BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 10, Complainant, vs. John M. Columbia Staten Island, NY, Respondent.	DECISION Complaint No. C10970029 District No. 10 Dated: September 11, 1998

Pursuant to Procedural Rule 9310, John M. Columbia ("Columbia") has appealed a January 6, 1998 decision issued by the District Business Conduct Committee for District No. 10 ("DBCC"). After a review of the entire record in this matter, we find that Columbia executed an unauthorized transaction as alleged in the complaint. We hereby impose a censure, $5,000 fine, and a 10-business- day suspension in all capacities. We also order Columbia to requalify by examination in any capacity in which he seeks to participate in the securities industry.

Background. Columbia has been registered with the NASD as a general securities representative since August 1992. During the relevant time, Columbia was employed by First Hanover Securities, Inc. ("Hanover"). Columbia is presently employed by member firm J.P. Turner & Company.

Facts. Customer KF opened a joint securities account with his wife ("the Account") at Hanover through a "cold call" initiated by Columbia in February 1995. It is undisputed that Columbia solicited, and KF authorized, the following purchases in the Account:

- 500 shares of Western Micro Technology Inc. ("Western") at $5 3/8 per share on February 17, 1995;
- 5,000 shares of Global Market Information, Inc. ("Global") common stock at $5 per share on March 9, 1995;

- 5,000 shares of Allied Devices Corporation ("Allied") common stock at $4 9/16 per share on May 9, 1995; and

- 1,000 shares of Triarc Incorporated Companies ("Triarc") common stock at $16 3/8 on June 21, 1995 (with stop/loss order at $15 3/8).

KF paid for each of these purchases by check. KF placed the stop/loss order on the Triarc stock on his own initiative, and against Columbia's advice, because he did not want to risk losing more than $1 per share.

On June 27, 1995, Columbia executed the Triarc stop/loss order. The sale generated proceeds of $15,064.48, giving the KF account a $1,420 loss. Hanover charged a $300 commission on the sale, $150 of which was credited to Columbia.

It is undisputed that Columbia called KF on June 27 to advise him that the Triarc stock had been sold and that during that conversation, KF asked Columbia to send him a check for the Triarc proceeds. KF testified that Columbia did not mention investing the proceeds in any other stock, but did suggest that KF place the Triarc proceeds in a money market account at Hanover. KF testified that he had already decided to close his account at Hanover and, therefore, asked Columbia to send him a check for the Triarc proceeds. He testified that he also wanted Hanover to send him the stock certificates for the other stock in the Account. It is not clear whether he asked Columbia for the stock certificates in the June 27 conversation. Columbia recalled that it was not until their July 3 conversation that KF told him that he wanted to close the Account and asked for the stock certificates. Columbia did not recall making any recommendation during the June 27 conversation.

Columbia called KF again on June 29, 1995, one day before the Triarc sale settled. The contents of this call are also disputed. Columbia testified that he was hesitant to talk to KF because he had lost money on Triarc and the Account was not doing well. Columbia testified that he was concerned that KF would close the Account, and that he thought it would be difficult to sell KF another stock. The price of Allied had dropped since May 9, and the market price was $3 1/2 - $4 on June 29. Columbia testified that he persuaded KF to "cost average down" his holdings in Allied by investing the Triarc proceeds in additional shares of Allied. Columbia testified that KF authorized him to use the Triarc proceeds to purchase additional shares of Allied, provided that Columbia could purchase Allied at $4 or better and not charge KF a mark-up.

KF, on the other hand, testified that on June 29 he did not authorize Columbia to invest the Triarc proceeds in additional shares of Allied, and that Columbia never even discussed Allied during that call. KF testified that Columbia urged him to keep his certificates and not sell the stock that had been in the Account. He testified that he rejected Columbia's suggestion that he put the Triarc proceeds in a money market account at Hanover. KF testified that he again asked for his stock certificates and a check for the Triarc proceeds. KF testified that he did not intend on June 29 to buy additional shares of Allied because he "was sitting on several losses and [he] didn't want to incur any more."

Columbia testified that he wrote the ticket for 3,750 shares of Allied after the call, but did not submit it immediately. He testified instead that he waited a couple of hours to see whether the price moved down and then submitted the ticket for 3,750 shares of Allied common stock at $4 per share when the price did not move. Although Hanover's trader purchased the stock for approximately $3 5/8, KF did not receive the benefit of that price. KF was charged $4 per share, the Firm took the full spread of $1,290, and Columbia earned a $645 commission. Columbia did not disclose his commission to KF.

On Monday, July 3, 1995, upon receipt of a confirmation for the Allied purchase, KF called Columbia in an admittedly angry mood to complain about the purchase and to demand that Columbia cancel the trade. Columbia refused to cancel the sale, and he and KF argued. KF testified that he "used some very sharp terms to describe [Columbia] and his actions." KF stated that Columbia told him that the trade was good and that he would not cancel the trade just because KF had changed his mind. Columbia stated that he gave KF two alternatives: to hold the stock or to sell the stock at a loss. He recalled that KF was rude and shouted obscenities over the phone when Columbia refused to cancel the sale.

On the morning of July 5, 1995, KF called the NASD to complain about the trade. On Thursday, July 6, KF sent the NASD a written letter of complaint in which he represented that he had not authorized the Allied purchase. He asked the NASD: to take action to rescind the June 29 purchase of Allied common stock; to see to it that he received a check for $15,064.48 comprising the proceeds of the sale of Triarc stock; and to police the closing of his account with Hanover and the mailing of stock certificates representing his holdings in the account.

On July 11, 1995, Columbia submitted a request to Hanover to close out KF's account and to send him his stock certificates and a check for the balance of his account. KF received his stock certificates on July 18 and 19, including a certificate for 8,750 shares of Allied, and the Firm sent him $64.84 on July 24.

In a letter dated July 29, 1995, KF complained to Hanover's clearing firm, Societe Generale, that he should have received a stock certificate for only 5,000 shares of Allied, not 8,750 shares. He explained that the additional 3,750 shares resulted from a "completely unauthorized" purchase. He asked Societe Generale to send him a certificate for 5,000 shares of Allied and a check for $15,064.48. Societe Generale referred KF's complaint to Hanover in August 1995.

In early September 1995, Richard M. Engelhardt ("Engelhardt"), Hanover's Manager, contacted KF and offered to resolve the issue by selling the disputed 3,750 shares of Allied at $4 5/32. KF agreed, and the stock was sold on September 5.

KF reiterated his version of the facts in a letter to NASD Regulation, Inc. Examiner Ellen Korner, which was received on May 6, 1996, and in an affidavit dated May 29, 1996.

Discussion

The sole issue before us is whether KF authorized the purchase of 3,750 shares of Allied common stock during his telephone conversation with Columbia on June 29, 1995. We affirm the DBCC's finding that he did not.

We, like the DBCC, have reached this determination on the basis that KF was more credible than Columbia. In accordance with the views of the Securities and Exchange Commission ("SEC"), we have given the DBCC's credibility determinations considerable weight and deference, since the DBCC hearing panel actually heard all of the testimony and observed Columbia and KF. The SEC has stated repeatedly that "credibility determinations by an initial fact finder can be rejected only where the record contains 'substantial evidence' for doing so." In re Joseph H. O'Brien II, Exchange Act Rel. No. 34105 at 4 n.7 (May 25, 1994). See also, In re Helene R. Schwartz, 51 S.E.C. 1207, 1208 n.5 (1994).

After a thorough review of the record, we have not found substantial evidence that warrants rejecting the DBCC's findings of credibility. KF has adamantly maintained that he did not authorize Columbia to invest the Triarc proceeds in additional shares of Allied. Columbia has been equally adamant that KF did authorize the purchase. Thus, we have examined their positions in light of the evidence in the record.

We have considered KF's conduct in light of the facts that we know to be true. Immediately upon receipt of his confirmation on July 3, 1995, KF called Columbia in a very angry mood to complain about the transaction. When Columbia refused to cancel the trade, KF immediately called the NASD to complain. On July 6, 1995, KF submitted a written complaint to the NASD, and on July 29, 1995, KF complained to Hanover's clearing firm that it had incorrectly sent him a stock certificate for 8,750 shares of Allied. In both of these letters, KF maintained that Columbia did not mention purchasing additional shares of Allied on June 29, and that he (KF) did not authorize the June 29 purchase of Allied. KF's testimony before the DBCC was consistent with his previous conversations and letters. When Hanover offered to settle the matter by selling the 3,750 shares of Allied at $5/32 over the $4 per share purchase price, KF accepted the offer.

On appeal, Columbia has attacked KF's credibility. We are not persuaded by his arguments. Columbia accuses KF of manipulating the NASD to his benefit. He implies that KF, as a former Internal Revenue Service agent, refuses ever to be wrong and also knew how to manipulate a bureaucracy -- NASD Regulation -- to his advantage. We find no basis in fact for this contention.

Columbia also contends that KF lied at the DBCC hearing because he knew that his testimony was not under oath. Columbia is estopped from raising this issue since, at the DBCC hearing, his counsel successfully objected to the regional attorney's request that KF testify under oath. In re Brooklyn Capital & Securities Trading, Inc., Exchange Act Rel. No. 38454 at 12 n.34 (March 31, 1997). Moreover,

KF's testimony at the DBCC hearing was entirely consistent with his previous letters and affidavit.[1]

Columbia accuses KF of trying to prejudice the DBCC against him by inserting "inflammatory and prejudicial" testimony, i.e., by testifying that Columbia used the term "control the float" in a sales presentation. We do not find this language to be either inflammatory or prejudicial, and find no merit in this contention.

We likewise do not find any inconsistency in KF's conduct by virtue of the fact that he did not complain to Columbia's supervisor after Columbia refused to cancel the trade on June 29. We find credible KF's contention that he believed that it would be futile to complain about a person whose title was Vice President and who he believed had a "fairly high position in the firm." We further do not find that KF ratified the June 29 purchase of Allied by permitting Hanover to sell the disputed 3,750 shares in August 1995. By that time, KF had demanded rescission from Columbia and had asked the NASD and Societe Generale to help him get the purchase rescinded. The record is undisputed that it was Hanover's decision to sell the stock as a way of resolving the problem without breaking the sale.

Columbia attempts to cast aspersions on KF by characterizing as "bizarre" KF's testimony regarding his philosophy of maintaining short-term relationships with various brokers. Columbia asserts that this testimony was meant to bolster KF's version of the events by demonstrating that he would close an account to preserve his independence. We, however, find credible KF's assertion that he had decided to close his account when the Triarc stop/loss order was executed because he had lost confidence in Columbia. Finally, we do not find KF less credible because he did not remember the exact words that he used to start the July 3 conversation with Columbia.

Columbia further contends that his version of the June 29 call is more credible because it is corroborated by two witnesses. The two witnesses were Frank Quartiero ("Quartiero"), a personal friend of Columbia who was Columbia's trainee, and Gregory Ricca ("Ricca"), another broker in Columbia's office. Both testified that they sat in the same office as Columbia during the relevant time, Quartiero at the corner of Columbia's desk and Ricca at a desk that abutted Columbia's. Each testified that they could hear Columbia speaking on the telephone. We do not, however, find that their

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[1] Prior to the amendment of the NASD Code of Procedure in August 1997, neither the NASD nor the SEC required that witnesses in NASD proceedings be sworn, and witnesses were not sworn as a matter of course. See In re Ronald W. Gibbs, Exchange Act Rel. No. 35998 at 10 (July 20, 1995) (citing In re Richard W. Perkins, 47 S.E.C. 847, 849, n.9 (1982), for the proposition that the absence of sworn testimony does not deprive respondent of due process since respondent has the opportunity to confront and cross-examine witnesses). The fact that the amended Code of Procedure now requires testimony to be taken under oath does not render any less reliable the unsworn testimony given in years of disciplinary proceedings before DBCCs and the National Business Conduct Committee or National Adjudicatory Council.

testimony corroborates Columbia's version of the June 29 telephone call sufficiently to overcome the DBCC's finding that KF's version was more credible.

Quartiero and Ricca both testified that they overheard Columbia arguing in a telephone conversation on July 3. The contents of this conversation are, however, not at issue. Quartiero and Ricca both testified that they also overheard the June 29 conversation. Both admit, however, that they did not participate in the June 29 conversation and did not hear what KF said. Thus, neither has first-hand knowledge that Columbia was talking to KF, and neither actually heard KF place the disputed order. Both testified that their knowledge of the order came from Columbia.

We find it difficult to believe that, out of the many conversations Quartiero and Ricca must have overheard in which Columbia spoke to customers about Allied, they specifically remembered the one brief conversation Columbia had with KF on June 29. Hanover was making a market in Allied during the relevant time. Both witnesses must have overheard many conversations in which Columbia advised his clients to purchase Allied stock. Quartiero estimated that Columbia spoke to between 10 and "more than 20" customers during the course of a day. Neither witness presented any evidence to show how they were able to distinguish one conversation from the other. When asked whether he could recall any other conversations involving Allied, Quartiero responded, "I don't recall conversations." Quartiero testifed that he only recalled the June 29 conversation because he remembered that Columbia wrote a ticket for 3,750 shares and he asked him about it. Ricca testified that he could not pinpoint the date of Columbia's purported conversation with KF. He testified that he was at his desk the day that KF placed the Allied order, but he did not recall on what date that occurred.

Further, the witnesses' recollections of what Columbia said in the June 29 conversation differ. Quartiero testified that he remembered Columbia's calling KF on June 29 and telling him to cost- average down his position in Allied by purchasing additional shares, and that KF purchased 3,750 shares of Allied after the call. Quartiero could not remember whether Columbia made a "presentation" during that conversation, only that he "mentioned [Allied] a few times." Quartiero testified that he remembered Columbia's writing the ticket because it was for an "odd" amount. Ricca, on the other hand, recalled that Columbia "presented" Allied during this conversation, and that he helped Columbia with the presentation by reminding him of recent Dow Jones news releases that indicated that Allied was looking for an acquisition partner. Ricca did not remember any particulars about the order.

We further find that the record substantiates KF's version of the June 29 telephone conversation. We find it highly unlikely that KF would have agreed to invest the Triarc proceeds in additional shares of Allied. KF showed that he was risk-averse when he put a one-point stop/loss order on Triarc on June 21 in the face of losing money on the other stocks that he had bought from Columbia. He demonstrated a lack of confidence in Columbia when he insisted on receiving a check for the Triarc proceeds rather than keeping the money in a money market account at Hanover. KF had also, by June 29, decided to close his account at Hanover because he had lost confidence in Columbia and did not want to work with him anymore.

Even if KF did not advise Columbia of his intention to close the account by June 29, as Columbia asserted to the DBCC, Columbia knew that KF was unhappy about losing money in Triarc, and Columbia was worried that KF had lost confidence in his advice and would not buy another stock from him. Given that KF had been unwilling to lose more than one point in Triarc and had lost almost one-half point in Allied in the month since he purchased 5,000 shares, we do not believe that KF would have purchased $15,000 more of Allied for the purchase of cost averaging down his holdings.[2] Nothing that we have considered on appeal causes us to disturb the DBCC's findings of credibility.[3]

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[2] We also do not find credible Columbia's assertion that he was working with KF to "cost-average down" his position in Allied. By selling KF Allied shares at $4, Hanover charged KF an eight percent mark-up, thereby denying KF the benefit of the price at which the Firm was able to purchase the stock -- $3 5/8. Columbia split the $1,290 mark-up with the Firm.

[3] We have also considered Columbia's contention that one of the DBCC hearing panelists was biased against him. We have carefully reviewed the record for such bias, and we have found no unfairness or bias in the panelist's treatment of Columbia and his witnesses. We find that the panelist was attempting to clarify responses and to obtain additional information regarding the events at issue. We have concluded that the panelist was merely attempting to ascertain the facts surrounding the transaction at issue. In re Ko Securities, Inc., Exchange Act Rel. No. 39443 (Dec. 11, 1997) (claim that hearing panelist questioned one of respondent's witnesses about matters not pertinent to the hearing not supported by record); In re U.S. Securities Clearing Corporation, Exchange Act Rel. No. 35066 (Dec. 8, 1994) (no bias where panel members' questions were directed at clarifying respondent's and other witnesses' answers).

We also affirm the decision of the NAC subcommittee that considered this matter to deny Columbia's request to adduce into the record evidence of NASD Regulation's payment of KF's travel expenses. We find that this proffer was not timely made and that the evidence is neither material nor exculpatory. Credibility was not first mentioned as an issue in the complainant's appellate brief, as Columbia contends. It was at issue at the DBCC hearing, and was noted in the DBCC's decision as the basis for its findings. Further, we find no evidence in the record that any payment to KF for transportation to the hearing influenced his testimony in any way. KF, who was not subject to compulsory process, had repeatedly made it clear to NASD Regulation and to Societe Generale that he was willing to travel from Chicago to New York to testify against Columbia notwithstanding that he was 81 years old. Further, KF's testimony remained consistent with his prior written and verbal complaints notwithstanding that NASD Regulation paid for some or all of his travel expenses.

Sanctions

We affirm the censure, $5,000 fine, 10-business day suspension in all capacities, and the requirement that Columbia requalify by examination in any capacity in which he seeks to participate in the securities industry (the sanctions imposed by the DBCC). In arriving at appropriate sanctions, we have considered each of the principal considerations in determining sanctions for unauthorized transactions in the 1996 edition of the NASD Sanction Guidelines ("Guidelines").[4]

In determining to affirm the sanctions imposed by the DBCC, we have considered that this violative conduct involved one transaction and that Columbia has no previous disciplinary history. Nonetheless, we consider this violation to be very serious, warranting serious sanctions. Ultimately, KF was not injured by the transaction, but only because the price of Allied stock rose, and he agreed to allow Hanover to sell the disputed stock at a slight profit. Neither Columbia nor Hanover ever agreed to break the trade. We understand that Columbia's refusal to rescind the purchase on July 3 is consistent with his contention that KF ordered the stock. We also have considered, however, his argument on appeal that we should consider that there may have been a misunderstanding between the parties on June 29, and that we should view the disputed conversation as two honest people seeing events differently. If that is what Columbia believed, we question why he did not give the customer the benefit of the doubt and cancel the trade. Only after KF complained to Societe Generale about his stock certificate did Hanover respond with an offer to sell the stock.

We have also considered that Columbia made a sizeable commission on the transaction. Not only did he not give KF the benefit of the price at which Hanover was able to purchase the Allied stock, Hanover charged KF the full spread, amounting to a mark-up of approximately eight percent, of which Columbia received half. We cannot help but think that retention of that commission may have been an incentive to Columbia not to break that trade. Because we believe that Columbia was motivated by what we believe was a sizeable commission on the transaction, we consider the 10-day suspension to be appropriately remedial. We have further determined that

[4] The recommended sanctions are within the NASD Sanction Guideline (1996 ed.) for unauthorized transactions.

We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

requalifying by examination will further impress Columbia with the seriousness of his actions and remind him of his responsibilities as a member of the securities industry.

Accordingly, Columbia is censured, fined $5,000, suspended from association with any member firm in any capacity for 10 business days, and required to requalify by examination in any capacity in which he seeks to do business. We order such requalification(s) to take place within 90 days. Columbia may continue in the securities business until that time, but shall thereafter be suspended if he fails to take and pass any such examinations. We also impose NAC hearing costs of $750. Pursuant to Rule 9360, the Chief Hearing Officer shall set the date on which the 10-business-day suspension shall begin.

On Behalf of the National Adjudicatory Council,

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Alden S. Adkins, Senior Vice President and General Counsel

Alden S. Adkins
Senior Vice President and General Counsel

September 11, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

John M. Columbia
Staten Island, NY

Re: Complaint No. C10970029: John M. Columbia

Dear Mr. Columbia:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange
Commission
450 Fifth Street, N.W., Stop 6-9
Washington, D.C. 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Alden S. Adkins
Senior Vice President and General Counsel

Enclosure

cc: Jay M. Lippman, Esq.
NASD Regulation, Inc. - District 10
NASD Financial Center
33 Whitehall Street
New York, New York 10004