

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10000122
v.	:	
	:	HEARING PANEL DECISION
VINCENT J. PUMA	:	
(CRD #2358356),	:	Hearing Officer - DMF
	:	
Freehold, NJ	:	October 22, 2001
	:	
Respondent.	:	

Registered representative effected one unauthorized transaction in a customer account in violation of NASD Conduct Rule 2110. Respondent was fined \$10,000 and suspended from associating with any NASD member firm in any capacity for ten business days.

Appearances

William M. Harter, Jr., Esq. and Jeffrey K. Stith, Esq. (Rory C. Flynn, Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

Steven Altman, Esq., on behalf of Vincent J. Puma.

DECISION

I. Procedural Background

Enforcement filed a Complaint on July 17, 2000, charging that between July 19, 1995 and August 31, 1995, respondent Vincent J. Puma violated NASD Conduct Rule 2110 by effecting ten transactions in eight customer accounts without those customers' prior knowledge or consent. Puma filed an Answer in which he denied effecting unauthorized transactions, asserting that as to certain of the alleged violations he completed the order tickets or allocation sheets for the transactions at the direction of one

of his supervisors, and that as to the remaining alleged violations, the customers authorized the transactions.

The hearing was held in New York, New York, on February 21-23, 2001, and by conference telephone call on March 1, 2001, before a Hearing Panel composed of a Hearing Officer, a current member of the District Committee for District No. 9, and a current member of the District Committee for District No. 10.¹ Enforcement presented eight witnesses: Michael Volpe, who, in 1995 was the manager of the New York City branch office of Josephthal, Lyon & Ross, where Puma was registered; Mitchell Fitter, then the assistant branch manager of that Josephthal office; Joseph Donia, an NASD Regulation, Inc. examiner; and five of the Josephthal customers in whose accounts Enforcement alleged Puma effected unauthorized trades. Puma testified on his own behalf and called no other witnesses. In addition, the Hearing Officer admitted into evidence all 17 exhibits offered by Enforcement, and all but one exhibit offered by Respondent.² The parties also stipulated to certain relevant facts both before and during the hearing.³

¹ The Hearing Officer who presided at the hearing left the Office of Hearing Officers after the Panel deliberated and made the determinations regarding the alleged violations and appropriate sanctions set forth herein. The new Hearing Officer edited the draft decision prepared by the original Hearing Officer, based on comments from the Panelists, but did not otherwise participate in the decision.

² Feb 23 Hearing Tr., pp. 189, 376-394. Complainant's exhibits were designated "CX ___." At hearing, the Hearing Officer reserved decision as to the admissibility of the first page of exhibits CX 2 - CX 9, but after further consideration admitted those pages. The Hearing Officer admitted Respondent's exhibits RX 1a, RX 3c, RX 4a-b, RX 5a-e2, RX 6a, b, e, f, g, RX 7a-d, f, g, RX 8a, RX 9j, RX 10b, f-m, RX 11b, d-g, i, RX 12 b, d-m, o, r, RX 13 b, d-j, l, RX 14 b, d-h, j, RX 15 a-b, e-i, RX 16b, RX 17a, e.

³ The stipulations filed pre-hearing are designated as "Stipulation ___."

II. Discussion

A. Introduction

A registered representative who effects unauthorized transactions violates his or her obligation to observe just and equitable principles of trade as required by NASD Rule 2110. The allegations of unauthorized transactions in this case fit into two distinct categories: orders Puma claims he submitted based on instructions from one of his supervisors, Volpe or Fitter; and orders Puma asserts he submitted after obtaining authorization from the customers.

After reviewing the evidence, the Hearing Panel determined that as to five trades, involving four customer accounts, Enforcement failed to prove by a preponderance of the evidence that Puma, rather than Volpe or Fitter, caused the trades to be effected. As to four of the five remaining trades, involving three customer accounts, the Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that the trades were unauthorized. The Hearing Panel found that Enforcement did prove by a preponderance of the evidence that Puma effected one unauthorized trade.

B. Puma's Employment at Josephthal

Volpe, the Josephthal branch manager, hired Puma in August 1994. At that time, the Josephthal branch employed approximately 30 registered representatives, and additional support staff. The branch also had two assistant managers, Fitter and RM. Initially, Puma, then 22 years old, worked on a salaried basis as a "cold caller" directly for Volpe and Fitter, who shared certain customer accounts for compensation purposes.⁴ After Puma became registered as a General Securities Representative in November 1994,

⁴ Feb 23 Hearing Tr., pp. 225-226.

he was required to open 20 new customer accounts for Volpe and Fitter.⁵ After opening those accounts, Puma was given his own account executive number under which he could earn commissions. Puma also continued to work as a sales assistant for Volpe and Fitter.⁶

Puma handled a variety of tasks for Volpe and Fitter, including answering telephones, sending letters to customers, and performing other secretarial tasks.⁷ Volpe described Puma in a positive manner, noting that he was “a hard working kid. He came to work and we had no problems with [him]... I liked the fact that he came to work. I thought we can [sic] do something together. This was somebody I wouldn’t mind at this time handling my accounts as well as his future accounts.”⁸

C. Puma Completed Order Tickets at the Direction of Volpe and Fitter

Puma stated that his responsibilities as a sales assistant included filling out indication of interest sheets for public offerings and completing order tickets, at the direction of Volpe or Fitter.⁹ Both Volpe and Fitter denied that they ever directed Puma to complete an order ticket or make an entry on an indication of interest sheet for an offering on their behalf.¹⁰ Fitter testified, however, that the new account form for one of the customers at issue in this proceeding was completed by another of his sales assistants on Fitter’s behalf.¹¹ Puma’s testimony is consistent with the practice at some industry firms, which allow sales assistants to complete order tickets at the direction of a

⁵ Feb 23 Hearing Tr., p. 225.

⁶ Stipulation 2.

⁷ Feb 23 Hearing Tr., pp. 206-207.

⁸ Feb 23 Hearing Tr., pp. 27-28.

⁹ Feb 23 Hearing Tr., pp. 206-207.

¹⁰ Feb 21 Hearing Tr., pp 48, 54, 56-57, 59, 78; Feb 22 Hearing Tr., pp. 56, 195-198; Feb 23 Hearing Tr., pp. 20, 37-38, 48-49, 52.

supervisor or experienced broker who has received an order from a customer. Puma's testimony is also reasonable given Volpe's and Fitter's supervisory responsibilities, which would have reduced the amount of time they had available to service their client accounts. Finally, the Hearing Panel had an opportunity to observe the demeanor of Volpe, Fitter and Puma as they responded to the questions posed by the parties and the Hearing Panel on this topic. Taking all these factors into consideration, the Hearing Panel credits Puma's testimony that he assisted Volpe and Fitter by completing order tickets, indication of interest sheets and allocation sheets at their direction, using their account executive number. Therefore, the Hearing Panel concluded that, under the circumstances presented in this case, the fact that Puma entered the information on certain order tickets did not, by itself, establish that he was responsible for initiating those orders.

D. The Alleged Commission Sharing Arrangement

Enforcement argued that Puma was motivated to effect unauthorized transactions, in part, in order to obtain commissions through an alleged commission sharing arrangement with Volpe and Fitter. While Puma was employed at the firm, Volpe and Fitter serviced certain customer accounts jointly, under account executive number "L63," and shared commissions generated under that number evenly.¹² Puma worked primarily as a sales assistant to Volpe and Fitter for the L63 customer accounts, while also attempting to build his own customer accounts under his own account executive number "M41."

According to Fitter, he and Volpe assigned Puma to manage 40 to 50 of the L-63 accounts, many of which were dormant accounts that had been transferred to Josephthal

¹¹ Feb 22 Hearing Tr., p. 82.

¹² Feb 21 Hearing Tr., pp. 44-45.

from a former member firm.¹³ Volpe and Fitter claimed that Puma was to have exclusive contact with these customers, attempting to obtain business from them, and was to receive one-third of the commissions he generated.¹⁴ When questioned about how such commissions were calculated, Fitter claimed that each month “we picked a point, a time in the ... month where we got a ballpark number of the commissions that [Puma] generated in L63.”¹⁵ Using a “scratch pad” to total the commissions, Fitter said he would then determine the amount of commissions that Puma had earned.¹⁶ Assuming, for example, that up until that point in the month Puma had generated \$4,000 in gross commissions in the L63 accounts, Volpe and Fitter would take all those commissions, and Puma would receive the next \$2,000 in commissions he generated in the accounts. He accomplished this by entering his own M41 number on the subsequent order tickets.¹⁷

Both Volpe and Fitter admitted that there were no written records to document this alleged commission sharing arrangement, or Puma’s responsibility for the L63 accounts. Furthermore, Enforcement did not offer any analysis of Puma’s commission records to substantiate the existence of the sharing arrangement.¹⁸

¹³ Feb 21 Hearing Tr., pp. 45, 82.

¹⁴ Feb 21 Hearing Tr., p. 45.

¹⁵ Feb 21 Hearing Tr., p. 46.

¹⁶ Feb 22 Hearing Tr., p. 187-195.

¹⁷ Feb 21 Hearing Tr., p. 46.

¹⁸ The evidence did show that, subsequently, some L63 accounts became M41 accounts, listed on Puma’s “moneyline” report. The Hearing Panel did not, however, find that these transfers (only one of which was properly documented) supported the existence of the claimed commission sharing arrangement while the accounts remained on the L63 moneyline.

Puma admitted speaking to L63 customers, but denied that he was involved in any commission sharing arrangement regarding those accounts.¹⁹ Puma testified that, instead, Volpe and Fitter “from time to time” would allow him to “run a trade through M41 ... so I can end up taking \$6- or \$700 for the month.” Puma said that these occasional commissions had “no specific relationship [to] how much commissions I generated in L63.”²⁰ In 1995 Puma earned only approximately \$9,500 at Josephthal.²¹

The absence of any supporting documentation significantly undermines the testimony of Fitter and Volpe. In addition, Fitter’s explanation about how the commission split was supposedly calculated did not make any sense. The Hearing Panel therefore found that there was insufficient credible evidence to establish the existence of the alleged commission sharing arrangement.

E. The Specific Alleged Unauthorized Transactions

The alleged unauthorized purchases in four customer accounts involved an initial public offering and aftermarket trading in Victormaxx Technologies, Inc. (VMAX). Josephthal was the lead underwriter for the unit offering, which consisted of one common stock and one warrant. The offering became effective on August 10, 1995. As to three customer accounts in which there were alleged unauthorized VMAX transactions, Puma claimed that he completed the indication of interest sheet, allocation sheet or order ticket as a sales assistant, at the direction of Fitter or Volpe. As to the fourth account, Puma said he completed the aftermarket order ticket based on an authorized customer order.

¹⁹ Feb 23 Hearing Tr., pp. 215-217.

²⁰ Feb 23 Hearing Tr., p. 257.

²¹ Feb 23 Hearing Tr., pp. 204.

The alleged unauthorized transactions in three other customer accounts involved purchases of Genemedicine (GMED), a security about which Josephthal had issued a research report and which it was recommending.²² Puma claimed that he was directed by Volpe and Fitter to complete an order ticket for one of the trades, and that he entered authorized orders for the other two trades. The eighth customer account also involved transactions that Puma claimed were authorized by the customers.

(1) Transactions That Puma Says Were Executed Based On Instructions From Volpe And Fitter

(a) Customer SHD

The Complaint alleges that on August 10, 1995, Puma purchased 700 VMAX units for the account of SHD without the customer's prior knowledge or consent.²³ There was conflicting evidence regarding the circumstances surrounding this trade. Fitter testified that SHD called him to request information about the VMAX IPO and expressed interest in investing in it.²⁴ Fitter said that he spoke to SHD about opening an account at Josephthal, and that he took account information from the customer,²⁵ but had a sales assistant other than Puma complete the new account form.²⁶ Fitter signed the new account form on July 24, 1995, as the account executive.²⁷ The form listed 2,000 shares of VMAX as the customer's initial transaction.²⁸

²² Feb 23 Hearing Tr., p. 297.

²³ Complaint, ¶ 5.

²⁴ Feb 21 Hearing Tr., p. 58.

²⁵ Id.

²⁶ Feb 22 Hearing Tr., p. 82.

²⁷ Feb 21 Hearing Tr., p. 58; RX 7a.

²⁸ RX 7a.

The indication of interest sheet for the VMAX IPO, under the L63 number, listed SHD for 2,000 units. Puma admits that he entered the customer's name, account number, and level of interest on the indication sheet, but says he did so at the direction of Volpe or Fitter, both of whom signed the form as the registered representatives for the accounts.²⁹ Puma prepared the L63 allocation sheet for the VMAX IPO in a similar manner and Volpe signed it as the registered representative for the accounts.³⁰ It listed an allocation of 700 VMAX for SHD.

In his testimony, SHD denied that he called the firm to express an interest in VMAX and said that any statement to that effect would be a "total lie."³¹ SHD could not recall ever speaking to Fitter, but remembered getting a cold call about VMAX, and was confident that he spoke to Puma about VMAX before the IPO. SHD said he noticed the VMAX stock in the account after it was purchased in August, but did not complain until November.

Puma testified that he never spoke to SHD, but made the entries based on instructions from Fitter or Volpe. He claimed that a different sales assistant contacted SHD about the VMAX IPO. Puma further asserted that because the trade was executed under L63, he received no commission.

The Hearing Panel noted that Fitter's testimony regarding his conversation with SHD was supported by the new account form, which contained an indication of interest by SHD in VMAX. The form was completed by a sales assistant other than Puma and was signed by Fitter. The Hearing Panel also found that SHD's failure to complain about

²⁹ Stipulation 23; CX 4, p. 3.

³⁰ Stipulation 23; CX 4, p. 4.

³¹ Feb 22 Hearing Tr., pp. 303-304.

the purchase for several months, until the price of the security declined, undermined his testimony that the transaction was unauthorized. The Hearing Panel, therefore, found that Enforcement failed to prove, by a preponderance of credible evidence, that Puma was responsible for an unauthorized purchase of VMAX in SHD's account.

(b) Customers JB and BB

The Complaint alleges that on August 10, 1995, Puma purchased 2,500 shares of VMAX for the joint account of JB and BB without their knowledge or consent.³² The evidence showed that the purchase was of 1,700 shares, not 2,500, but Puma did not object to that inconsistency either at or before the hearing, and it did not affect the Hearing Panel's decision.

The evidence shows that Volpe sold a total of 10,500 VMAX shares from the accounts of three of his active customers on August 10, 1995, in the immediate aftermarket. Instead of submitting the sell tickets to the order room for execution, Volpe crossed those shares with purchase orders from other customers, including JB and BB's joint account. It was to Volpe's advantage to cross the trades, because the firm preferred not to have sell orders for IPO stock in the immediate aftermarket.³³

Puma admitted that he completed the order ticket for the purchase by JB and BB's account, but stated that he wrote that ticket and several others that day at the direction of either Volpe or Fitter.³⁴ Puma testified that on August 10, after the IPO allocations were submitted, he received instructions from Volpe and Fitter to execute a number of trades as the three of them reviewed the L63 list of accounts. Puma described his filling out of

³² Complaint, ¶ 4.

³³ Feb 23 Hearing Tr., pp. 273-274.

³⁴ Feb 23 Hearing Tr., pp. 234-235.

order tickets in this manner as “not an uncommon duty for me.”³⁵ As with the other trades done in the L63 account, Puma received no commission for completing the order ticket.

Fitter and Volpe denied directing Puma to fill out the ticket.³⁶ To the contrary, Volpe claimed that he was holding his customers’ limit orders to sell VMAX when Puma just happened to come to him to approve the order ticket for the JB and BB joint account.³⁷ Volpe stated he took the purchase order for the JB and BB joint account, and others that were given to him, and used them to cross with his sell orders. Fitter, however, admitted that three other customer accounts that had VMAX purchases crossed with Volpe’s selling customers also complained about the transactions.³⁸

JB testified that before the VMAX transaction, he had purchased and sold stock in his Josephthal account with Puma as the account executive, and that those transactions had been effected without incident.³⁹ When he noticed 1,700 VMAX shares in his account, he immediately informed Puma of the mistake. In response, Puma informed JB that the trade must have been a mistake, and said he would straighten it out.⁴⁰ Ultimately, Josephthal canceled the purchase of VMAX for the account.

³⁵ Feb 23 Hearing Tr., p. 239.

³⁶ Feb 21 Hearing Tr., p. 54; Feb 23 Hearing Tr., p. 20.

³⁷ Feb 23 Hearing Tr., pp. 143-144.

³⁸ Feb 22 Hearing Tr., pp. 126-130.

³⁹ Feb 22 Hearing Tr., pp. 13, 22.

⁴⁰ Feb 22 Hearing Tr., p. 15.

In light of this evidence, the Hearing Panel found that Enforcement failed to prove by a preponderance of the credible evidence that Puma was responsible for effecting the unauthorized purchase.

(c) Customers GS and DMS

The Complaint alleges that on August 18, 1995, Puma purchased 1,370 shares of VMAX and sold 1,200 shares of Weitzer Homebuilders, Inc. for the joint account of GS and DMS without their prior knowledge or consent.⁴¹ GS testified that the transactions were effected while he was traveling in Alaska, and that he is certain that he did not authorize the transactions.⁴²

Puma did not dispute that the trades were unauthorized, and in his dealings with the customers he never attempted to have them accept the trades. Although Puma had previously recommended securities to these customers, he testified he had no contact with them regarding these transactions. Puma stated that he completed the order tickets for the purchase of VMAX and sale of Weitzer Homebuilders based on instructions from Volpe or Fitter.⁴³ The order tickets, which were approved by Volpe, reflect that the transactions were effected under L63.

The Hearing Panel found Puma's testimony that he completed the order tickets at Volpe or Fitter's request to be credible based on the Panel's conclusion that Puma did complete order tickets for the L63 accounts at the instructions of Volpe and Fitter. The Hearing Panel therefore found that Enforcement failed to prove by a preponderance of the

⁴¹ Complaint, ¶ 6.

⁴² Feb 22 Hearing Tr., pp. 329-331.

⁴³ Feb 23 Hearing Tr., pp. 269-270.

credible evidence that Puma was responsible for the unauthorized trades in the account of GS and DMS.⁴⁴

(d) Customer PJN

The Complaint alleges that on July 19, 1995, Puma purchased 2,500 shares of the common stock of GMED for the account of customer PJN without his prior knowledge or consent.⁴⁵ The PJN account was an L63 account. Before July 19, Puma had recommended approximately 11 trades to PJN and, according to PJN, those trades were executed without incident or complaint.⁴⁶ Puma admitted that he recommended various securities to PJN including a previous purchase of 2,500 GMED on June 23, 1995.

Puma testified that on July 19, 1995, Fitter instructed him to complete an order ticket for 2,500 GMED for the PJN account. Knowing that Fitter also spoke to PJN regarding securities, Puma did not consider it unusual to receive an instruction to complete the ticket. Puma said that once he completed the ticket, he handed it to Fitter.⁴⁷ Puma agreed with PJN's testimony and letter outlining the chronology of subsequent events.⁴⁸ According to PJN, when he received a trade confirmation for the July 19 purchase of 2,500 GMED, he called Puma and told him that he did not order the stock. Puma accepted PJN's representation, told PJN that it was a mistake and that he would check into it.⁴⁹ Two days later, Puma told PJN that he was looking into it and would call

⁴⁴ Complaint, ¶ 6.

⁴⁵ Complaint, ¶ 3.

⁴⁶ Feb 22 Hearing Tr., p. 250-256.

⁴⁷ Feb 23 Hearing Tr., pp. 267-268.

⁴⁸ Feb 22 Hearing Tr., pp. 246- 282; CX 3, pp. 2-3.

⁴⁹ CX 3, p. 2.

him back.⁵⁰ Puma then checked with either Fitter or Volpe regarding the trade and was informed that they would handle the matter.⁵¹ Puma called PJN back and left a message on his answering machine assuring the customer that the trade would be straightened out.⁵² Puma never attempted to have PJN accept the trade and never suggested that PJN had authorized the transaction.⁵³

Fitter denied that he instructed Puma to write out an order ticket for PJN's purchase of 2,500 GMED on July 19, 1995.⁵⁴ He also claimed that Puma never told him of a problem with the PJN account.⁵⁵

Puma's testimony that he completed the order ticket at Fitter's direction is consistent with other evidence, and the Hearing Panel did not find Fitter's denial to be more credible than Puma's testimony. The Hearing Panel therefore found that Enforcement failed to prove by a preponderance of credible evidence that Puma, rather than Fitter, was responsible for the unauthorized trade in PJN's account.

(2) Transactions that Puma Claims were Authorized by the Customers

(a) Customers RR and MR

The Complaint alleges that on August 11, 1995, Puma purchased 1,000 VMAX units for the joint account of RR and MR without their prior knowledge or consent.⁵⁶ The evidence showed that there were two 1,000 unit purchase orders for VMAX entered for

⁵⁰ CX 3, p. 2.

⁵¹ Feb 23 Hearing Tr., p. 268; RX 11b.

⁵² CX 3, p. 3.

⁵³ Feb 22 Hearing Tr., p. 266.

⁵⁴ Feb 21 Hearing Tr., p. 57.

⁵⁵ Feb 21 Hearing Tr., p. 56.

the RR and MR joint account, and that the trades were effected on August 10, not August 11, 1995, as alleged in the Complaint.

The Hearing Panel found that the discrepancy as to the date of the transactions was immaterial since both parties' evidence was that the transaction was effected on August 10, 1995 and Puma did not claim or show that he suffered any prejudice as a result of the discrepancy. The Hearing Panel also found that the second purchase of 1,000 VMAX units was an erroneous duplicate, not caused by Puma, that the firm promptly canceled.⁵⁷ Thus, the issue was whether Puma effected a single unauthorized 1,000 VMAX unit trade in the account on August 10.

RR was an experienced investor, who has had many brokerage accounts and has been investing in securities for more than 40 years.⁵⁸ RR opened an account at Josephthal after being cold called by Puma.⁵⁹ RR initially purchased Infrasonics, based on Puma's recommendation. When Puma later contacted RR regarding the VMAX IPO, RR informed him that he was not interested in an IPO.⁶⁰ RR told Puma, however, that he would consider a purchase if he could sell it on the first day.⁶¹ At the hearing, RR stressed that he never authorized Puma to purchase VMAX or even enter an indication of

⁵⁶ Complaint, ¶ 7.

⁵⁷ RX 12h.

⁵⁸ Feb 22 Hearing Tr., p. 212.

⁵⁹ Id.

⁶⁰ Feb 22 Hearing Tr., p. 214.

⁶¹ CX 5, p. 2.

interest on his behalf.⁶² According to RR, Puma said he would call RR back when the security was priced to see if he was interested, but Puma never called.⁶³

When RR received a confirmation for the VMAX purchase, he called Puma to find out why he had received a confirmation for a purchase that he had not authorized.⁶⁴ Puma did not claim that RR authorized the purchase, but told RR that he would “take [RR] out with a small profit the same day [he] called.”⁶⁵ Puma suggested that RR pay part of the cost of the VMAX units by selling his Infrasonics stock and the balance by check.⁶⁶ RR agreed, in order to resolve the matter without canceling the transaction, and sent the check as discussed.⁶⁷

When RR received a confirmation for the purchase of the second 1,000 VMAX units, he called Puma, who told him (correctly) that the confirmation was a mistake. Puma also assured him that his original VMAX stock had been sold “at a small profit.”⁶⁸ RR subsequently received a cancel confirmation for the second purchase of 1,000 VMAX units, but did not receive a confirmation for the sale of the original VMAX units, as he had expected.⁶⁹ After failing to reach Puma by telephone, he spoke with Fitter about the unauthorized transaction and followed the conversation with a complaint letter.

⁶² Feb 22 Hearing Tr., pp. 214, 222-224, 229, 231-233, 235.

⁶³ Id.

⁶⁴ Feb 22 Hearing Tr., p. 215.

⁶⁵ Id.

⁶⁶ Feb 22 Hearing Tr., p. 216.

⁶⁷ Id.

⁶⁸ CX 5, p. 2.

⁶⁹ CX 5, p. 3.

Puma's testimony differed significantly from RR's. Puma testified that he believed after speaking with RR, that he was authorized to purchase 1,000 VMAX units for the account.⁷⁰ According to Puma, when RR received the initial confirmation, he contacted Puma, not to complain about the trade, but simply to find out how much he owed.⁷¹ Puma then worked out the arrangements to sell RR's Infrasonics and obtain a check for the balance.

Having had an opportunity to observe the demeanor of both RR and Puma, the Hearing Panel found RR's testimony more credible than Puma's, and concluded he did not authorize Puma to purchase the VMAX IPO for his account. The Hearing Panel also credited RR's testimony that he subsequently ratified the purchase based on Puma's promise that the VMAX would immediately be sold at a small profit.

The Hearing Panel did not credit Puma's testimony that RR authorized the purchase and called, after he received the confirmation, merely in order to learn how much he owed for the purchase. As an experienced investor, RR was familiar with the process of paying for purchases based on the amounts stated in the confirmations he received. The Hearing Panel finds it more probable that, as RR testified, he called Puma to complain that the transaction was unauthorized.

The fact that RR ratified the purchase does not absolve Puma of responsibility for having effected an unauthorized trade. The SEC has held that a registered representative's unauthorized trading violates the standards in Rule 2110 even if the customer never complains or repudiates the trade, noting that "we have repeatedly held

⁷⁰ Feb 23 Hearing Tr., p. 291.

⁷¹ RX 12b.

that ratification of a transaction after the fact does not mean trades were properly authorized.”⁷²

Therefore, the Hearing Panel found that Enforcement proved by a preponderance of the credible evidence that Puma effected an unauthorized purchase of 1,000 VMAX units in the joint account of RR and MR on August 10, 1995, in violation of NASD Rule 2110.

(b) Customer JJ

The Complaint alleges that on August 4, 1995, Puma purchased 3,500 warrants of Biotechnology General Corp. and sold 800 shares of Infrasonics, Inc. for the JJ account without the customer’s prior knowledge or consent.⁷³ In support of this allegation, Enforcement offered a complaint letter by JJ dated September 8, 1995, and a declaration by JJ dated June 18, 1996. In both the declaration and the complaint letter, JJ asserted that the trades alleged in the Complaint were effected in his account without his authorization while Puma was his broker.⁷⁴ JJ did not testify at the hearing. According to NASDR examiner Joseph Donia, the NASDR staff left a telephone message for JJ and sent him a letter requesting that he participate in the hearing, but JJ failed to respond.⁷⁵

Puma admitted that he was responsible for the trades, and that he completed the order tickets, but testified that he placed the orders only after speaking to and receiving trading authorization from JJ.⁷⁶

⁷² Justine Susan Fischer, Exchange Act Release No. 40335, 1998 SEC LEXIS 1763, at *16 (August 19, 1998).

⁷³ Complaint, ¶ 8.

⁷⁴ CX 7.

⁷⁵ Feb 23 Hearing Tr., p. 164, 166.

⁷⁶ Feb 23 Hearing Tr., pp. 310 - 312.

JJ was under no obligation to testify at the hearing, but because he did not do so, his five-year-old uncorroborated and untested written statements were the only evidence supporting Enforcement's allegations. In contrast, the Hearing Panel had an opportunity to observe Puma as he responded to questions posed by the parties and the Panelists. Having heard and observed Puma, and the absence of evidence corroborating JJ's statements, the Hearing Panel found it critically important that it have an opportunity to observe JJ as a witness, and that Respondent and the Panel have an opportunity to question him. Therefore, the Hearing Panel found that Enforcement failed to prove by a preponderance of the credible evidence that Puma effected unauthorized trades in JJ's account.

(c) Customers ER and JR

The Complaint alleges that on August 31, 1995, Puma purchased 2,000 shares of GMED for the joint account of ER and JR without their knowledge or consent.⁷⁷ The allegation stems initially from a two-line letter from ER and JR to Josephthal's Compliance Department, in which they stated that the purchase of the 2,000 shares of GMED was unauthorized. The customers also executed a declaration on June 6, 1996, in which they again summarily stated that the transactions were executed without their consent while Puma was their account executive.⁷⁸ Neither ER nor JR testified at the hearing. Donia testified that he left a telephone message and sent a letter seeking their testimony, but they failed to respond.

⁷⁷ Complaint, ¶ 9.

⁷⁸ CX 8, p. 1.

Puma testified that he solicited ER to purchase GMED based on a buy recommendation issued by Josephthal.⁷⁹ Puma further reaffirmed a letter he sent to Josephthal in September 1995 in which he stated that the “trade was most certainly authorized by the customer,” and that he knew “of no reason payment should not have been received.”⁸⁰

As with JJ, the Hearing Panel found that, in light of Puma’s in-person testimony denying that the trade was unauthorized and the absence of any evidence corroborating the customers’ brief statements, it was essential for the Hearing Panel to have an opportunity to observe the customers and for the parties and the Panel to have an opportunity to question them. In the absence of such in-person testimony from the customers, the Hearing Panel found that their written statements were insufficient to prove by a preponderance of the credible evidence that Puma effected the trade in question without authorization.

(d) Customers MHS and DS

The Complaint alleges that on August 31, 1995, Puma purchased 2,000 shares of GMED for the joint account of MHS and DS without their prior knowledge or consent.⁸¹ In support of the allegations, Enforcement presented a complaint letter dated September 10, 1995 and a declaration dated June 30, 1996 signed by the customers.⁸² The letter and declaration stated in substance that the 2,000 share purchase of GMED was executed without their authority or consent while Puma was their account executive. MHS and DS

⁷⁹ Feb 23 Hearing Tr., p. 297; RX 13b.

⁸⁰ CX 13b.

⁸¹ Complaint, ¶ 10.

⁸² CX 9, pp. 1-2.

failed to testify at the hearing. Donia testified that he left a telephone message asking them to contact him if they wished to cooperate in the proceeding, but they never responded.⁸³

Puma acknowledged that he solicited MHS to purchase the stock, completed the order ticket, and placed the order for the transaction. He claimed, however, that MHS agreed to the purchase. As with customers ER and JR, Puma left Josephthal before the settlement date for this trade and was not at the firm to attempt to resolve any dispute with the customers.

Once again, in light of Puma's in-person testimony and the absence of any evidence to corroborate the customers' statements, the Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that Puma effected the trade without authorization.

III. Sanctions

The Hearing Panel found the evidence sufficient to prove only that Puma effected a single unauthorized transaction in the joint account of ER and RR, in violation of NASD Rule 2110. For unauthorized trading, the NASD's Sanction Guidelines recommend that the adjudicators impose a fine of \$5,000 to \$75,000 and a suspension for a period of 10 business days to one year, except in egregious cases, where the adjudicators should consider a suspension of up to two years or a bar.⁸⁴

According to the Guidelines, there are three categories of egregious cases: (1) quantitatively egregious unauthorized trading; (2) unauthorized trading accompanied by certain aggravating factors; and (3) qualitatively egregious unauthorized trading, as

⁸³ Feb 23 Hearing Tr., p. 172.

⁸⁴ NASD Sanction Guidelines, p. 102 (2001 ed.).

determined by the strength of evidence that the trades were unauthorized and the respondent's motives in effecting the trade.

Since the Hearing Panel found that Puma effected a single unauthorized transaction in a single customer account, his violation was plainly not quantitatively egregious. And the evidence did not establish that the single unauthorized transaction was accompanied by any of the aggravating factors identified in the Guidelines – efforts to conceal the unauthorized trade; attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct – or any other aggravating circumstance.

Finally, the evidence also failed to establish that the unauthorized trade was qualitatively egregious. The evidence against Puma was not particularly strong. The Hearing Panel, having observed the witnesses, found that RR's testimony that he did not authorize the trade was more persuasive than Puma's testimony that RR did authorize it; there was no independent evidence to corroborate RR's testimony. And the evidence did not clearly establish that Puma acted in bad faith; he may have misunderstood RR's wishes in light of the telephone conversation that both RR and Puma testified occurred before Puma placed the purchase order.

The Hearing Panel therefore concluded that Puma should be sanctioned for a single, non-egregious unauthorized transaction, and that for such a violation the sanctions should be at the low end of the ranges recommended in the Guidelines. Taking into consideration all the unique circumstances of this case, the Hearing Panel determined that Puma should be both fined \$10,000 and suspended in all capacities for 10 business days.

IV. Conclusion

Respondent Vincent J. Puma violated NASD Conduct Rule 2110 by effecting an unauthorized transaction in a customer account. Respondent is fined \$10,000 and suspended from association with any member firm in any capacity for 10 business days. In addition, Respondent shall pay costs in the amount of \$6,436.00, consisting of a \$750.00 administrative fee and \$5,686.00 for the cost of the Hearing transcript. These sanctions shall become effective on a date set by the Association, but not earlier than 30 days after this decision becomes the final disciplinary action of the Association, except that if this decision becomes the final disciplinary action of the Association, the suspension shall become effective with the opening of business on December 17, 2001, and end at the close of business on December 31, 2001.⁸⁵

HEARING PANEL

by: _____
David M. FitzGerald
Hearing Officer

Copies to:

Via Overnight Courier and First Class Mail

Vincent J. Puma
Steven Altman, Esq.

Via First Class Mail and Electronic Transmission

William M. Harter, Esq.
Jeffrey K. Stith, Esq.
Rory C. Flynn, Esq.

⁸⁵ The Hearing Panel 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.