

**NASD OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	Disciplinary Proceeding
	:	No. C01020014
Complainant,	:	
	:	
v.	:	Hearing Officer – DMF
	:	
PAUL JOSEPH BENZ	:	
(CRD #1548330)	:	<b>HEARING PANEL DECISION</b>
	:	
Chester, NJ	:	
	:	March 4, 2003
Respondent.	:	

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**Respondent violated NASD Rule 2110 by allowing the NASD member firm of which he was president to conduct a securities business when it did not meet its net capital requirement under SEC Rule 15c3-1. For that violation he is suspended from associating with any member firm in any principal capacity for 30 days, fined \$5,000 and required to re-qualify as a principal. In addition, respondent violated NASD Rules 8210 and 2110 by failing to respond to NASD staff requests for information in a timely manner. For that violation, he is suspended in all principal capacities for 30 days (to be served concurrently with his suspension for the net capital violation), fined \$2,500 and ordered to re-qualify as a principal.**

Appearances

David A. Watson, Esq., Regional Counsel, San Francisco, CA, and Jonathan Prytherch, Regional Counsel, New York, NY (Rory C. Flynn, Washington, DC, Of Counsel) for Department of Enforcement.

Peter A. Benz, Esq., Madison, NJ, for Respondent.

**DECISION**

**I. Procedural History**

On September 5, 2002, the Department of Enforcement filed a Complaint against Paul Joseph Benz and Christopher John Benz, charging that (1) they violated NASD Rule

2110 by allowing Beacon Trading, L.L.C. (“Beacon”) to engage in a securities business when it did not meet its minimum net capital requirement under SEC Rule 15c3-1, and (2) they failed to provide information requested by NASD staff, in violation of NASD Rules 8210 and 2110. On September 26, 2002, the respondents filed an Answer denying the charges and requested a hearing.

At the final pre-hearing conference on January 3, 2003, just five days before the hearing, respondents’ counsel (who is also their father) indicated that Christopher Benz was out of the securities industry, had no intention of returning, and would not attend the hearing. He stated that Christopher Benz would, therefore, accept a decision by default. (Transcript of Pre-Hearing Conference, Jan. 3, 2003, pp. 14-17.)

On January 8, 2003, a hearing was held in Woodbridge, New Jersey, before a Hearing Panel that included a Hearing Officer and two members of the District 9 Committee.<sup>1</sup> At the outset of the hearing, respondents’ counsel reiterated that Christopher Benz would accept a decision by default. (Tr. 6-7.) Therefore, the hearing proceeded as to Paul Benz only, and this decision addresses only the charges against him. The Hearing Officer will issue a separate default decision addressing the charges against Christopher Benz, pursuant to Rule 9269.

## **II. Facts**

Paul Benz entered the securities industry in 1989. He was associated with several different firms, including serving as a branch manager for one firm, before opening Beacon with his brother Christopher in 1998. Beacon was an introducing broker with a \$5,000 minimum net capital, clearing through Computer Clearing Services, Inc. (“CCS”). (Tr. 215.) Paul Benz, who was qualified as a General Securities Representative and

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<sup>1</sup> The hearing transcript is cited “Tr.”; Enforcement’s exhibits as “CX”; Respondent’s exhibits as “RX.”

General Securities Principal, was president of Beacon. Christopher Benz, who was qualified as a Financial and Operations Principal (Paul Benz was not so qualified), served as Beacon's FINOP. (CX-1; CX-2; Tr. 205-06, 237.)

**A. The DR Transaction and Resulting Debit Balance**

Beacon appears to have operated successfully until December 2000. By that time, its clients included about 200 day-traders who placed orders directly through CCS, using CCS's proprietary software installed on the day-traders' personal computers. (Tr. 164, 221-23.)

The events leading to this proceeding began on October 31, 2000, when Beacon placed an unsolicited limit order on behalf of one of its non-day-trading customers, DR, doing business as DRIG, to purchase 999,000 shares of GlobalNet, Inc. stock at \$5.015 per share. Beacon executed the purchase at the very end of the October 31 trading day, but it appears the trade was not processed until the following day, November 1. (CX-7; Tr. 208-09.)

On November 2, CCS contacted Beacon about the trade. Because the total cost of the purchase was more than \$5 million, CCS expressed concern about DR's ability to pay for the stock. According to DR's new account form, he was a 28-year-old self-employed investment banker with a \$300,000 per year income and liquid assets of \$2 million. CCS spoke to Christopher Benz, who advised that he knew DR personally and that DR "was worth ten times the amount of that trade." In addition, CCS contacted DR and his accountant directly and, thereafter, DR wired \$200,000 into his account. Furthermore, at this time, the market price of GlobalNet was above \$7 per share, well in excess of the \$5.015 that DR had paid for the stock, which provided additional security for the trade.

Under these circumstances, CCS did not attempt to cancel or reverse the trade. (CX-6; CX-17; Tr. 176-79, 208-09, 211.)

Ultimately, however, DR did not pay for the stock, causing a debit balance in his account of nearly \$5 million. Further, the market price of GlobalNet stock declined substantially after early November; by early December it slipped below \$5 and by December 19 it had dropped below \$1.50. As a result, the stock no longer adequately secured the debit balance in DR's account. (CX-17; Tr. 49, 182, 187.)

**B. Beacon's Failure to Meet Its Net Capital Requirement**

On December 19, 2000, after NASD staff became aware of the problem in the DR account, staff examiners called Paul Benz who, as noted above, was president of Beacon, but not its FINOP. The examiners told Benz that, because of the debit balance in DR's account, they believed Beacon did not meet its net capital requirements and that Beacon was, therefore, prohibited from conducting a securities business. Paul Benz disagreed, saying that he believed CCS had taken responsibility for the DR trade. NASD staff responded, however, that, based on the terms of the clearing agreement between Beacon and CCS, Beacon was required to recognize the unsecured debit balance in the DR account in calculating its net capital. (CX-4; CX-5; Tr. 31-32, 214-16, 219.)

Even though Paul Benz disagreed with NASD staff, Beacon acted promptly to halt its securities business after receiving the call. For retail customers who placed orders directly through Beacon, this was relatively simple – Beacon simply refused to effect any transactions for those customers, other than transactions to close open account positions, which Enforcement agreed was permissible. Beacon's day-trading customers, however, presented a more difficult problem, because they placed orders directly through CCS by

computer. Paul Benz and Beacon's other employees attempted to contact all of Beacon's approximately 200 day-traders by telephone, e-mail or facsimile, advising them that they should not effect any transactions, except to close open positions in their accounts. This effort was generally successful, but three day-trading customers, who placed their orders directly through CCS, effected a total of 19 impermissible transactions after December 19. Of the 19 transactions, all but two were during the period December 20-22; the remaining two transactions were on December 26. Beacon never resumed business; for all practical purposes, it ceased to operate when the NASD examiners called Paul Benz on December 19. In June 2001, Beacon's NASD membership was terminated pursuant to a Form BDW filed by Beacon. (CX-3; CX-22; CX-33; Tr. 55-57, 219-23.)

**C. Paul Benz's Responses to NASD Staff Information Requests**

On December 20, 2000, NASD examiners appeared at Beacon's offices to confirm that it had halted its business and to obtain records. None of Beacon's principals was present, but the employees who were present gave the examiners some records and the examiners spoke to Paul Benz by telephone. (Tr. 34-40, 224.)

On December 29, 2000, NASD staff sent Paul Benz a request for additional information, pursuant to Rule 8210. In the request, they acknowledged that Beacon had provided on December 20:

- 1) October and November, 2000 Focus Filings.
- 2.) Trial Balance, Income Statement, and Bank Reconciliation for October and November, 2000.
- 3.) Order Ticket to purchase 990,000 shares of GlobalNet at a limit price of \$5.015, good for the day only, for the account of the DRIG (Account# 12000444) on October 31, 2000 [in fact, both the ticket and the trade were for 999,000 shares].

The request asked Paul Benz to provide, in addition, no later than January 9:

1.) Net Capital Computation for October and November, 2000 using your own internal method of record keeping, pursuant to SEC Rule 17a-3 and 17a-4. 2.) Order Ticket to purchase 990,000 shares of GlobalNet for the account of the DRIG (Account# 12000444) executed on November 6, 2000 [in fact, the purchase was for 999,000 shares; November 6 was the settlement date, not the trade date; and Beacon had already given the staff the correct trade ticket on December 20]. 3.) A report of Beacon's unpaid bills for the months of October and November, 2000.

(CX-23.)<sup>2</sup>

Paul Benz did not respond to this request by the January 9 due date. On January 19, 2001, NASD staff sent him another letter reiterating the three requests set forth in the December 29 letter. By this time, Beacon was out of business, its landlord had reclaimed the premises where its offices had been located, and Paul Benz had sought and obtained employment as a registered representative with another firm. The letter stated that it was "imperative" that Paul Benz send the requested documents to NASD by January 26, 2001. (CX-1; CX-24; Tr. 231-32.)

Paul Benz did not respond by that date, but on January 30, 2001, NASD staff received, by facsimile, a letter from Paul Benz dated January 29, 2001, and enclosures.

In the letter, Paul Benz stated:

Attached please find balance sheets and capital computations for October and November of 2000. I double checked, and you do have the correct trade ticket. If you need the trade ticket from the clearing firm as well, please let me know. Analytic Trading, LLC has taken over the space in San Jose, as well as the outstanding bills for items such as phone and communications lines, etc. We do not have any outstanding bills for the year 2000. Please call me if you require any additional information. Thank you for your help.

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<sup>2</sup> There is evidence that Paul Benz received a copy of this request by certified mail on January 5, 2001, but, pursuant to Rule 8210, even without such evidence, he is deemed to have received the request, because it was sent to him at his CRD address. (CX-23, p. 4; Tr. 61.)

On March 14, 2001, NASD staff sent Paul Benz another request, pursuant to Rule 8210. In the request, NASD staff stated that the balance sheet that Paul Benz submitted with his January 29 letter

does not satisfy our requirements of a net capital computation, in accordance with SEC Rule 15c3-1, as well as SEC Rules 17a-3, 17a-4. In addition to providing ... the aforementioned information, please outline the steps you and the firm have taken to ensure that the firm is not conducting a securities business ... Please submit the above referenced documents ... by March 23, 2001.

(CX-25; CX-26; Tr. 63-65.)<sup>3</sup>

Paul Benz did not respond to this letter by March 23. Therefore, on April 4, NASD staff sent him a letter advising him that, “should you not respond by April 12, 2001, we will consider it a failure to respond to this second request .... As a reminder, a failure to respond to the Association’s request for information may, in and of itself, result in disciplinary action against your firm pursuant to NASD Procedural Rule 8210.” Paul Benz subsequently called the examiner who had signed the letter, concerned about the threat of disciplinary action, and suggested that Christopher Benz, Beacon’s FINOP, was the appropriate person to provide the net capital computations the staff was seeking.

(CX-27; Tr. 67-68; 70-71.)<sup>4</sup>

On May 17, 2001, NASD staff sent Christopher Benz the same request for net capital computations it had sent to Paul Benz on March 14. Subsequently, on July 6, 2001, the staff sent Christopher Benz a letter stating:

In an effort to complete our investigation and examination of Beacon Trading, L.L.C, which pertains to the GlobalNet transaction on November 6, 2000 for your customer DR of the DRIG, we are again requesting

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<sup>3</sup> Although there is no evidence that he actually received the letter, he is deemed to have received it because it was sent to his CRD address. (Tr. 65.)

<sup>4</sup> Paul Benz signed a receipt acknowledging delivery of this letter on April 6, 2001. (CX-27, p. 3.)

documentation relating to your firm's net capital position during the time period in question. Specifically, as of today's date, we have not received an adequate net capital computation from the firm for the month of October 2000, as requested in previous letters. Please provide a computation of Beacon's net capital position for the period ended October 31, 2000. Furthermore, we are requesting the following additional information from you and your firm relating to this examination: 1. Bank statements for the period of October through December of 2000. 2. Clearing Account statements for the period of October through December of 2000. 3. Any and all correspondence between Beacon and your clearing firm, Computer Clearing Services, Inc.

(CX-28; CX-29; Tr. 71.)

Paul and Christopher Benz responded to NASD staff in a letter dated July 17, 2001, in which they stated:

Beacon Trading, LLC filed their Focus reports, and computations of net capital can be found in those filings. There has been no written correspondence between Beacon Trading, LLC and Computer Clearing Services, Inc. regarding the GlobalNet transaction, other than the NASD arbitrations filed. Attached please find copies of the bank statements, and clearing statements that you have requested. Again, thank you for your help with this, and other matters. If you have any additional questions please feel free to contact us.

(CX-30; Tr. 72.)

On August 7, 2001, NASD staff sent Paul Benz a letter requesting that he sign the July 17 letter he and Christopher had sent (apparently they had not signed the original letter) and that he "provide a copy of the firm's general ledger for the period of November 1, 2000 to December 31, 2000." The staff sent a letter to Christopher Benz conveying the same requests on the same date. It is apparent that Paul and Christopher Benz must have made some response to this letter, because the version of the July 17 letter included in Enforcement's exhibits bears the signatures of both Paul and Christopher Benz, but the record does not establish the date or content of their response.

(CX-30; CX-31; CX-32; Tr. 132.)



### **III. Discussion**

#### **A. Net Capital Violations**

It is a violation of SEC Exchange Act Rule 15c3-1 for a broker/dealer to engage in a securities business if it does not meet its net capital requirement. There is no dispute that if the unsecured net debit balance from the DR GlobalNet trade was included in Beacon's net capital computation, the firm was below its required net capital on December 20, 21, 22, and 26, 2000. Paul Benz contends, however, that, because CCS dealt directly with DR and his accountant after the trade, DR effectively became its customer, rather than Beacon's, for purposes of the GlobalNet Trade. Therefore, he argues, CCS bore sole financial responsibility for the debit balance in the account. (Tr. 214-19.)

The SEC rejected a similar argument in William H. Gerhauser, Sr., 53 S.E.C. 933, 938-39, 1998 SEC LEXIS \*2402 (Nov. 4, 1998). In that case, an introducing broker's principals argued that the introducing broker was not required to include the negative equity in certain customers' margin accounts in its net capital computations, because the clearing firm had agreed to bear financial responsibility for them. The SEC rejected this argument, holding that, for purposes of calculating net capital pursuant to Rule 15c3-1, the terms of the clearing agreement were controlling. Because the clearing agreement in that case provided that the introducing firm would be liable if any of its customers failed to meet their margin obligations, the introducing broker was required to include the negative equity in the margin accounts in its net capital calculations. The SEC said that this would be true even if, on an ad hoc basis, the clearing firm had agreed to be solely responsible for the negative balances in the accounts at issue. For net capital purposes,

the firms could not vary the terms of the clearing agreement except by submitting an amended agreement to NASD and receiving NASD's approval.

The Gerhauser decision is controlling here. DR was Beacon's customer and Beacon placed the trade for him. The clearing agreement between Beacon and CCS provided that Beacon agreed to indemnify CCS from any liabilities, expenses, or costs if "any customer of [Beacon] fails to make payment for securities purchased...." (CX-5, p. 13.) Therefore, Beacon was required to include the negative balance in DR's account when it calculated its net capital.<sup>5</sup>

Paul Benz contended that CCS was so deeply involved in the DR transaction that it should not be allowed to rely on the terms of the clearing agreement; rather, CCS should be solely liable for any losses on the trade. As between Beacon and CCS, Paul Benz may or may not be correct – that issue is under consideration in on-going litigation and arbitration involving Beacon, CCS and DR. (Tr. 182, 214, 259-60.) The Hearing Panel, however, was concerned with Beacon's regulatory obligations, not with the private rights or obligations of Beacon and CCS. The SEC's observation in Gerhauser is equally applicable here:

In reaching our conclusion, we emphasize that our holding is limited to the narrow issue of [the introducing firm's] responsibility to regulatory authorities in calculating net capital. [The introducing firm and the clearing firm] apparently are involved in an ongoing dispute concerning whether any written or verbal agreements modified their respective obligations to each other. Whether they effectively reached a private agreement regarding who would bear the losses generated by the customer account deficiencies is a separate question from their regulatory responsibilities.

53 S.E.C. at 939.

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<sup>5</sup> Because CCS would be responsible for the negative balance if it could not collect the money from DR or Beacon, it was also required to include that amount in its net capital computations, and, in fact, CCS did so. (Tr. 160-61.)

The Hearing Panel concluded, therefore, that, in calculating its net capital, Beacon was required to include the net deficiency in the DR account as an obligation. As a result, NASD staff correctly advised Paul Benz on December 19, 2000, that Beacon did not meet its net capital requirements, and was required to stop conducting a securities business. As explained above, although the trades were not processed through Beacon, three of Beacon's day-trading customers effected a total of 19 impermissible non-closing transactions on December 20, 21, 22, and 26, 2000, while Beacon was below its required net capital. (CX-33.) Beacon thus conducted a securities business on those dates in violation of SEC Rule 15c3-1.

The remaining issue is whether Paul Benz was responsible for those violations. As a general matter, it is the FINOP who is responsible for determining whether a firm meets its net capital requirements. Paul Benz was not Beacon's FINOP, but he was its president. (CX-1, p. 4; Tr. 237.) The SEC has explained,

We have long maintained ... that "the president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient."

Gerhauser, 53 S.E.C. at 940-41. In that case, the firm's president argued that the FINOP, not he, was responsible for the firm's net capital violation, but the SEC held that once the president "intervened in determining the firm's net capital, he incurred responsibility for the result." Id. at 941. Similarly, in this case, once NASD staff notified Paul Benz that Beacon was not in net capital compliance, as president of the firm he became responsible for ensuring that it did not engage in a securities business. Although he did take steps to

halt the business, some trades occurred. The Hearing Panel finds, therefore, that Paul Benz violated Rule 2110 by failing to prevent Beacon's net capital violations.

**B. Failure to Respond Timely**

Rule 8210 authorizes NASD staff to require member firms or associated persons to provide information with respect to any matter involved in an NASD examination. Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD's self-regulatory function. See Joseph G. Chiulli, Exch. Act Rel. No. 42359, 2000 SEC LEXIS 112, at \*16, 19 (Jan. 28, 2000); Michael David Borth, Exch. Act Rel. No. 31602, 51 S.E.C. 178, 180, 1992 SEC LEXIS 3248, at \*7 (Dec. 16, 1992).

Paul Benz did not respond to either the December 29, 2000 request or the follow-up January 19, 2001 request in a timely manner. He was required either to respond by the due date or, if he could not do so, to request an extension from the staff. There is no evidence that he sought an extension, or that the staff granted one. Therefore, his response dated January 29, 2001, was untimely.

The January 29 response was not, however, materially incomplete under the circumstances. Paul Benz was not Beacon's FINOP, and he was not qualified as a FINOP, so his response to the staff's request for net capital computations was reasonable. He provided FOCUS reports for the periods in question that contained net capital computations. He also stated, correctly, in the January 29 response that Beacon had already provided the relevant trade ticket. The staff's insistence that Beacon supply a different ticket, reflecting a trade on November 6, 2000, was attributable to the staff mistaking the settlement date (November 6) for the trade date. Finally, Paul Benz's

statement in the January 29 letter that Beacon had no outstanding bills for the periods in question was clearly a reasonable, good faith attempt to respond to the staff's request for information about unpaid bills.<sup>6</sup>

Paul Benz also failed to make a timely response to the staff's March 14, 2001, request for a net capital computation "in accordance with SEC Rule 15c3-1, as well as SEC Rules 17a-3, 17a-4." (CX-26.) Paul Benz was not a FINOP, so it was understandable that he believed he had already provided this information through the FOCUS reports. It should have been clear to him from the March 14 request, however, that the staff was asking for different information than he had previously provided.<sup>7</sup> Even if he did not understand what that information was, or why the staff needed it, he was required to respond, at least by asking appropriate questions about what the staff was seeking. He could not simply ignore the request. It is noteworthy, however, that when he called the staff examiner after receiving the April 4 follow-up request, and explained that Christopher Benz, as the FINOP, was the appropriate person to address net capital computation issues, the examiner apparently agreed, and sent a request for net capital information to Christopher Benz.

The March 14 request also asked Paul Benz to "outline the steps you and the firm have taken to ensure that the firm is not conducting a securities business." There is no

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<sup>6</sup> Paul Benz testified, "I'm a little \$5,000 BD. And I have a checking account and a clearing firm statement, and the same thing with the unpaid bills. The bill comes in and we write the check. We really didn't have any unpaid bills." (Tr. 228.)

<sup>7</sup> Although Beacon's FOCUS reports contained net capital computations, the staff examiner testified that he wanted "to see how Beacon was computing their net capital based on their system of accounting. I wanted to see the information flow from a general ledger to a trial balance to a balance sheet, and then into an independent computation of net capital. ... The information provided on the FOCUS filings ... did not accurately reflect the information that was provided on the balance sheet. The numbers did not match the breakdown of the categories on the computation of net capital such that I was unable to do an adequate verification." (Tr. 59.) The staff's own calculations of Beacon's net capital, however, showed that the firm had substantial excess capital as of October 31, 2000, and also after that date, apart from the unsecured debit balance in the DR account. (CX-11.)

dispute that, apart from permissible closing transactions and the 19 impermissible day-trader transactions between December 20 and December 26, Beacon stopped conducting a securities business on December 19 and never resumed it. As noted above, Benz called the NASD examiner after receiving the April 4 follow-up request. The examiner acknowledged that, in general, they discussed Paul Benz's "questions about what he was responding to with respect to [the examiner's] letters," but the examiner made no notes of the specific topics they discussed. (Tr. 128-29.) It is reasonable to assume that if they discussed the March 14 information requests, Paul Benz told the examiner that Beacon had been out of business for several months; there would have been no reason for him to withhold that information. Therefore, the Hearing Panel finds that Enforcement failed to establish that Paul Benz did not provide the requested information.

Finally, with regard to the August 7, 2001 request that Paul Benz sign the July 17, 2001 letter and provide a copy of the firm's general ledger for the period November 1, 2000 through December 31, 2000, it is clear that he did respond. First, the copy of the July 17, 2001 letter included in Enforcement's exhibits is signed. Second, at the hearing, Paul Benz offered an exhibit that included portions of Beacon's general ledger from the relevant period that Enforcement produced from its files during discovery. (CX-30; RX-2; Tr. 105-14; 132.) If Enforcement had those materials, it is reasonable to infer that they came from either Paul or Christopher Benz in response to the staff's request. Therefore, the Hearing Panel found that Enforcement failed to prove that Paul Benz did not respond to the August 7 request.

In light of all this, the Hearing Panel found that Paul Benz violated Rule 8210 by failing to respond to the staff's requests in a timely manner. But the Panel found that

Enforcement failed to prove, by a preponderance of the evidence, that he failed to provide requested information.

#### **IV. Sanctions**

##### **A. Net Capital**

Enforcement requested that Paul Benz be suspended for nine months as a principal and fined \$15,000 for the net capital violations. (Tr. 287-88.) The Hearing Panel concluded that the sanctions should be much lower. The Sanction Guidelines for net capital violations recommend a fine of \$1,000 to \$50,000 and a suspension of the responsible person in any or all capacities for up to 30 business days, except in egregious cases, where a lengthier suspension of up to two years or a bar is suggested. NASD Sanction Guidelines at 33 (2001 ed.).

The Hearing Panel determined that this was not an egregious case. Enforcement did not contend, and the Panel did not find, that Paul Benz had any responsibility for Beacon's net capital compliance until NASD staff called him on December 19, 2000. After NASD called, Paul Benz took prompt action to halt all non-closing transactions effected through Beacon, and attempted to contact all of Beacon's day-trading customers to tell them that they had to stop trading through CCS. For all practical purposes, Beacon put itself out of business that day. Enforcement could cite only three accounts in which any non-closing transactions occurred after December 19, 2000, and all three accounts were day-traders who executed their transactions directly through CCS.

Enforcement argues that Beacon could have forestalled even these few transactions by asking CCS to prevent any of its day-trading customers from effecting any non-closing transactions. A witness from CCS testified that he believed Beacon did

not contact CCS; in contrast, Paul Benz testified he believed Beacon did contact CCS. (Tr. 165, 220.) In any case, although the Hearing Panel finds that Paul Benz, as president of Beacon, bears some responsibility for the improper transactions, the Panel also finds that he is entitled to considerable credit for his efforts to prevent them. The Panel notes that he undertook those efforts, which effectively brought an end to Beacon's business, even though he believed the debit balance in the DR account should have been CCS's responsibility, rather than Beacon's.

Based on this assessment, the Hearing Panel determined that for this violation Paul Benz should be fined \$5,000 and suspended in all principal capacities for 30 days. In addition, the Hearing Panel will require him to re-qualify as a principal before serving again in that capacity. The re-qualification requirement is appropriate because it was clear from Paul Benz's testimony that, until the NASD staff contacted him on December 19, he had not sufficiently considered the implications of the DR transaction or his obligations as president of Beacon in that regard.

**B. Failure to Respond Timely**

For the failure to respond violation, Enforcement requested that Paul Benz be fined \$10,000 and suspended in all capacities for six months, if the Panel concluded that his failure involved late and/or incomplete responses, or that he be barred in all capacities if the Panel found a complete failure to respond to certain requests. (Tr. 288.) The recommendations in the Sanction Guidelines vary considerably depending on whether the respondent failed to respond, or responded in an untimely manner. In the case of a failure to respond timely, which is the violation that the Panel has found in this case, they



recommend a fine of \$2,500 to \$25,000 and a suspension in any or all capacities for up to two years. NASD Sanction Guidelines at 39 (2001 ed.)

As explained previously, the Hearing Panel found that Paul Benz responded late to several requests, but that, overall, he made a good faith effort to cooperate with NASD staff. He was hampered, however, by the fact that he was not a FINOP, and by Beacon going out of business. There is no indication that he tried to delay or obstruct the staff's investigation; instead, the Panel credited his testimony that he felt the staff was sending repeated requests for information he had already provided.

To a considerable degree, this case is attributable to an unfortunate breakdown in communications between persons who were trying to act in a responsible manner. For Paul Benz, after December 19, 2000, Beacon was a failed business. His primary goal was to obtain and succeed at new employment, although he recognized his responsibility to provide information about Beacon to NASD staff. For the NASD staff, however, Beacon remained an active NASD member that could resume its business. The staff needed detailed financial information about Beacon to conclude its investigation, but Paul Benz, who was not a FINOP, did not even understand precisely what they were requesting, or why his responses failed to meet their needs. If Paul Benz and the staff had communicated more clearly and effectively, this proceeding might have been unnecessary.

Taking all these circumstances into account, the Hearing Panel determined that for failing to respond in a timely fashion, Paul Benz should be fined \$2,500 and suspended in all principal capacities for 30 days, to be served concurrently with his suspension for the net capital violation. Suspending him in only a principal capacity is

appropriate because that is the capacity in which he was being called upon to provide information about Beacon's activities. He will also be required to re-qualify as a principal because he failed adequately to appreciate his obligation, as a principal, to ensure timely compliance with NASD staff requests for information.

**V. Conclusion**

Respondent Paul Joseph Benz violated Rule 2110 by allowing Beacon Trading, L.L.C. to conduct a securities business when it did not meet its net capital requirement under SEC Rule 15c3-1, and he violated Rules 8210 and 2110 by failing to respond to NASD staff requests for information in a timely manner. For the net capital violation, he is suspended from associating with any NASD member in any principal capacity for 30 days, fined \$5,000 and ordered to re-qualify as a principal before serving again in that capacity. For the failure to respond in a timely manner, he is suspended in all principal capacities for 30 days (to be served concurrently with his suspension for the net capital violation), fined \$2,500 and ordered to re-qualify as a principal before serving again in that capacity. In addition, Paul Benz shall pay costs in the amount of \$2,502.30, including an administrative fee of \$750 and hearing transcript costs of \$1,752.30.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this decision becomes the final disciplinary action of NASD, except

that if this decision becomes the final disciplinary action of NASD, the suspensions shall begin on May 5, 2003 and end at the close of business on June 16, 2003.<sup>8</sup>

**HEARING PANEL**

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By: David M. FitzGerald  
Hearing Officer

Copies to:

Paul Joseph Benz (via overnight delivery and first class mail)  
David A. Watson, Esq. (electronically and via first class mail)  
Jonathan Prytherch, Esq. (electronically and via first class mail)  
Rory C. Flynn, Esq. (electronically and via first class mail)  
Peter A. Benz, Esq. (via facsimile and first class mail)

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<sup>8</sup> The Hearing Panel has 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.