NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C8A020014
v.	:	
	:	Hearing Officer - JN
BRAD A. ROETHLISBERGER (CRD #2239578)	:	**HEARING PANEL DECISION**
Green Bay, Wisconsin,	:	January 30, 2003
Respondent.	:	

Registered representative engaged in day trades, where the cost of purchases in cash was paid by the proceeds of sales. He wrongfully caused his firm to extend him credit (in violation of Regulation T); he violated Section 7(f) of the Exchange Act and NASD Rules 2110 and 2520(f)(9). Respondent is fined $1,000, suspended for one month (with credit for time served under a three-month suspension imposed by the firm) and directed to re-qualify in all capacities. Respondent was also assessed $2,457.94 in hearing costs.

Appearances

For the Complainant: Dale A. Glanzman, Esq.

For the Respondent: James J. Moylan, Esq. and Jeffrey D. Barclay, Esq.

DECISION

I. Introduction

On March 18, 2002, the Department of Enforcement filed a two-cause Complaint against Respondent Brad A. Roethlisberger. The First Cause alleged that he wrongfully caused his firm to extend him credit in purchasing securities, in violation of Section 7(f)

of the Exchange Act, Regulation X, and NASD Conduct Rule 2110. The Second Cause alleged that he wrongfully used his cash account for day trades, in which he met the cost of purchased shares by selling the same stock ("free riding"), in violation of NASD Rules 2110 and 2520(f)(9). Respondent admitted the transactions in issue and submitted a lengthy statement in mitigation and extenuation.

A Hearing Panel, composed of an NASD Hearing Officer and two members of NASD District Committee No. 8, conducted a hearing on November 14, 2002 in Chicago, Illinois. Enforcement introduced four exhibits, cited with the prefix "CX," and Respondent introduced ten exhibits, cited with the prefix "RX." A stipulation, filed November 8, 2002, is cited as "Stip.," and the transcript of the hearing is cited as "Tr."

II. Background

From April of 1996 through August of 1998, Respondent was a registered general securities representative of Associated Investment Services, Inc., where he maintained his own cash discount brokerage account (CX-1; Tr. 41-43). On July 2, 10, 13, 15, and 16 of 1998, he engaged in day trades, involving purchases and sales in that cash account (Tr. 45-46, 49; Compl., Ex. A). In each instance, he did not pay for the stock, but instead met the purchase price through the proceeds of a same-day sale (Tr. 46). The net result of these trades was a $5,829 loss, which he covered (Id.).

Thereafter, in September of 1999, Respondent became registered with Financial Network Investment Corporation, where he is currently employed (CX-1; Tr. 230, 233). Mr. Roethlisberger was registered at the time of the alleged violations and at the time of the filing of the Complaint, and NASD thus has jurisdiction over him. He has no disciplinary history and no record of any customer complaints.

III. Liability

A. Admitted Violations

The essential facts are undisputed and, without exception, liability is admitted. Section 7(f) of the Exchange Act makes it unlawful for any person to receive an extension of credit for the purchase of securities, if the loan is prohibited by regulations promulgated under that statute. Regulation T, issued under the Act, sets out the rules governing extensions of credit by brokers and dealers. The parties agree that Respondent's un-paid-for purchases in his cash account caused his firm to extend credit in violation of Regulation T. They further agree that he, therefore, violated Section 7(f) of the Exchange Act, as well as NASD Rule 2110's general ethical mandate (Stip., p. 2; Tr. 22).[1] Further, they agree that he also violated NASD Rule 2520(f)(9) – which prohibits "effecting transactions in a cash account where the cost of securities purchased is met by the sale of the same securities" – and that such misconduct also violates Rule 2110 (Id.).

B. Willfulness

The only issue as to liability is whether Roethlisberger violated Regulation X, which is directed to the "borrower who willfully causes credit to be extended in contravention of" Regulation T. While conceding the unlawfulness of his actions under the Exchange Act and Rules 2110 and 2520(f)(9), Respondent urges that his misconduct was not willful.

[1] It is well settled that violations of the Act and rules promulgated thereunder also constitute violations of Rule 2110. See, e.g., L. H. Alton & Company, Exchange Act Rel. No. 40886, 1999 SEC LEXIS 17 (January 6, 1999).

Though there is no requirement that the actor be aware that he is violating the Rules or Acts (Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 180 (2d Cir. 1976)), "willfulness" does require proof that "the respondent knew or should have known under the particular facts and circumstances that his conduct was improper" (In re Christopher LaPorte, Exchange Act Rel. No. 39171, 1997 SEC LEXIS 2058 at *8 (September 30, 1997). "Willfulness" thus differs from inadvertence or negligence. Applying these principles, the Panel is not persuaded by a preponderance of the evidence that Respondent's misconduct was willful.

Roethlisberger's background was primarily in insurance and mutual funds. Before the events at bar, he had no experience whatsoever with day trading and knew nothing of its implications (Tr. 47, 54, 57, 76-77, 82, 222). He intended to pay for the shares with the proceeds of the sales and to meet any shortfall through a line of credit opened at the firm's banking affiliate; he had not thought about what would happen if the proceeds and his funds were insufficient (Tr. 49, 52, 54, 57).

Respondent turned to Mr. Hansen, a registered representative in the firm's discount division, who was his "contact person" for the transactions in issue, and who saw Roethlisberger as his "customer" (Tr. 83, 131). According to Roethlisberger, he asked Hansen if he would be allowed to buy and sell on the same day, utilizing the line of credit to make up any shortfall, and Hansen stated that he could do so (Tr. 49-50, 51, 52-53, 56). Hansen (who later was reprimanded for processing the trades in issue) (RX-15), said that although he did not remember the conversation, he considered Respondent to be a truthful person, who would be telling the truth if he had sworn to such events (Tr. 100, 128, 130).

That Hansen would have given Respondent the go-ahead was consistent with other circumstances. Several brokers in the discount division took Respondent's orders, and their supervisor, a Series 24 principal, reviewed the trades without raising objections (Tr. 107, 108, 109-110, 134). Hansen acknowledged that "we were not familiar with day trading at that time" (Tr. 105). Another of the involved brokers said: "we weren't real clear on procedures of settlement, because this was the first time that it happened in our department. And I guess since then we have had better training. So in that regard, I guess … we were naïve or not knowledgeable enough" (Tr. 177).

Considering Respondent's own inexperience and ignorance, Hansen's advice that he could go forward with day trades on credit, and the prevailing attitude of the licensed professionals who were processing his transactions, the Panel cannot conclude that Roethlisberger "should have known under the particular facts and circumstances that his conduct was improper." The Panel sees no reason why he should be treated as having greater sensitivity than the several other representatives in the discount brokerage account division who had responsibility for the transactions. It is not persuaded by the preponderance of the evidence that Respondent "willfully" caused his firm to extend credit in violation of Regulation T.

In any event, even if Respondent's conduct was technically "willful" (on the theory that representatives are deemed to know all of the rules), the Panel would nevertheless conclude that on the facts of this case, no additional sanction should be imposed.

IV. Sanctions

Where multiple related violations arise out of the same underlying transaction or event, a single set of sanctions may be appropriate and effective. See, e.g., Department of Enforcement v. Respondent Firm 1, No. C8A990071, 2001 NASD Discip. LEXIS 6, at *30-31 (NAC Apr. 19, 2001). Though the Complaint alleges violations grounded in various sources (Section 7(f) of the Exchange Act, NASD Rule 2110, and NASD Rule 2520(f)(9)), the Panel finds that the allegations are all rooted in the same series of July 1998 trades and that a single set of sanctions is, therefore, appropriate.

The Panel begins with the Sanction Guideline for violations of Regulation T. That Guideline, which has been employed in a similar NASD disciplinary proceeding,[2] recommends a fine of $1,000 to $50,000 and a suspension for up to 30 days, or, in egregious cases, a suspension of up to two years or a bar (NASD Sanction Guidelines (2001) p. 35).

Enforcement seeks a six-month suspension, a sanction which under the Guideline, would be appropriate if this were an egregious case. But this Panel, after considering all of the circumstances, is not persuaded that the instant facts were egregious.

The trades were not extensive in number or duration. They involved twelve purchases and fourteen sales, occurring over a two-week period in July of 1998 (Stip., p. 1; Compl., Ex. A). Although the trades subjected Respondent's firm to significant potential exposure, it never was actually called upon to make up for any shortfalls. The ultimate result of the transactions was small: $5,829 net loss, which Respondent paid to the firm. Roethlisberger limited this trading to himself and did not involve any customers

[2] See Dep't of Enforcement v. Patrick H. Smith, No. C07010095 (OHO May 6, 2002), where day trades, made without paying for the purchases, involved violations of Regulations T and X.

in such transactions. Nor did he hide anything from the firm. Indeed, it was his own inquiry as to the reflection of sales proceeds in his account which first brought the trades to the firm's attention (Tr. 124).

Moreover, Respondent's firm already imposed a three-month suspension on him for the activities in issue. One of the "principal considerations" governing sanctions is "[w]hether the member firm with which an individual respondent is/was associated disciplined respondent for the misconduct at issue prior to regulatory detection" (Guidelines, supra, p. 10). In this case, the firm placed Roethlisberger on leave four days following the last trade and suspended him four days later (RX-19). Prompt and decisive discipline by a firm is commendable. The Panel believes that taking account of such action is a way of encouraging it and is entirely consistent with the principal consideration noted above.

Enforcement argued that Respondent should receive no credit for the firm-imposed suspension because he chose to resign (Tr. 242). Roethlisberger explained that he was "disgruntled with how this whole process took place, especially after the impending – the suspension of 90 days" and decided to take some time off after questioning "whether or not I should actually be in the business with these sanctions" (Tr. 74, 217-218). The resignation was unquestionably the product of the suspension, which led him to leave the industry, but for the suspension, Respondent would not have left the firm or the industry. The Panel concludes that in these circumstances, his resignation and one-year absence effectively constituted service of the firm's sanction. Roethlisberger should be given credit for "time served" under the firm's sanction.

The Panel imposes a one-month suspension, which Respondent has already served.[3]

Enforcement also seeks a $20,000 fine. The Panel concludes that such fine is too high. The conduct, as found, was not egregious. The requested fine would amount to about 25% of the adjusted gross income reported by Respondent and his spouse for 2001 (RX-13). This case has no factual predicate for a severe monetary penalty. Roethlisberger made no profit on these transactions, and his firm suffered no losses. Nor did any customer sustain a loss. Indeed, the only financial loser was the Respondent himself, who made up the $5,829 net loss. Considering all of the circumstances, the Panel is not persuaded that a heavy monetary penalty is necessary in this case. The Panel imposes a fine of $1,000.

Finally, to impress upon Respondent the importance of knowing and adhering to all rules and regulations, the Panel directs that Roethlisberger be required to re-qualify by examination in all capacities

V. Order

For engaging in trades in his cash account, where the cost of the shares purchased was to be met by the proceeds from same-day sales of those shares, Respondent caused his firm to violate Regulation T and violated Section 7(f) of the Exchange Act, and NASD Rules 2110 and 2520(f)(9).

For this misconduct, Respondent Brad A. Roethlisberger is suspended for one month. He shall be credited with a three-month suspension served under a sanction

[3] See Dist. Bus. Conduct Committee v. Lars Dean Omlid, 1992 NASD Discip. LEXIS 111 at *15 (NBCC March 12, 1992); Dep't. of Enforcement v. Brendan C. Walsh, C01010018, (Oct. 7, 2002), at http://www.nasdr.com/pdf-text/oho_dec02_18.pdf. Both decisions allow credit for time served under a firm-imposed suspension.

previously imposed by his firm for the same misconduct and thus he need not serve any additional period of suspension. Respondent is ordered to re-qualify by examination in all capacities before associating with a member firm. Finally, Respondent is fined $1,000 and assessed a total of $2,457.94 in costs ($1,707.94 for the hearing transcript plus a $750 standard administrative fee). The fine and costs shall become effective on the date this Decision becomes the final disciplinary action of the NASD.[4] The re-qualification must occur within six months of the date on which this Decision becomes the final NASD decision.

FOR THE HEARING PANEL.

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
January 30, 2003

Copies to: Brad A. Roethlisberger (via overnight delivery and first class mail)
James J. Moylan, Esq. (via overnight delivery and first class mail)
Dale A. Glanzman, Esq. (via electronic mail and first class mail)
Rory C. Flynn, Esq. (via electronic mail and first class mail)

[4] The Hearing Panel 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.