 10 unauthorized transactions in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and Conduct Rule 2110. We also find that Douglas provided false misleading, or inaccurate information in violation of Conduct Rule 2110.

Sanctions

The Hearing Officer ordered sanctions of a \$50,000 fine, a bar, and restitution of \$29,886 for executing 10 unauthorized transactions. In addition, the Hearing Officer fined Douglas \$10,000 for providing false, misleading, or inaccurate information. Except for the \$50,000 and \$10,000 fines, we affirm the sanctions. In light of our policy determination that, in certain cases involving the imposition of a bar, no further remedial purpose is served by the additional imposition of a monetary sanction, we do not impose the \$50,000 and \$10,000 fines. See NASD Notice to Members 99-86 (Oct. 1999). In addition, we order Douglas to pay \$1,000 in appeal costs.

A. Unauthorized Transactions

The NASD Sanction Guidelines ("Guidelines") for unauthorized transactions suggest a fine of \$5,000 to \$75,000.⁴ The Guidelines state that for cases involving

⁴ See NASD Sanction Guidelines (2001 ed.) at 102.

customer losses, the NAC should consider suspending the individual for 10 to 30 business days. In egregious cases, the Guidelines suggest a longer suspension (of up to two years) or a bar. The Guidelines identify the following three categories of egregious unauthorized trading: 1) quantitatively egregious trading, i.e., unauthorized trading that is egregious because of the sheer number of unauthorized trades executed; 2) unauthorized trading accompanied by aggravating factors; and 3) qualitatively egregious unauthorized trading. See Daniel S. Helen, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999).

The Hearing Officer found that Douglas' conduct was accompanied by an aggravating factor, namely attempting to conceal his misconduct by claiming many of the transactions were mistakes or computer errors. The Guidelines provide an illustrative, but not exhaustive, list of aggravating factors including: 1) efforts to conceal the unauthorized trading; 2) attempts to evade regulatory investigative efforts; 3) customer loss; or 4) a history of similar misconduct. Two of these examples are present in this case. First, Douglas attempted to conceal the unauthorized trading by misrepresenting to customers that the transactions were mistakes and computer errors. Second, Douglas' unauthorized transactions resulted in customer loss. We find that these two facts are aggravating factors. Therefore, we affirm the Hearing Officer's imposition of a bar. Because the customers' losses are quantified, we affirm the order of restitution. We order Douglas to pay the following amounts in restitution to the following customers: (1) \$544 to GB; (2) \$11,088 to TC; (3) \$7,082 to JL; (4) \$2,243 to RN; and (5) \$8,929 to JS and SS. Because we are barring Douglas, however, we eliminate the Hearing Officer's \$50,000 fine for this violation.

B. Providing False Account Information to a Customer

The Guidelines for misrepresentations or material omissions of fact suggest a fine of \$2,500 to \$50,000 and a suspension for up to 30 business days for negligent misconduct.⁵ The Guidelines state that for intentional or reckless misconduct, there should be a monetary sanction of \$10,000 to \$100,000 and a suspension of 10 business days to two years. In egregious cases, the NAC should consider a bar. The Hearing Officer imposed a \$10,000 fine because Douglas intentionally misled customer TC by providing false account information. We agree with the Hearing Officer's finding that Douglas intentionally misled his customer. Douglas had control over these transactions and failed to notify TC that the trade was canceled. Douglas stated to TC that Douglas would issue TC a check for the sale of Fun Tyme, even though Douglas knew that the sale had never taken place. Douglas even told TC that he would put a stop payment on the first check and issue a second check. This statement was patently untrue. We therefore find that Douglas' intentional misconduct substantially supports the sanction imposed. Because we are barring Douglas, however, we eliminate the Hearing Officer's \$10,000 fine for this violation.

⁵ See NASD Sanction Guidelines (2001 ed.) at 96.

Accordingly, we order that Douglas be barred from associating with any member firm in any capacity. The bar will be effective as of the date of this decision.⁶ In addition we order Douglas to pay restitution totaling \$29,886 to the customers in the amounts specified above. Finally, we order Douglas to pay \$1,000 in appeal costs.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

⁶ We have also considered and rejected without discussion all other arguments advanced by the respondent.