NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C9B000015
v.	:	
	:	**Hearing Panel Decision**
MICHAEL DABNEY (CRD #500768) Plainsboro, New Jersey	:	Hearing Officer - SW
	:	Dated: September 10, 2001
Respondent.	:	

Respondent violated Rules 2110 and 8210 by failing to appear timely for an on-the-record interview requested by the NASDR staff. For the failure to timely appear, Respondent was suspended for 180 days. Enforcement failed to prove by a preponderance of the evidence that Respondent made certain misrepresentations and omissions, converted $10,000 from customer LA, or forged a document to conceal the conversion.

Appearances

Michael J. Newman, Regional Counsel, Woodbridge, NJ, for the Department of Enforcement.

Michael Dabney *pro se*.

DECISION

I. Introduction

A. Complaint and Answer

The NASD Regulation, Inc., Department of Enforcement ("Enforcement") filed the Complaint on June 1, 2000, alleging that: (1) Respondent Dabney solicited $10,000 from customer LA, in the form of three checks, to invest in the initial public offering of

United Heritage Bank, but converted the funds to his own personal use, in violation of NASD Conduct Rules 2330(a) and 2110; (2) Respondent forged the signature of New Millennium Bank's Chairman on a subscription agreement to evidence LA's purported alternate purchase of New Millennium Bank stock, in order to conceal his conversion of LA's $10,000, in violation of Rule 2110; (3) Respondent made certain misrepresentations and omissions, in connection with his solicitation of LA's investment in United Heritage Bank, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Conduct Rules 2110 and 2120; and (4) Respondent failed to appear for an on-the-record interview requested pursuant to Rule 8210 in violation of Rules 2110 and 8210.

Respondent denied counts one, two, and three, asserting that he did not solicit an investment from LA, but rather LA gave him the money to fund a joint gambling venture. With respect to count four, Respondent admitted that he did not appear for the on-the-record interview, but stated that he called the NASD to reschedule the April 2000 interview and did not become aware of the time of the rescheduled interview until after the fact. Respondent admitted that he failed to follow-up with the NASD after he missed the rescheduled interview. Respondent subsequently appeared for an on-the-record interview with the NASD on September 12, 2000, after Enforcement filed the Complaint.

B. The Hearing

The Parties presented evidence to a Hearing Panel on November 16, 2000, in Woodbridge, New Jersey.[1] The Hearing Panel consisted of two current members of

[1] References to the testimony set forth in the transcript of the November 16, 2000 Hearing will be designated as "Tr." References to exhibits presented by Respondent will be designated as "RX-," and references to exhibits presented by Enforcement will be designated as "CX-."

District Committee 9 and the Hearing Officer.[2] Enforcement presented exhibits labeled CX-1-16, and 18, and four witnesses: customer LA[3]; BS, a friend and co-worker of LA; MS, Chairman of New Millennium Bank; and an NASD Staff Supervisor for the Special Investigations Unit for District 9. Respondent testified on his own behalf and presented one witness, an NASD examiner, and one exhibit, labeled RX-2.[4] Subsequently, on December 4, 2000, Respondent submitted one additional exhibit, labeled RX-3, and Enforcement submitted two additional exhibits, labeled CX-19 and CX-20, on February 21, 2001 and March 7, 2001, respectively. Enforcement and Respondent submitted post-hearing briefs on July 25, 2001 and August 14, 2001, respectively.

II. Discussion

A. Jurisdiction

Article V, Section 4 of the NASD's By-Laws creates a two-year period of retained jurisdiction over former registered persons, covering conduct that occurred prior to termination of a respondent's registration and failures to provide information requested, pursuant to Rule 8210, during the period of retained jurisdiction. Respondent was registered as an investment company and variable contract products representative with NASD member firm 1717 Capital Management ("1717 Capital") from August 1996 through June 5, 1998.[5] Enforcement filed the Complaint on June 1, 2000, within two

[2] This Hearing Panel decision is a decision of the majority of the three panelists; however, the dissenting panelist has determined not to file a dissenting opinion.

[3] An East Orange New Jersey obituary reported that LA died on April 22, 2001.

[4] The designation of RX-1 was reserved for a copy of a money order that Respondent failed to submit.

[5] Respondent admitted the allegations in paragraph 1 of the Complaint that he was registered with 1717 Capital until voluntarily terminating his association on June 5, 1998.

years of that date, and the Complaint alleged misconduct while Respondent was registered with 1717 Capital and a failure to respond to requests for an on-the-record interview issued during the period of retained jurisdiction. The NASD thus has jurisdiction over this proceeding.

B. Background

Respondent was introduced to customer LA, an assistant elementary school principal, in 1996.[6] (Tr. pp. 25-26, 28, 139). LA purchased four Life USA annuities through Respondent. (Tr. p. 25). Eventually, Respondent and LA formed a close personal relationship. (Tr. pp. 27-28, 139). Respondent visited LA's home on a number of occasions, and LA and Respondent attended a number of basketball games together. (Tr. pp. 27, 139).

Beginning in late 1997, LA gave Respondent three checks, payable to Respondent, totaling $10,000. (CX-3; CX-4; CX-5). LA gave Respondent the first check in the amount of $2,000 on December 30, 1997, and Respondent cashed it immediately. (CX-3). On the memo line of the December 1997 check, there is a notation, "Leslie Ave. (BK)."[7] (CX-3).

LA gave Respondent the second check in the amount of $3,000 on September 29, 1998, and Respondent deposited it into a custodial account that he controlled. (CX-4; CX-14). On the memo line of the September 1998 check, there is the notation "Bk for Bk." (CX-4). After Respondent deposited the $3,000 September 1998 check into his account, he had a balance of $3,027.85. (CX-14, p. 8). During the period from September

[6] LA was employed in the education system for 36 years. (Tr. p. 25).

[7] Leslie Avenue is the location of a four-unit rental property that LA owns. (Tr. p. 35).

29, 1998 to October 14, 1998, Respondent made eight withdrawals, totaling $2,940, from the account. (Id.). Some of the withdrawals were for personal expenses. (Tr. pp. 164-165, 186). On October 14, 1998, Respondent's account had a balance of $103.31.[8] (CX-14, p. 8).

LA gave Respondent the third check in the amount of $5,000 on February 3, 1999, and Respondent also deposited it into his account. (CX-5; CX-14). On the memo line of the February 1999 check, there is the notation "United Heritage Bank." (CX-5). After Respondent deposited the $5,000 February 1999 check into his account on February 4, 1999, he had a balance of $5,010.24. (CX-14, p. 2). During the period from February 4, 1999 to March 31, 1999, Respondent made withdrawals totaling $6,435, and four deposits totaling $1,443.36. (CX-14, pp. 2-4). Respondent admitted some of the withdrawals were for personal expenses. (Tr. p. 186). On March 31, 1999, Respondent's balance in the account was $21.95. (CX-14, p. 4).

There is no dispute that LA gave Respondent three checks, which Respondent endorsed, and cashed or deposited. What is disputed is whether LA gave Respondent the three checks to invest in securities.

C. Conversion of LA's Funds Not Proven

Enforcement had the burden of proving by a preponderance of the evidence that Respondent converted the funds of LA. Neither LA nor Respondent offered a credible explanation for the issuance of the three checks payable to Respondent over the thirteen-month period. Consequently, the Hearing Panel concludes that Enforcement failed to

[8] During this same period, Respondent made no other deposits into the account. (CX-14, p. 8).

prove by a preponderance of the evidence that LA gave Respondent $10,000 to invest and Respondent converted the $10,000.

1. Customer LA's Explanation

At the Hearing, LA testified that, in 1997, Respondent told him of an opportunity to purchase shares of stock of United Heritage Bank.[9] (Tr. p. 29). LA testified that, at the time of the solicitation, Respondent stated that he had an "inside track" at United Heritage Bank because the owners, like him, were Rutgers University graduates. (Tr. pp. 29-30). LA testified that it was his understanding that "if you didn't have the inside track, you could not get any shares" of the United Heritage Bank offering. (Id.). According to LA, the shares were initially to be purchased in Respondent's name. (Id.). LA testified that Respondent told him that within "a period of about six months the shares would be turned into [LA's] name." (Id.). The shares of United Heritage Bank were to be purchased over a period of time as they became available. (Tr. p. 32). LA testified that he questioned Respondent "very thoroughly" about the investment. (Tr. p. 30).

In December 1997, LA gave Respondent a check for $2,000; subsequently, approximately eight months later, in September 1998, LA gave Respondent a second check for $3,000; and finally, an additional five months later, in February 1999, LA gave Respondent a check for $5,000. (CX-3; CX-4; CX-5; Tr. pp. 30-31). When LA gave Respondent the checks, he did not obtain a receipt or any other document evidencing his investment.[10] (Tr. p. 79).

[9] Respondent was not licensed to sell common stock and would have had no financial incentive to recommend bank shares to LA. (Tr. p. 168-169).

[10] In 30 years of investing, LA admitted that this was the first time that he ever wrote a check for an investment to an individual. (Tr. p. 59).

LA testified that, in 1999, he repeatedly pressed Respondent for evidence of his investment in light of impending Year 2000 concerns. (Tr. p. 34). LA testified that he wanted stock certificates for his shares of the United Heritage Bank stock. [11] (Id.). LA said that, in response to his continuing requests for documentation of the investment, Respondent provided him with a subscription agreement for New Millennium Bank in May 1999. (CX-6).

According to LA, Respondent explained, in May 1999, that instead of investing in United Heritage Bank, located in Edison, New Jersey, he had invested in New Millennium Bank, located in New Brunswick, New Jersey. (Tr. p. 38). Respondent admitted giving LA a copy of the New Millennium Bank offering circular dated February 1, 1999.[12] (CX-7, pp. 1-19; Tr. p. 170). LA testified that, in May 1999 at his home, Respondent assisted him in completing the New Millennium Bank subscription agreement and took the agreement saying he was going to "take that form and transform it into a certificate."[13] (Tr. p. 39). The subscription agreement listed LA as the name for the stock registration. (CX-6, p. 2). LA also received copies of the updates to the New Millennium Bank Offering circular, which extended the offering period from March 30, 1999 to April 30, 1999, and then to June 14, 1999. (CX-7, pp. 20-22).

LA testified that subsequently, in August 1999, the same subscription agreement was returned in the mail to him with the purported signature of the Chairman of New

[11] LA admitted that most of his investments were in street names and he did not normally hold actual stock certificates. (Tr. pp. 75-76).

[12] The New Millennium Bank initial public offering began on February 1, 1999. (CX-6).

[13] The subscription agreement dated May 27, 1999 indicated that a check for $10,000 payable to New Millennium Bank Escrow Account was enclosed. (CX-6, pp. 1-2).

Millennium Bank, accepting the subscription as of July 27, 1999. (CX-6, pp. 2, 3; Tr. p. 42). The envelope in which the subscription agreement was returned had a canceled postage mark and indicated a printed return address of New Millennium Bank, Fifty Seven Livingston Avenue, Post Office Box 678, New Brunswick, NJ 08903.[14] (CX-6, p. 3).

LA stated that when he received the subscription agreement rather than a stock certificate, he realized something was wrong. (Tr. p. 43). LA called New Millennium Bank in August 1999 and discovered that, according to the bank's records, neither he nor Respondent owned shares of New Millennium Bank. (Tr. pp. 47-48, 97).

Although LA's demeanor projected sincerity, the Hearing Panel found LA's testimony less than credible for several reasons. First, the Hearing Panel finds it difficult to believe that an investor with more than 30 years of investment experience would give three checks payable to Respondent for an investment in bank stock without receiving some documentation for the investment for more than a year.[15] In addition, LA had no coherent explanation for his acceptance of the substitute investment in New Millennium Bank.[16] (Tr. pp. 40-41).

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[14] This was the correct address of New Millennium Bank. (CX-7, p. 20).

[15] LA had invested in the market since 1961 and described himself as an experienced investor. (Tr. pp. 58-59). LA testified that he had an investment portfolio in excess of $100,000. (Tr. pp. 53-54). BS, a teacher who has known LA all of his life, testified that he spoke with LA daily to get advice and discuss investments. (Tr. p. 210).

[16] **Question.** "Did you question Mr. Dabney why the investment had changed from United Heritage Bank to New Millennium Bank?"
Answer. "Yes, I did."
Question. "What did he explain?"
Answer. "Answer that he gave me, because of the people who were -- who were -- who he was working with made the suggestion, thought this would be the best way to -- the people he were alluding to at that time that he told me was Hirschfield Associates, who he was dealing with." (Tr. p. 40).

Second, there were significant disparities between LA's testimony and his prior written recitations of the events. On February 19, 2000, LA wrote a letter to Respondent indicating that he had invested $10,000 with Respondent and wanted an explanation of who had the $10,000. (CX-16, pp. 1, 5-6). LA did not mention United Heritage Bank in the letter. (CX-16, pp. 4-6). Instead, he stated in the letter that he had checked with New Millennium Bank and found that it had no record of a purchase of stock by Respondent. (CX-16, pp. 5). The Hearing Panel inferred from this information that LA wanted to give the impression that he expected New Millennium Bank to have a record that Respondent had purchased stock, although the subscription agreement that LA completed for New Millennium Bank listed LA, rather than Respondent, as the purchaser of the shares. (CX-16, p. 5).

Subsequently, LA wrote a customer complaint letter, dated April 3, 2000, which he sent to the NASD. (CX-16, p. 8-10). The customer complaint letter accused Respondent of embezzlement and fraud, indicating that Respondent had solicited LA to invest in New Millennium Bank. (Id.). The complaint letter said nothing about United Heritage Bank. (Id.). In the letter, LA indicated that he wrote Respondent the three checks after he completed the subscription form for New Millennium Bank. (CX-16, pp. 9-10). LA also stated that he wrote the checks over a period of seven months rather than thirteen months. (CX-16, p. 9).

Third, there were discrepancies in LA's testimony. LA initially testified that Respondent gave him a United Heritage Bank offering circular at the time in December 1997 when he gave Respondent the $2,000 to invest. (Tr. 33). Subsequently, LA testified that Respondent gave him the offering circular after he had given Respondent the $2,000

check. (Tr. p. 84). In any event, prior to giving Respondent the second and third checks for the purchase of United Heritage Bank stock, LA had the offering circular. (CX-2; Tr. p. 84). The United Heritage Bank offering circular clearly indicated on the front page that the offering of stock was to expire on April 1, 1997 and the minimum purchase in the offering was 250 shares at $10 a share or $2,500, rather than $2,000, the amount of the first check. (CX-2, pp. 1, 8). In light of this information, the Hearing Panel finds that LA's testimony regarding Respondent's solicitation of an investment in United Heritage Bank was not credible.

Respondent also failed to note on two of the checks the alleged investment in United Heritage Bank. When asked why he wrote "Bk for Bk" on the memo line of the September 1998 check, LA speculated that he may have written it because they were talking about two banks and he "didn't know which one it was for."[17] (Tr. p. 81). However, LA testified that, at the time the September 1998 check was written, he didn't know the investment had changed. (Tr. p. 38). LA said he first learned that the investment had changed when Respondent presented him with the New Millennium subscription agreement in May 1999. (Tr. p. 39).

When asked why "Leslie Avenue" was written on the memo line of the December 1997 check, LA claimed that when he wrote the check he left the memo line blank, at the request of Respondent. (Tr. p. 37). However, LA explained that, in preparing his 1997 taxes, he wrote "Leslie Avenue" on the December 1997 check by mistake. (Tr. p. 35). In contrast, Respondent testified that LA wrote "Leslie Avenue" on the check when he gave

[17] In contrast to LA, Respondent testified that the notation "Bk for Bk" was shorthand for the name of the account in Antigua through which their gambling venture was funded. (Tr. p. 63).

it to Respondent in December 1997, explaining that he would claim the money as a tax write-off by saying Respondent was a contractor doing work on the property. (Tr. p. 61).

If LA's testimony were truthful, the microfiche copy of the check made by LA's bank when it was cashed would not show "Leslie Avenue" on the memo line; if Respondent were telling the truth, "Leslie Avenue" would appear on the microfiche copy. However, LA's putative efforts to provide a microfiche copy of the check failed, even though the Hearing Officer left the record of the Hearing open for more than four months, to give LA an opportunity to obtain a microfiche copy of the December 1997 check.[18]

Finally, Enforcement presented the testimony of a supposedly "corroborating witness," which raised a concern that LA was attempting to buttress his explanation after the fact. BS, a friend and co-worker of LA, testified that LA told him, in the fall of 1999, that LA was investing $10,000 in United Heritage Bank.[19] (Tr. pp. 203, 205, 207). BS said that LA told him that it was a pre-IPO opportunity to buy shares in a bank that was newly opening in central New Jersey. (Tr. p. 204). BS testified that LA explained to him that Respondent had some connections with the officers or the founders of the bank and that Respondent had access to shares that other people did not. (Tr. pp. 211-212). In response to repeated questions concerning the timing of the conversation, BS reiterated it was "the fall of 1999, not two years ago, the fall of 1999." (Tr. p. 215).

LA testified that prior to the fall of 1999, i.e., by August 1999, he knew the investment had been changed to New Millennium Bank and, in fact, realized there was a problem with the investment and had already called New Millennium Bank. (Tr. p. 47).

[18] LA did provide microfiche copies of the September 1998 and February 1999 checks. (CX-19).

[19] The Hearing Panel noted that by the fall of 1999, the United Heritage Bank offering was closed.

2. Respondent's Explanation

Respondent admitted that he and LA developed a personal relationship. (Tr. p. 139). Respondent admitted that he received three checks from LA. (Tr. p. 197). Respondent admitted that he provided information to LA concerning a number of initial public offerings for banks located in New Jersey, including United Heritage Bank and New Millennium Bank.[20] (Tr. pp. 169-171). However, Respondent denied ever soliciting LA for an investment in banks. (Tr. pp. 169-170).

Respondent claimed that the checks were written by LA to fund his portion of their gambling partnership.[21] (Tr. p. 161). Respondent, a former Rutgers University college basketball player, developed a system of betting on teams that played four or five away games in six or seven nights. (Tr. pp. 70-71). Respondent would bet against the teams at the end of their road trips, when the players were tired and in all likelihood "wouldn't cover" the spread. (Tr. pp. 70-71). Respondent said he placed the bets offshore in Antigua, and transferred funds to Antigua through the use of Western Union money grams.[22] (CX-14, pp. 12-13; CX-15, p. 8). Respondent testified that LA, rather than opening his own account with the offshore bookie, agreed to fund his bets through Respondent's account. (Tr. p. 188). According to Respondent, LA did not want people to know he was gambling. (Tr. p. 193). LA wanted to be discrete because he was concerned

[20] According to a newspaper article, seven banks were expected to open in New Jersey in 1997. (CX-2, p. 14).

[21] LA denied that Respondent ever mentioned gambling to him. (Tr. pp. 54, 60). LA denied ever discussing basketball gambling with anyone in his life. (Tr. p. 63).

[22] Respondent provided four copies of Western Union money grams evidencing transfers of funds to Antigua on October 2, 1998, and February 5, 16, and 20, 1999. (Tr. p. 153; CX-14, pp. 12-13).

about his reputation in the school district. (Id.). Respondent testified that LA and he designated funds to be wired to Antigua as "Bk for Bk." (Tr. p. 63).

Respondent testified that LA complained to the SEC and the NASD because of a disputed bet. (Tr. pp. 20-22). Respondent testified that LA was under the impression that they had won $24,000 on what is known as a four-team parlay. (Tr. p. 143). Respondent made a bet that required all four teams to win. (Id.). Respondent told LA which four teams they would be betting on before he placed the bet. (Id.). After he spoke with LA, a star player on one of the four teams was injured, so that particular team was taken off the board and Respondent substituted another team that he thought would cover the spread.[23] (Tr. p. 21). The team Respondent substituted did not cover the spread, although the other three teams did cover their spreads. (Id.). In addition, the team that Respondent had replaced covered its spread. (Id.).

Respondent stated that he did not have an opportunity to call LA and tell him that he had substituted a team, and they had not won. (Tr. pp. 21, 143). According to the teams that LA had written down, they had won $24,000. (Tr. p. 20-21). When Respondent tried to explain to LA that he had to substitute a team, LA said, "You're a liar, you cheated me out of my money, it's $24,000." (Tr. p. 143).

Respondent's demeanor projected sincerity. His testimony during the hearing was consistent with the explanation he provided at his September 2000 on-the-record interview. (CX-15; CX-18). However, Respondent could not remember the names of the

[23] According to Respondent, one is precluded from betting on a team if one of the main players of the team is not participating in the game. (Tr. p. 143).

four teams in the four-team parlay; nor could he remember the name of the injured player that resulted in the bet being changed. (Tr. p. 182).

Furthermore, Respondent offered no documentary evidence to support his claim that LA was involved in gambling with him. Although Respondent testified that, at least on one occasion, he had written a money order to LA for $1,900 as his share of their gambling winnings, he was unable to produce the money order, even though the Hearing Panel gave him additional time to locate it. (Tr. p. 192).

Finally, Respondent had no explanation for the letter that LA sent him on February 16, 2000, or why he failed to respond to the letter. (CX-15, pp. 6-7; Tr. p. 184). Respondent testified, "I didn't understand it, and I came to the conclusion it seemed like I was trying to be set up for something. I didn't understand why he would try to correlate the information he got on the banks to our gambling." (Tr. p. 184).

On balance, the Hearing Panel concludes that both Respondent and customer LA were less than candid regarding the circumstances surrounding the issuance of the checks. The Hearing Panel believes that neither party wanted to provide the true explanation for the issuance of the checks.

3. Conversion or Misappropriation of Customer's Funds

Rule 2330(a) provides that no member or person associated with a member shall make improper use of a customer's securities or funds. Improper use of a customer's funds occurs when the funds are not used as intended by the customer.[24] Improper use of a customer's funds rises to the level of conversion when a registered representative uses

[24] In re Bernard D. Gorniak, Exchange Act Rel. No. 35996, 1995 SEC LEXIS 1820 (1995).

the proceeds from a check payable to a customer for his own use and benefit, without authorization, and fails to repay the customer.[25]

The Hearing Panel noted that the documentary evidence in this case was very limited. The primary evidence that Respondent solicited LA's investment was LA's testimony. The notations on the first and second checks were not inconsistent with Respondent's testimony that they had been given for the purpose of gambling.

Although the third check had the notation "United Heritage Bank," which supported LA's explanation that it was given for an investment in the United Heritage Bank offering, the Hearing Panel noted that the United Heritage Bank offering closed on April 27, 1997 almost two years prior to the time that LA wrote the third check. LA did not address this inconsistency in his testimony.

Finding that neither LA nor Respondent was being entirely honest with the Hearing Panel, the Hearing Panel concludes that Enforcement failed to establish by a preponderance of the evidence that Respondent converted or misappropriated LA's funds.

D. Forgery Not Proven

The second cause of the Complaint alleged that, in order to conceal his conversion of LA's $10,000, Respondent forged the signature of New Millennium Bank's Chairman on a subscription agreement, in violation of Rule 2110, to convince LA that the funds had been invested in New Millennium Bank stock.

LA testified that after completing the subscription agreement with Respondent in May 1999, Respondent took the form with him and "said he would take that form and

[25] Department of Enforcement v. Robert J. Kendzierski, Complaint No. C9A980021 (NAC, Nov. 12, 1999) at http://www.nasdr.com/pdf-text/nac1199_06.pdf.

transform it into a certificate." (Tr. p. 39). LA testified that he received a copy of the completed New Millennium subscription agreement, in the mail, in August 1999. (Tr. p. 42). The accepted line on the subscription agreement stated that the agreement was accepted "by Board of Directors" dated July 27, 1999, with the purported signature of the New Millennium Bank's Chairman. (CX-6, p. 2). The subscription agreement stated that LA would be purchasing 1,000 shares of New Millennium at $10 per share. (CX-6, p. 1).

LA admitted that he did not have any evidence that Respondent sent him the signed New Millennium Bank subscription form. (Tr. p. 66). Respondent testified that he knew nothing about the completed New Millennium subscription agreement. (Tr. p. 178). Respondent denied that he had sent the forged subscription agreement to LA. (Tr. p. 172). As stated above, the Hearing Panel finds that LA's testimony regarding the transactions is not credible.

Accordingly, the Hearing Panel finds that Enforcement failed to prove by a preponderance of the evidence that Respondent forged the signature of the New Millennium Bank Chairman on the subscription agreement.

E. Misrepresentations and Omissions Not Proven

The third cause of the Complaint alleged that in connection with Respondent's "sale of bank stock to LA", Respondent knowingly or recklessly made the following misrepresentations or omissions: that Respondent had the "inside track" at New Millennium Bank[26]; that Respondent had access to the bank stock because he was a graduate of Rutgers University; and that the bank shares were subject to a restriction

[26] The Hearing Panel noted that LA testified that the misrepresentations were made in the discussions concerning United Heritage Bank.

period of approximately six months. These misrepresentations were alleged to constitute violations of Section 10(b) of the Exchange Act[27], SEC Rule 10b-5, thereunder, and NASD Conduct Rules 2120[28] and 2110.

Section 10(b) of the Exchange Act, SEC Rule 10b-5, thereunder, and NASD Conduct Rule 2120 are anti-fraud provisions and prohibit the making of material misrepresentations and omissions in connection with the offering, purchasing, or selling of securities. In general, in order to find a violation of these provisions, there must be a showing that (1) misrepresentations and/or omissions were made in connection with the purchase or sale of securities, (2) the misrepresentations and/or omissions were material, (3) as to Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder, and Conduct Rule 2120, the misrepresentations and/or omissions were made with the requisite state of mind, i.e., scienter, and (4) as to Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder, the transactions involved interstate commerce, i.e., Respondent must have used a means or instrumentality of interstate commerce, such as the telephone, the U.S. Postal Service, or a national securities exchange.[29]

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[27] Section 10(b) of the Exchange Act provides:
"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[28] In re Prime Investors, Inc., Securities Exchange Act Release No. 38,487, 1997 SEC LEXIS 761, at *24 (April 8, 1997). (making material misstatements of fact in connection with a sale of a security is a violation of Conduct Rule 2120).

[29] See SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992), 1992 U.S. Dist. LEXIS 1322 at **148-149 (1992).

As explained above, the Hearing Panel did not find either LA's or Respondent's explanation for the issuance of the checks credible. Having so determined, the Hearing Panel finds that Enforcement failed to prove by a preponderance that Respondent made material misrepresentations in connection with the purchase or sale of securities, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, thereunder, or NASD Conduct Rules 2120 or 2110.

F. Failure to Appear Timely for an On-The-Record Interview Proven

The fourth cause of the Complaint alleged that the NASDR staff sent Respondent requests for an on-the-record interview, pursuant to Rule 8210, concerning the alleged conversion, forgery, and misrepresentation allegations contained in counts one, two, and three. On April 28, 2000, the NASDR staff sent Respondent a letter requesting that he appear for an on-the-record interview on May 8, 2000, in Woodbridge, New Jersey. (CX-8, pp. 1-2). The request was sent to Respondent at his CRD address, via first class mail and Airborne Express, and at the alternate P.O. Box address obtained for Respondent from LA, via first class and certified mail. (CX-8, p. 1; Tr. p. 112). The U.S. Postal Service returned an illegible signed receipt for the certified mailing sent to the P.O. Box address, reflecting delivery of the mailing on May 1, 2000. (CX-9).

In a May 1, 2000 letter mailed to Respondent at his CRD address, the P.O. Box address and three additional alternate addresses, the NASDR staff reiterated the request that Respondent appear for an on-the-record interview on May 8, 2000, in Woodbridge, New Jersey. (CX-10, pp. 1-2).

On May 4, 2000, Respondent left a message with the NASDR staff indicating that he was in California and would not return until the second week of June. (Tr. pp. 114,

117). In a subsequent conversation on the same day, the NASDR staff spoke with Respondent and indicated that they would try to make arrangements to reschedule the interview, but reiterated Respondent's obligation to appear for the New Jersey interview if alternate arrangements could not be made. (Tr. pp. 117, 129-130).

On May 5, 2000, the NASDR staff left a message on Respondent's cell phone voice mail and sent Respondent a letter at his CRD address, P.O. Box address and three additional alternate addresses, indicating that arrangements had been made for an on-the-record interview on May 9, 2000, in Los Angeles, California. (CX-11; Tr. p. 119). Respondent did not appear for the interview. (Tr. p. 122).

Procedural Rule 8210(a)(1) gives the NASD the authority to require persons associated with a member to report "orally or in writing with regard to any matter" under investigation. The obligation to answer such requests continues for two years from the termination of a representative's registration. This Rule provides a means for the Association to carry out its regulatory functions in the absence of subpoena power. It is a "key element in the NASD's efforts to police its members"; failure to respond subverts the Association's ability to perform its regulatory responsibilities.[30]

Respondent admitted that he was aware of the original request to appear for an on-the-record interview. (Tr. p. 146). Respondent testified that it was his understanding that because he was in California other arrangements would be made, but he said he did not learn that NASDR staff had arranged the May 9 interview in Los Angeles until after that date. (Id.). He, however, admitted that he did not follow-up with the NASDR staff when he checked his messages and realized that he had missed the interview. (Id.).

[30] Richard J. Rouse, 51 S.E.C. 581 (1993); John J. Malach, 51 S.E.C. 618 (1998).

Subsequently, Respondent appeared for an on-the-record interview on September 12, 2000. By not appearing until September 2000 for an interview originally requested in April 2000, Respondent failed to appear timely for an on-the-record interview and, thereby, violated Procedural Rule 8210 and Conduct Rule 2110.

III. Sanction

For failing to appear for an on-the-record interview, Enforcement recommended that Respondent be barred from associating with any member firm in any capacity. The Hearing Panel noted that Respondent did provide an on-the-record interview on September 12, 2000. When an individual respondent does not respond in a timely manner to a request issued pursuant to Rule 8210, the Guidelines suggest a fine of $2,500 to $25,000 and suspending the individual for up to two years.[31]

The principal considerations listed in the relevant Guideline include the nature of the information requested, the number of requests, and the degree of regulatory pressure required to obtain a response. In this case, there were two requests for an on-the-record interview within a short period of time concerning serious allegations of misconduct by Respondent. Respondent immediately called the NASDR staff when he received the request, and explained that he would be unable to appear in New Jersey on the date listed in the request. Respondent testified that he did not learn of the staff's proposal to take his statement in California until after the date had passed. Respondent was negligent in failing to follow-up, but he subsequently appeared for an on-the-record interview within four months of the original request. After weighing these factors, the Hearing Panel finds that Respondent's misconduct was serious, but not egregious. Consequently, the Hearing

[31] NASD Sanction Guidelines, p. 39 (2001).

Panel suspends Respondent for 180 days from association with any member firm in any capacity.[32]

IV. Order

Respondent Dabney is suspended for 180 days for violating Conduct Rule 2110 and Procedural Rule 8210 by failing to appear timely for an on-the-record interview. In addition, Respondent is ordered to pay the $2,063.50 hearing cost, which includes an administrative fee of $750 and hearing transcript costs of $1,313.50.[33]

If this Decision becomes the final disciplinary action of the Association the 180-day suspension shall become effective with the opening of business on Monday, November 5, 2001 and end on May 6, 2002.[34]

HEARING PANEL

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By: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
September 10, 2001

Copies to:
Michael Dabney (via Airborne Express and first class mail)
Michael J. Newman, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

[32] See NAC Redacted Decision, Complaint No. C8A990071 (April 19, 2001) at http://www.nasdr.com/pdf-text/nac0401_01red.pdf.

[33] Pursuant to NASD Procedural Rule 8320, the Association, after seven days notice in writing, may summarily revoke the registration of a person associated with a member who fails to pay promptly a monetary sanction imposed when such monetary sanction becomes finally due and payable.

[34] 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.