

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

OSCAR MONTENEGRO
(CRD No. 4222514),

21 E. 16 Street
Brooklyn, NY 11226,

1222 Salzedo, #1
Coral Gables, FL 33134,

Respondent.

Disciplinary Proceeding
No. C10040019

Hearing Officer—Andrew H. Perkins

PANEL DECISION

November 16, 2004

Respondent converted funds from two individuals, in violation of NASD Conduct Rule 2110, failed to obtain permission from a registered principal before making website information available to the investing public, in violation of NASD Conduct Rules 2210(b) and 2110, and provided false testimony during an investigative interview, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The Respondent is barred from association with any member firm in any capacity for the conversions and false testimony. He is not further sanctioned for the advertising violation.

Appearances

Adam Lipnick, Regional Counsel, New York, NY (Rory C. Flynn, Chief Litigation Counsel, Washington, D.C., Of Counsel) for the Department of Enforcement.

Oscar Montenegro appeared *pro se*.

DECISION

I. Introduction

On March 16, 2004, the Department of Enforcement (“Enforcement”) filed the Complaint against the Respondent Oscar Montenegro (“Montenegro” or the “Respondent”). The Complaint contains four causes of action. The first and second allege that the Respondent converted \$19,975 from two customers, in violation of NASD Conduct Rule 2110. The third cause of action alleges that the Respondent, while associated and registered with member firm Daylight Online Brokerage, LLC (“Daylight Online”), created and used an Internet website to promote his own direct access trading firm without obtaining permission from Daylight Online, in violation of NASD Conduct Rules 2210(b) and 2110. Finally, the fourth cause of action alleges that the Respondent provided false testimony to NASD during an on-the-record interview, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On April 12, 2004, the Office of Hearing Officers received a copy of Montenegro’s Answer, which he had sent to Enforcement in New York, NY. In his Answer, the Respondent denies the violations in the Complaint and waives his right to a hearing. Consequently, the Hearing Officer directed the parties to file written summaries of their cases for the Hearing Panel’s consideration. On June 11, 2004, Enforcement filed a submission with 29 supporting exhibits, including the affidavit of William Kennedy,¹ a Field Supervisor with NASD’s Department of Market Regulation in New York City, and

¹ Ex. 2.

the affidavit of Warren Hansen,² the former president of Daylight Online. The Respondent filed nothing further.

Based on the evidence submitted by Enforcement, the Hearing Panel finds that the Respondent committed the violations alleged in the Complaint. Further, as discussed below, the Hearing Panel concludes that the Respondent should be barred permanently from the securities industry.

II. Findings of Fact and Conclusions of Law

A. Respondent's Registration

Montenegro was registered as a General Securities Representative with NASD through White Pacific Securities, Inc. (“White Pacific”) from November 22, 2000, until December 4, 2001.³ During the same period, Montenegro also was employed by NobleTrading.com, Inc. (“NobleTrading”),⁴ a “direct access trading firm” that cleared through White Pacific.⁵ In December 2001, Montenegro joined Daylight Online, where he was registered as a General Securities Representative from January 14, 2002, until May 23, 2002.⁶ Since his termination from Daylight Online, Montenegro has not been registered with NASD or associated with any NASD member firm.⁷

² Ex. 3.

³ Ex. 1, at 2.

⁴ NobleTrading.com, Inc. is incorrectly referred to at various places in the record as Noble Trading, Inc.

⁵ Ans. ¶ 1. Customers who engage in direct access trading submit their brokerage orders directly to the market by using software installed on their personal computers. In this manner, customers can direct how their orders get routed for execution. (*See* Hansen Aff. ¶ 4.)

⁶ Ex. 1, at 1.

⁷ *Id.* at 1. Montenegro is subject to NASD jurisdiction pursuant to Article V, Section 4 of NASD's By-Laws, because the Complaint, which was filed within two years of the termination of his registration with Daylight, charges him with misconduct that commenced while he was registered, and with providing false testimony during an interview conducted by NASD staff during the two-year period following the termination.

B. Conversion

1. Conversion of CS's Funds

In early 2002, William Kennedy, a Field Supervisor with NASD, learned that White Pacific had filed two amended termination notices on the Respondent's behalf dated December 21, 2001, and February 26, 2002, which reflected that Montenegro had misused funds belonging to CS.⁸ This disclosure prompted the NASD investigation that ultimately led to the filing of the Complaint instituting this proceeding.

In the course of the ensuing investigation, NASD discovered that, in approximately July 2001, the Respondent spoke with customer CS about opening a NobleTrading account. She agreed and gave him a check for \$4,975. The check is dated July 25, 2001, and made payable to Montenegro. The handwritten notation "registration" appears on the memo line on the face of the check.⁹ Montenegro negotiated the check, but NobleTrading has no record of an account for CS although it did have a day trading account for her sister, TS.¹⁰ Montenegro was the broker on the TS account.

NobleTrading first learned about CS when she telephoned the firm for help in December 2001, shortly after Montenegro left the firm.¹¹ NobleTrading provided NASD with a tape of the telephone conversation between CS and a former assistant at NobleTrading, Efrain Oliveras.¹² During this conversation, CS stated that she had sent

⁸ Ex. 7 and 8. The second notice further stated that Montenegro misappropriated certain intellectual property belonging to NobleTrading.

⁹ Ex. 5.

¹⁰ Ex. 2, Kennedy Aff. ¶ 6; Ex. 4.

¹¹ Ex. 2, Kennedy Aff. ¶ 3; Ex. 6. Respondent tried to repay her without involving the firm. He promised her \$2,000 if she would call Noble Trading and let them know that everything was being taken care of.

¹² Ex. 6 (transcript of telephone conversation translated from Spanish).

Montenegro a check for \$4,975, which she had made payable to him at his direction, and that she wanted her funds returned. CS further stated that she had tried to get Montenegro to refund her money, but he had only offered to return \$2,000.¹³ Oliveras requested that CS send NobleTrading a copy of the canceled check, which she did. NobleTrading in turn provided NASD staff with a copy of the check.

Immediately after CS's call, White Pacific filed an amended termination notice (Form U-5) to report that the Respondent was under investigation for misuse of client funds.¹⁴

On the same day, December 21, 2001, Montenegro sent an email to NobleTrading in which he claimed that CS was presently in his Florida office from Seattle¹⁵ and that she would soon send NobleTrading a letter on his behalf regarding her check.¹⁶ In the email, Montenegro claims that CS no longer trusted NobleTrading because it had falsely told her that he had been fired. Consequently, she would not send the letter NobleTrading had requested concerning Montenegro and her check.¹⁷

In January 2002, NobleTrading received a letter purportedly signed by CS that repudiates the claims she made in her recorded telephone conversation with Oliveras.¹⁸ The letter states that she was never a member of NobleTrading and that she never intended for her funds to be used for trading stocks. The letter further states that

¹³ Ex. 6, at 8.

¹⁴ Ex. 7.

¹⁵ CS lived in Oregon. (*See* Ex. 5.)

¹⁶ Ex. 9.

¹⁷ *Id.*

¹⁸ Ex. 10.

Montenegro has repaid her in full.¹⁹ In his Answer, Montenegro claims that the check was a personal loan.²⁰ NASD staff was unsuccessful in its attempts to contact CS to verify the letter's content.²¹

2. Conversion of CP's Funds

Shortly after Montenegro left NobleTrading, he moved to Florida to establish his own direct access trading firm, United States Trading Group of Miami, Inc. ("USTG"). At about the same time, Warren Hansen, then the president of Daylight Online, was interested in expanding the firm's business by entering into business relationships with independent contractors who had their own customer base and who required the services of a broker-dealer to place customer trades. In late 2001, an employee of Daylight Online's clearing firm referred Hansen to Montenegro.²²

Hansen contacted Montenegro about joining Daylight Online. Montenegro confirmed that he was in the process of establishing USTG and that he needed a broker-dealer like Daylight Online through which to operate his securities business. Hansen understood from talking with Montenegro that he had a large customer base in South Florida and Latin America. Ultimately, they agreed that USTG would become an office

¹⁹ *Id.*

²⁰ Ans. ¶ 7.

²¹ Ex. 2, Kennedy Aff. ¶ 7.

²² Ex. 3, Hansen Aff. ¶¶ 1–3.

of supervisory jurisdiction (“OSJ”)²³ for Daylight Online.²⁴ On January 11, 2002, Montenegro registered with Daylight Online as a General Securities Representative.

However, in early January 2002, Hansen learned that the State of Florida would not approve Montenegro’s registration in Florida because of the Form U-5 NobleTrading filed that indicated Montenegro was under investigation for misuse of customer funds.²⁵ In light of Montenegro’s registration problems, Hansen decided to move temporarily to Florida to service Respondent’s customers with the understanding that once Montenegro became registered in Florida he would reclaim his customers.²⁶

In March 2002, Hansen moved to Florida, opened an office in Coral Gables, and began servicing Montenegro’s customers. Montenegro also used the Coral Gables office.²⁷

In the meantime, Hansen began setting up his own direct access trading firm, Hyperion Trading Inc. (“Hyperion”), which he hoped would operate as another Daylight Online OSJ.²⁸ In February 2002, Montenegro offered to help Hansen raise capital for Hyperion since he could not operate USTG.²⁹ One potential investor was CP, who was

²³ Under Conduct Rule 3010(g)(1), an OSJ is an office of a member at which any one or more of the following functions takes place: order execution or market making; structuring of public offerings or private placements; maintaining custody of customers' funds or securities; final acceptance (approval) of new accounts on behalf of the member; review and endorsement of customer orders pursuant to Conduct Rule 3010(d); final approval of advertising or sales literature for use by persons associated with the member pursuant to Conduct Rule 2210(b)(1); or responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member.

²⁴ Ex. 3, Hansen Aff. ¶¶ 2, 5.

²⁵ *Id.* ¶ 7.

²⁶ *Id.* ¶ 8.

²⁷ *Id.* ¶ 9.

²⁸ *Id.* ¶ 11.

²⁹ *Id.* ¶ 12.

interested in investing \$50,000 for a 15% ownership interest in Hyperion.³⁰ Montenegro told Hansen that CP wanted to invest through Montenegro because they had a personal relationship and because CP only spoke Spanish.³¹ Montenegro and Hansen agreed that Montenegro would receive CP's investment on Hansen's behalf.³²

In early March 2002, Montenegro wired \$20,000 to Hansen's bank account as CP's investment.³³ Hansen questioned Montenegro about the remaining \$30,000 he expected to receive. Montenegro assured Hansen that he would get the remaining investment, but he first needed to provide CP with the share certificates memorializing CP's ownership of 150,000 shares. Hansen reluctantly complied, but Montenegro never provided the remaining \$30,000 he had obtained from CP.³⁴

In early May 2002, having still not received the balance of CP's investment, Hansen hired an interpreter and called CP directly.³⁵ Hansen learned that CP and his wife, NB, had given Montenegro two checks totaling \$35,000.³⁶ Hansen explained that he only received part of that investment, and he confirmed that neither of them authorized Montenegro to keep any portion of their investment.³⁷

³⁰ *Id.* ¶ 13.

³¹ *Id.* ¶¶ 14-15.

³² *Id.*

³³ *Id.* ¶ 16.

³⁴ *Id.* ¶¶ 17-18.

³⁵ *Id.* ¶ 18.

³⁶ *Id.* ¶ 18; Ex. 11. *See also* Ex. 13.

³⁷ Ex. 3, Hansen Aff. ¶ 18; Ex. 13; Ex. 14. Later, Hansen and CP entered into a Stock Purchase Agreement to reaffirm that none of their transactions would give rise to any commission, finder's fee, or similar payment. (Ex. 16; Ex. 3, Hansen Aff. ¶ 19.) Finally, NB made a similar reaffirmation in her affidavit to the police (Ex. 13), and CP did so during a telephone conversation with NASD (Ex. 14; Ex. 15).

The next day, Hansen questioned Montenegro, who admitted keeping the \$15,000, but vowed to repay Hansen.³⁸ Then in June 2002, after receiving no repayment from Montenegro, Hansen reported the incident to the Coral Gables Police Department.³⁹ The police investigation confirmed, through Montenegro's bank records, that Montenegro had deposited \$35,000 into his personal account on March 6, 2002, and then wired only \$20,000 to Hansen on March 11, 2002.⁴⁰ Following further investigation, the Coral Gables Police Department charged Montenegro with third degree grand theft, a felony.⁴¹ Montenegro was allowed to enter a deferred prosecution program on the condition that he pays full restitution to Hansen.⁴² As of June 2004, Respondent had paid Hansen \$14,711.⁴³

3. Discussion

The Hearing Panel finds that Montenegro converted funds from CS and CP, in violation of NASD Conduct Rule 2110. Unquestionably, Montenegro diverted CS's funds to his own use. Notwithstanding the suspect letter of January 2002, the evidence shows that CS gave Montenegro her personal check for \$4,975, which bore the handwritten notation, "Registration" on its face. This notation is consistent with CS's complaint to NobleTrading. If the check had been a personal loan as Montenegro asserts, there would have been no reason for CS to call NobleTrading when she wanted her

³⁸ Ex. 3, Hansen Aff. ¶ 20. Respondent also acknowledged keeping a portion of the investment in an email to Hansen on May 16, 2002. Ex. 17. Despite Respondent's retention of \$15,000, Hansen honored CP's full investment. CP even invested an additional \$15,000 to complete the originally anticipated \$50,000 investment for 15% ownership of Hyperion. (Ex. 3, Hansen Aff. ¶ 21.)

³⁹ Ex. 3, Hansen Aff. ¶ 24.

⁴⁰ Ex. 12.

⁴¹ Ex. 3, Hansen Aff. ¶ 24; Ex. 19.

⁴² Ex. 19; Ex. 3, Hansen Aff. ¶ 25.

⁴³ Ex. 3, Hansen Aff. ¶ 25.

money returned. In short, Montenegro's contention that the check evidences a loan lacks credibility. More likely, Montenegro drafted the January 2002 letter to exonerate himself.

Likewise, the evidence shows without question that Montenegro converted \$15,000 from CP, which he had given to Montenegro to purchase an interest in Hyperion. Montenegro deposited CP's checks and forwarded only \$20,000 to Hansen. Montenegro kept the balance for his personal use and benefit. During his on-the-record interview, Montenegro claimed that he was entitled to a commission on CP's investment in Hyperion. No evidence supports this claim. To the contrary, Hansen submitted an affidavit to the Coral Gables Police Department in which he states that Montenegro had admitted to Hansen and his wife that he took the balance of CP's funds to purchase a BMW automobile and to pay bills.⁴⁴

For the foregoing reasons, the Hearing Panel concludes that Montenegro violated NASD Conduct Rule 2110, as alleged in the first and second causes of the Complaint.

C. Advertising Violations

One of Montenegro's steps towards developing his firm was to create a website for USTG—www.ustradinggroup.com.⁴⁵ NASD uncovered this website after NobleTrading submitted pages it printed from the website on February 4, 2002.⁴⁶ NobleTrading was concerned that Montenegro had plagiarized copyrighted material from its website. On April 2, 2002, NASD staff accessed the USTG website and confirmed

⁴⁴ Ex. 18, at ¶ 16.

⁴⁵ Respondent registered USTG's domain name on the Internet. (Ex. 29.)

⁴⁶ Ex. 2, Kennedy Aff. ¶ 11; Ex. 8; Ex. 20.

that it was operational.⁴⁷ Daylight Online never approved the USTG website.⁴⁸ In fact, Montenegro disregarded Hansen’s instruction to keep the website password protected until it passed a compliance review at Daylight Online.⁴⁹

NASD Conduct Rule 2210(a) defines “advertisement” to include “material published, or designed for use in ... electronic or other public media.” Under Rule 2210(b), a registered principal must approve any advertisement before its use.⁵⁰ Here, Montenegro did not get the USTG website or its content approved by a principal at Daylight Online before he made it available to the public. Consequently, the Hearing Panel finds that Montenegro violated NASD Conduct Rules 2110⁵¹ and 2210(b).

D. False Testimony

NASD Procedural Rule 8210 is a crucial component of NASD’s examinations and investigations. Procedural Rule 8210 gives NASD the right to require a member or person associated with a member to provide information, orally or in writing, in connection with an examination or investigation. Procedural Rule 8210 further states that no member or person shall fail to provide such information. It is axiomatic that

⁴⁷ Ex. 2, Kennedy Aff. ¶ 11; Ex. 21.

⁴⁸ Ex. 3, Hansen Aff. ¶ 27.

⁴⁹ *Id.*

⁵⁰ The Respondent was charged with violating provisions of Rule 2210 that existed prior to November 3, 2003, when the Rule was amended. Accordingly, the Hearing Panel considered, and the Decision references, only the former provisions.

⁵¹ A violation of an SEC or NASD rule also constitutes a violation of Conduct Rule 2110’s ethical obligation to observe high standards of commercial honor and just and equitable principles of trade. *See Steven J. Gluckman*, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, *22 (July 20, 1999) (citations omitted).

Procedural Rule 8210 prohibits an associated person from providing false or misleading information to NASD in connection with an examination or investigation.⁵²

In connection with its investigation of Montenegro's involvement with USTG, NASD staff conducted on-the-record interviews of the Respondent on February 3 and February 7, 2003, pursuant to NASD Procedural Rule 8210.⁵³ During the interviews, the Respondent admitted his involvement in the design and creation of USTG's website, but claimed to have almost no other connection to USTG. Montenegro repeatedly denied having any active involvement with USTG.⁵⁴ Montenegro also stated, in response to a written request for information, "My business relationship with US TradingGroup is none."⁵⁵

However, evidence retrieved from Montenegro's computer at Daylight Online, including USTG's business plan and two investment proposals, proves otherwise.⁵⁶ The business plan listed Montenegro as founder and current contact person.⁵⁷ The investment proposals identify Montenegro as president and owner of USTG, and they establish that he solicited funds on USTG's behalf.⁵⁸ Finally, the Respondent also identified himself as USTG's president in the email he sent to NobleTrading on December 21, 2001.⁵⁹

⁵² See *John Montelbano*, Exchange Act Release No. 47,227, 2003 SEC LEXIS 153, at *36-38 (Jan. 22, 2003) (upholding NASD's finding that respondents violated Procedural Rule 8210 by giving false testimony during an on-the-record interview).

⁵³ Ex. 2, Kennedy Aff. ¶ 12.

⁵⁴ Ex. 22, at 164, 166, 305-06.

⁵⁵ Ex. 23.

⁵⁶ Ex. 3, Hansen Aff. ¶ 26; Ex. 26; Ex. 27; Ex. 28.

⁵⁷ Ex. 26, at 5.

⁵⁸ Ex. 27; Ex. 28.

⁵⁹ Ex. 9.

Accordingly, the Hearing Panel finds that Montenegro violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by providing false testimony at his on-the-record interviews.⁶⁰

III. Sanctions

A bar is the standard sanction for conversion.⁶¹ The NASD Sanction Guidelines likewise provide that, in egregious cases, adjudicators may impose a bar where a respondent is found to have responded untruthfully to a request for information issued pursuant to Procedural Rule 8210.⁶²

In this case, Montenegro repeatedly and adamantly denied his involvement in USTG, despite overwhelming evidence to the contrary. Moreover, he lied on more than one occasion—once during his on-the-record interviews and again in a written response to a request for information.⁶³ The Hearing Panel finds no mitigating circumstances warranting imposition of anything less than a bar for these violations. Accordingly, the Hearing Panel will bar Montenegro for each of these violations.⁶⁴ The Hearing Panel will not impose additional sanctions for Montenegro's advertising violation. A suspension would be redundant,⁶⁵ and a monetary fine would serve no additional remedial purpose.⁶⁶

⁶⁰ See *Department of Enforcement v. Eric H. Dieffenbach*, No. C06020003, 2004 NASD Discip. LEXIS 10, at *29–30 (N.A.C. July 30, 2004) (citing *Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996)).

⁶¹ NASD Sanction Guidelines 40 (2004 ed.).

⁶² *Id.* at 37.

⁶³ Ex. 22; Ex. 24, at 5.

⁶⁴ The Hearing Panel will not order restitution because CS and CP have been compensated already for their losses.

⁶⁵ *Department of Enforcement v. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *17 (N.A.C. Mar. 27, 2002).

⁶⁶ See, e.g., *Department of Enforcement v. Castle Securities Corp.*, No. C3A010036, 2004 NASD Discip. LEXIS 1, at *36–37 (N.A.C. Feb. 19, 2004).

IV. Order

Oscar Montenegro is barred permanently from association with any member firm in any capacity for conversion of funds, in violation of NASD Conduct Rule 2110, and for failing to respond truthfully to requests for information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. Each bar shall become effective once this decision becomes the final disciplinary action of NASD.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Oscar Montenegro (first-class mail)
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Rory C. Flynn, Esq. (first-class and electronic mail)