NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHN AUDIFFEREN (CRD No. 2053214), Brooklyn, NY, Respondent.	Disciplinary Proceeding No. C10030095 Hearing Officer – JN **HEARING PANEL DECISION** March 14, 2005

Respondent caused his firm to make unlawful credit extensions to a customer and received the beneficial use of such extension of credit, violations of Regulation T, Section 7(c) and (d) of the Exchange Act, and Rule 2110. He also allowed "free-riding" by the customer and shared in profits from her account, violations of Rules 2520(f)(9), 2330(f), and 2110, respectively. He also caused the firm to extend credit to himself and received the beneficial use of such extension, violations of Regulations T and X, Sections 7(c) and (f) of the Exchange Act, and Rule 2110. Finally, he failed to disclose a customer complaint on a Form U-4, a violation of IM 1000-1 and Rule 2110.

For all his misconduct involving the customer, he was barred and fined $17,500 (reflecting ill-gotten gains). That fine shall be payable if Respondent later seeks reinstatement in the securities industry. For misconduct involving his own account, he was barred. Because of those bars, no sanctions were imposed for the U-4 violation. Respondent was also ordered to pay $7,446.31 in costs associated with the hearing.

Appearances

For the Complainant: Jay M. Lippman, Esq., Vaishali Shetty, Esq., and Rory C. Flynn, Esq.

For the Respondent: John Audifferen, pro se.

DECISION

I. Introduction

On November 7, 2003, the Department of Enforcement filed a multi-cause Complaint against Respondent John Audifferen. The Complaint alleged various misconduct involving a customer's account and his own account. Most of those allegations pertain to unlawful extensions of credit and receipt of the beneficial use of such extensions, which constituted violations of Regulations T and X, Sections 7(c) and (d) and (f) of the Securities Exchange Act of 1934, and Rule 2110. The Complaint also alleged that he allowed that customer to pay for her securities by using profits derived from their sales, a violation of the "free-riding" prohibitions (Rules 2520(f)(9) and 2110). Enforcement further charged Audifferen with sharing in profits from the customer's account, a violation of Rules 2330(f) and 2110. Finally, the Complaint alleged a non-willful failure to report a customer complaint on Respondent's Form U-4, a violation of IM-1000-1 and Rule 2110.

The Hearing Panel, composed of an NASD Hearing Officer and members of NASD District Committees No. 10 and No. 11, conducted hearings on August 16 and 17 and September 8 and 9 of 2004. Enforcement filed a post-hearing brief on October 22, 2004, and Respondent filed his post-hearing submission on December 8, 2004. Enforcement's forty-two exhibits are cited in this Decision with the prefix "CX"; Respondent's five exhibits are cited with the prefix "RX"; and pages of the hearing transcript are cited with the prefix "Tr."

II. Liability

A. Misconduct Involving Customer KW's account

During January through May of 2000, the Respondent was a registered representative employed by May, Davis Group Inc. Among his customers was Ms. KW, a professional dancer whom he had known for several years prior to opening the account (Tr. 650, 722). The Complaint alleges several violations centering on transactions in her account.

1.) unlawful credit extensions (the EUNI and MXIP purchases)

The Complaint alleges that Respondent made and caused his firm to make unlawful credit extensions to customer KW, in violation of the Securities Exchange Act of 1934 and regulations promulgated thereunder. Section 7(a) of the Act authorizes the Federal Reserve Board to issue regulations "for the purpose of preventing the excessive use of credit for the purchase and carrying of securities." The Board's Regulation T establishes deadlines within which customers must pay for their securities purchases. For cash accounts, Regulation T requires that the firm obtain full cash payment for purchases within five business days following the transaction (unless lawfully extended).[1]

Section 7(c) of the Act makes it unlawful for any firm to extend or maintain credit for a customer, except in compliance with such regulations. Section 7(d) applies that same prohibition to extensions by associated persons. Violations of the Board's credit regulations also constitute violations of Rule 2110's mandate for high standards of commercial honor and just and equitable principles of trade.[2]

[1] See Section 220.8 of Regulation T and Memorandum of NASD Board of Governors (1996), reprinted in NASD Manual, supra, p. 8163.

[2] NASD Manual (Nov. 2003), p. 8164.

The unlawful credit extensions to KW involve her purchases (executed by Respondent) of 1,000 shares of eUniverse Inc. (EUNI) and 3,000 shares of Max Internet Communications (MXIP) on January 21 and 25 of 2000, respectively. As extended, the payment deadline for the EUNI purchase (a $6,917.50 debt) was due on February 4, 2000 (CX-14, CX-14A; Tr. 272-276). Such payment did not arrive until February 8 (CX-14A; Tr. 277). As to the MXIP shares, the extended payment deadline was February 8, 2000. No payment was made then, and the cost of those shares ($63,105) was covered by their sale on February 10 (Tr. 278-279).

As shown, the EUNI purchases were not paid for on time, and the MXIP shares were never paid for. In allowing the customer to retain blocks and later sell them, May, Davis thereby unlawfully extended credit to her.

Contrary to Audifferen's argument,[3] there was abundant evidence linking Respondent to these credit extensions. To begin with, both purchases arose out of his recommendations (Tr. 684), and he executed them. The customer testified that she never knew of these purchases until she saw them on a statement (Tr. 59-60), and the Panel credits that testimony. She was an unsophisticated investor with almost no prior securities experience.[4] But for Audifferen, she would never have owned the stock in the first place, let alone failed to have paid for it on time.

Moreover, Respondent was personally involved in the credit aspect of KW's purchases. On February 7, 2000, shortly after expiration of the deadline for payment of

[3] Respondent's post-hearing statement, p. 1.

[4] Before opening the account with Audifferen, she had an account with Schwab where she carried stock which had been given to her and which she would sell when she needed money (Tr. 32; CX-5, par. 6). At no time, did she have knowledge of the securities markets or follow them (Tr. 32-33).

$6,917 for the EUNI shares, Respondent withdrew $7,000 from his checking account (Tr. 700-701; CX-12, p. 191, CX-20, p 263). On that same day, someone deposited $7,000 in KW's checking account (CX-9, p. 172; Tr. 460). On the next day, KW's check for $7,000 was deposited in her May Davis account (Tr. 276-277, 460-461; CX-9, p. 172, CX-10, p. 179-180). That check ultimately cleared, and paid for the EUNI purchase (albeit after expiration of the Regulation T deadline) (CX-9, p. 172; Tr. 277)

Respondent dismisses the above circumstances as a " coincidence,"[5] while offering no explanation of his withdrawal of $7,000 – at the time when KW needed $6,917 to pay for the EUNI purchase – and the appearance of $7,000 in her checking account on that same day. Moreover, KW testified repeatedly that she lacked sufficient funds to cover her $7,000 check and that Respondent was the source of the $7,000 deposit which did cover it (Tr. 53, 96). Her pre-hearing affidavit states that he told her "he would deposit $7,000 into my checking account to cover the check" (CX-5, par. 18). The Panel concludes that Audifferen himself (for whatever reason) funded his client's purchase of the EUNI stock and was directly involved in post-deadline extensions of credit to her.

The evidence also links him to the extension of credit for the MXIP purchase, for which $63,105 was due on February 8, 2000. On February 10, 2000, someone deposited a check signed by KW for $61,105 in her securities account.[6] She lacked sufficient funds to cover that check, and it later bounced (Tr. 59, 277-278). KW explained that she had earlier signed the check in blank and given it to Respondent, who said he wanted it on

[5] Respondent's post-hearing statement, p. 3.

[6] Why the check was for $61,105 when the amount due was $63,105 is not explained on this record.

hand for future use, noting her prior bounced checks (Tr. 61-63). A comparison of the handwriting on the check (other than her signature) with acknowledged samples of Audifferen's writing, persuades the Panel that he wrote the date, payee and amount,[7] precisely as the customer had testified (Tr. 61-62). Because Respondent was in possession of the check and filled it in, it is a fair inference that he was also the person who deposited it in KW's account as purported payment for the MXIP purchase.

On this record, the Panel finds that Respondent was deeply involved in the customer's payments (or attempts to pay) and may properly be held responsible for the accompanying unlawful extensions of credit to her.

2.) Beneficial use of unlawful extensions (the EUNI and MXIP sales)

Section 7(f) of the Exchange Act makes it unlawful for any person to "obtain, receive, or enjoy the beneficial use of" a credit extension which violates Regulation T. The Complaint alleges that Respondent received $17,500 from KW and thereby obtained such beneficial use (par. 19). The Panel agrees.

On February 10 and March 3 of 2000, respectively, Respondent sold KW's shares of MXIP and EUNI, producing a total profit of $15,987. On March 8, 2000, May, Davis wired $18,000 from KW's securities account to her bank account (CX-7, p. 11; CX-9, p. 12). Audifferen admitted requesting precisely such a transfer (Tr. 751-752). Pursuant to the customer's request, her bank then transferred $17,500 to the Respondent's bank for a beneficiary named "John Audifferen" (CX-16, p. 212).[8]

[7]See CX-4, p. 125-126; CX-5, par. 20; CX-10, pp. 175-181; CX-17, p. 216; CX-39; CX-12; CX-24; Tr. 48-49, 234-235, 699-705.

[8] The customer said that she made this transfer because Audifferen told her to, and that he, without further explanations, referred to it as "his" money (Tr. 73-74).

That $17,500 could only have come from profits attributable to the EUNI and MXIP sales[9] - transactions which would never have been possible but for the pre-existing unlawful extensions of credit, which allowed KW to retain the shares. By receiving the $17,500, Respondent obtained the beneficial use of those extensions and thus violated Section 7(f) of the Exchange Act. See SEC v. Militano, 1994 U. S. Dist. LEXIS 8420 (S.D.N.Y. 1994) and SEC v. Militano, Litigation Release NO. 14145, 1994 SEC LEXIS 2049 (July 5, 1994) (withdrawing profits from accounts which received improper credit extensions gave customer beneficial use of such credit); SEC v. David James Leslie, Litigation Release No,. 19000m 2004 SEC LEXIS 2946 (Dec. 15, 2004) (placing sell orders for securities not paid for on time gave customer beneficial use of unlawful credit extension).

3.) Willfulness of the credit violations

The Complaint alleges that Respondent acted "willfully" in extending credit and in receiving the beneficial use of those extensions – in the form of $17,500 from the customer's account. Respondent denied acting willfully. The Panel finds that the record supports the allegations of willfulness.

In assessing that element, the SEC evaluates "whether the respondent knew or should have known under the particular facts and circumstances that his conduct was improper." Richmark Capital Corp., Exchange Act Rel. No. 48757, 2003 SEC LEXIS at 27-28 (Nov. 7, 2003). That principle certainly applies to violations of the credit

[9] The only other transaction of significance in KW's account involved the sale of a third security, which produced a net loss of some $3,300 (CX-14A, pp. 209N, 209V). Examination of the gross revenue produced by the sales of EUNI ($9,644), MXIP ($76,392), and the third security ($6,824), shows that the EUNI and MXIP transactions accounted for over 90% of the money coming into KW's account (CX-7, p. 153; CX-14A, p. 209V).

regulations. See Dep't of Enforcement v. Brad A. Roethlisberger, No. C8A020014, 2003 NASD Discip. LEXIS 6 at *4 (OHO, January 30, 2003), modified as to sanctions, 2003 NASD Discip. LEXIS 48 (NAC, December 15, 2003). Applying the Richmark standard, there is ample evidence of willfulness.

To establish willfulness, Enforcement need not prove that Respondent knew of or intended to violate a particular regulation.[10] In the instant case, however, even that element is present. Audifferen was an experienced broker, who knew about Regulation T's establishment of deadlines for payment of purchases. As he said, "I know about Reg. T: Hey, John, you need so-and-so amount of money by this-and-this date" (Tr. 616). He further knew that the Regulation imposed restrictions when payment was not received on time (Tr. 595, 598, 619).

As to the EUNI purchase, Respondent also knew or should have known that the customer would be unable to produce the $7,000 needed to pay for that stock. He knew that one month before making that purchase, she had already bounced a $5,000 check, which had been deposited in her securities account to pay for another transaction (CX-14A, p. 209A; Tr. 270, 272, 713-714). Though KW was unaware of the EUNI purchase until she saw it on a statement, Audifferen never checked with her to ascertain whether she could afford to pay for it. Moreover, the Respondent certainly knew that he withdrew $7,000 from his own bank account at a time when KW owed the firm $6,917 and he offered no explanation as to why he made that withdrawal. The customer testified that Respondent told her he would make the deposit to cover her check and proceeded to do so, testimony which was entirely consistent with the simultaneous arrival of $7,000 in her

[10] Wonsover v. SEC, 205 F.3d 408, 413-415 (D. C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F. 2d 171, 180 (2d Cir. 1976).

checking account. The evidence thus supports the inference the Audifferen intentionally funded his customer's purchase of the EUNI stock, after expiration of the Regulation T deadline.

As to the MXIP purchase, Respondent also knew or should have known that KW's $61,105 check, her supposed payment, would not clear. The customer testified that she did not have funds in her account to cover the purchase (Tr. 59). As shown, Audifferen himself filled in that amount on the check and certainly knew that he was obligating her for that sum. Even if she actually earned $100,000 per year, as her new account form stated (Tr. 664), Respondent should have realized that the purchase cost would have been more than 60% of such annual income. If, on the other hand, she actually earned about $4,000 per month, as she testified (Tr. 86-87), the MXIP purchase would have substantially exceeded her annual income. There was no evidence of any source of significant extra income or of particularized assets sufficient to support the notion that her $61,105 check would clear. Despite Respondent's vague references to "real estate" interests on KW's part, the record contains nothing which provides any basis for a reasonable belief that she somehow had sufficient funds to cover a $61,105 check. That is particularly so, considering Respondent's knowledge that only two months before, the same customer had bounced a much smaller check in her securities account (Tr. 270; 715; CX-9, p. 168, CX-14A, pp. 209A and 209N).

His receipt of $17,500 from her account was certainly willful. He surely knew that he obtained that money, that it came from her account, and that it reflected the profitable sales which he had executed. Indeed, KW testified that Respondent had demanded the payment, describing the money as "his" (Tr. 73-74). Even under

Audifferen's version of events (that he was taking back what he had earlier given or loaned to her), he was nevertheless intentionally taking the money from the proceeds of the sales.

The Panel concludes that Audifferen's involvement in the extensions of credit and his receipt of benefits derived from them were willful.

4.) Other offenses: Profit sharing and free-riding

Subject to certain exceptions which are inapplicable here, Rule 2330(f) provides that no associated person "shall share directly or indirectly in the profits or losses in any account of a customer carried by the member…." The Complaint alleges that Audifferen's receipt of the $17,500 from the account violated that Rule (pars. 20, 21). The record shows that the money came from KW's account, that such account was carried with a member firm, and that the $17,500 reflected profits from stock sales in that account. Respondent thus violated Rule 2330(f) and thereby also violated Rule 2110.

Under Rule 2520(f)(9), "[n]o member shall permit a customer to make a practice, directly or indirectly, of effecting transactions in a cash account [such as KW maintained here] where the cost of securities purchased is met by the sale of the same securities."[11] This practice is sometimes referred to as "free riding" (Tr. 301). The Complaint alleges that Respondent caused his firm to violate that rule when it allowed KW to pay for the MXIP purchase though profits derived from selling those same securities (par. 21). The Panel agrees.

The evidence shows that the customer never paid for the MXIP purchase (which cost $63,105) at any time. She did not have sufficient funds to pay for the stock when the

[11] Rule 0115(a) provides that associated persons, such as Respondent, "shall have the same duties and obligations as a member under these Rules."

money was first due, or at any time during February, when the shares were eventually sold at a profit (Tr. 278). As noted above, the customer's check for $61,105 failed to clear. The cost of the shares was thus ultimately paid for by the profits derived from their sale (Tr. 279).

These circumstances fully support the Complaint's free-riding allegation. The Panel concludes that Audifferen caused his firm to violate Rule 2520(f)(9), misconduct which also violates Rule 2110. Roethlisberger, supra.

B. Misconduct Involving His Own Account

Respondent maintained his own securities account at May, Davis. In April and May of 2000, he bounced three checks (for $7,000, $13,000, and $30,000), which he had deposited in that account as payments for certain stock purchases (CX-20, pp. 275-276, CX-24, pp. 322-324; CX-22; Tr. 214, 232, 234, 730, 733). Audifferen did not have sufficient funds in his account to cover those purchases, and payments for them were not made within the Regulation T deadlines (Tr. 282-283, 290-291, 301-302). Respondent's defaults left the firm ultimately responsible for the payments (Tr. 285-288, 302).[12]

By means of the dishonored checks, Respondent obtained possession (albeit temporarily) of shares for which he never paid. On the facts of this case, the Panel concludes that Audifferen willfully caused his firm to extend credit to him in violation of Regulation T (conduct prohibited by Regulation X)[13] and also violated Section 7(f) of the Act which, as noted above, prohibits the "beneficial use" of such an extension.

[12] The firm eventually sold one of the holdings at a loss and cancelled Respondent's purchase of the other security, action which left the firm responsible for obligations associated with the transaction (CX-27A, pp. 336B, H, K-M; Tr. 282-286, 290-291, 299-300).

[13] As explained by the National Adjudicatory Council in Roethlisberger, supra, "Regulation X prohibits borrowers from willfully causing broker-dealers to extend credit in violation of Regulation T" (2003 NASD Discip. LEXIS 48 at *3. See Section 3(b) of Regulation X (12 CFR 224.3(b)).

Respondent said that the firm's operations department failed to inform him that the checks had bounced (Tr. 616, 622, 740, 750, 801-802). A securities professional cannot shift the blame to others for his failures to meet financial obligations to the firm.[14] Moreover, a broker should not need someone to tell him that he lacks funds to cover a series of checks; he himself "had a duty to ensure that there were sufficient funds available in his checking account…to cover the checks that he issued" (Simek, supra).

Respondent testified that he believed that there were funds to cover the checks and argued that the violations involving his own account were thus not willful. As explained earlier, willfulness is present when the respondent "knew or reasonably should have known under the particular facts and circumstances that his conduct was improper." Richmark, supra. That test is amply satisfied here.

As of May 2000, when he drew and deposited the first of the three worthless checks (CX-24, p. 324; CX-20, p. 275), Respondent must have known that there were already serious problems in his checking account. Between October 22, 1999 and April 7, 2000, he had already bounced thirteen checks totaling over $50,000 (CX-20, pp. 251, 252, 259, 263, 267, 271).

Respondent claimed to have believed that he would have money to cover the checks from cash at home, commissions, and "borrowing from a friend" (Tr. 623, 736 740-742). But he made no particularized showing of cash or commissions of such

[14] See John Gordon Simek, Exchange Act Rel.No. 27528, 1989 SEC LEXIS 2355 at *21 (Dec. 12, 1989); Thomas P. Garrity, Exchange Act Rel. No. 25115, 1987 SEC LEXIS 3215 at *10-11 (Nov. 12, 1987); Dist. Bus. Conduct Committee v. K. A. Knapp & Co., Inc. No. CHI-773 (NASD Board of Governors) slip op., p. 7 (Sept. 23, 1985).

magnitude as to meet these obligations;[15] and the supposed "friend" was never identified. In any event, writing checks on the hope that money will arrive from somewhere is unacceptable conduct by a securities professional, who had "a duty to ensure that there were sufficient funds available" to cover checks written to the firm. John Gordon Simek, Exchange Act Rel. No. 27528, 1989 SEC LEXIS 2355 at *21 (Dec. 12, 1989).

When pressed for details as to why he believed that his checks would clear, Respondent said that he could not remember four-year old events (Tr. 736, 741-742). The Panel is not persuaded by this excuse. A securities professional, who regularly pays close attention to financial details, would not ordinarily forget the supposed basis for $50,000 worth of checks to his own firm. Moreover, in later explaining a prior inconsistent statement on a different matter, Audifferen discussed his memory, stating "[b]ecause of what is going on you kind of put yourself back there in that time frame, and I start to remember little things, no matter how minor, no matter how major" (Tr. 770).

In writing the checks in question, Respondent must have known that during the period between October 22, 1999 and early April of 2000, he had written thirteen bad checks, totaling over $50,000. One (for $13,000 which he deposited in his mother's May Davis account) bounced on March 22, 2000, only a few weeks before the first of the three checks involved here. Two other checks (for $5,000 each) were returned on April 4 and 7 of 2000 – only days before he drew the first of the three. Finally, in February of 2000, only two months before the first of the three checks, Respondent acknowledged financial "hardship" and asked his firm for a $21,400 advance (CX-11, p. 184; Tr. 678).

[15] Respondent's net pre-tax commissions for February of 2000 (his only source of income during the time in question) were $2,791 (CX-18, p. 240; Tr. 735).

The circumstances of this case make it unlikely that Audifferen ever had $50,000 available to satisfy the checks, let alone that he forgot where such money was coming from. In the Panel's view, the "forgotten" source of the supposedly anticipated money never existed, and Respondent knew or reasonably should have known that the checks would bounce.

C.) The U-4 Offense

Finally, the Complaint alleges a non-willful failure to disclose a particular customer complaint on a Form U-4 filed in connection with Respondent's later employment at J. P. Turner. It is undisputed that there was such a complaint, involving sales practices at Investec, where Audifferen worked after leaving May, Davis, and that the Turner U-4, filed in September of 2001, did not mention it (CX-28). Respondent acknowledged that he was aware of the complaint before seeking employment at Turner (Tr. 776-777). When asked whether it would be "fair to say that you knew at the time when a Form U-4 was being prepared on your behalf by J. P. Turner you are obligated to disclose the [particular] complaint," Respondent answered: "I knew I was obligated to disclose it" (Tr. 777).

Audifferen presented two "defenses." First, he said that he disclosed the customer complaint to Turner during a telephone conversation with one of its officers concerning the U–4 and saw only the last page which he signed and transmitted to the firm (Tr. 764-767, 777). Second, he believed that he disclosed the complaint in responding to some state regulator's inquiry, which response also reached the firm (Tr. 780-782, 784).

The Panel does not accept Audifferen's accounts. The Turner officer to whom Respondent supposedly made the disclosure had no knowledge of the customer complaint

until October of 2001, when Investec submitted an amended Form U-5 pertaining to Audifferen's departure (Tr. 313-314). That witness, who had responsibility for the firm's recruitment and registration, said "I had no knowledge of it [before the U-5] and normally anything that would be of that nature would come through me" (Tr. 314). Two other Turner employees who also dealt with the matter similarly testified that they first learned of the customer complaint through the later-filed U-5 (Tr. 137, 139, 358-359, 394-396).

The claimed explanation to the state regulator was unfocused and purely speculative. Respondent could not even name the state involved, let alone produce any record reflecting the asserted disclosure. The only evidence of such an explanation was a letter to New Jersey authorities, written more than a month after the U-4 was filed (RX-2). When asked about the relevance of a post-U-4 disclosure, Audifferen said that he "would be willing to bet there was one that I would say had an earlier date, I just don't know which state to ask for the information from" (Tr. 780).

On this record, the Panel finds Respondent did not disclose the customer complaint to Turner in any manner. But even if there were such disclosures, they would not constitute defenses to the deficient U-4. The responsibility for ensuring the accuracy of the Form U-4 falls upon the registered representative. In re Frank R. Rubba, Exchange Act Release No. 40,238, 1998 SEC LEXIS 1499, at *8 (July 21, 1998) (firm's failure to update U-4 would not excuse Respondent's failure to see that Form was current). See also Guang Lu, Exchange Act Rel. NO. 51047, 2005 SEC LEXIS 117 at *22 (Jan. 14, 2005) (firm president's statement that Respondent need not disclose complaint on U-4 not a defense to failure to disclose; representative cannot shift responsibility to firm or

supervisors); Dep't of Enforcement v. Walker 2000 NASD Discip. LEXIS 2, at *22 (NAC, Apr. 20, 2000) (finding liability for defective U-4, though Respondent urged inter alia that he had informed NASD of the matter); DBCC v. Maucere, 1992 NASD Discip. LEXIS 109, at 50-51 (NBCC, Mar. 3, 1992) (attaching bankruptcy petition to U-4, while mitigating, was not a defense; Respondent "should have fully disclosed the details of his bankruptcy on the Form U-4 itself" and is responsible for Form's accuracy).

III. Sanctions

Enforcement recommends sanctions which total a one-year suspension, $20,000 in fines (to be paid if Audifferen seeks to return to the industry), disgorgement of $17,500, and a re-qualification requirement (Enforcement's Post-Hearing Br. p. 25).[16] In arguing for these sanctions, the Department reasons that Audifferen's misconduct involving customer KW's account and his own account was egregious (Id., p. 26-27). The Panel agrees that the circumstances surrounding these violations were egregious. Indeed, in its view, the misconduct pertaining to the customer's account and to his own account were sufficiently serious as to warrant a bar for each set of actions.

A. Violations as to KW's account

As the Panel concluded, Audifferen gave unlawful credit extensions to his customer and then benefited by that illegality. These violations of Regulation T and

[16]The Complaint focuses on KW's account (causes one and two); Respondent's own account (cause three); and the deficient Form U-4 (cause four). For causes one and two, Enforcement recommends a six-month suspension, a $3,000 fine for the credit violations ($1,500 for each of the two purchases); $2,000 for the free-riding; $2,500 for sharing in profits; and disgorgement of the $17,500 which Respondent took from KW's account. For cause three, Enforcement seeks a further six-month suspension (to be served consecutively with the above suspension) and a $7,500 fine for the credit violations inherent in transactions involving the bad checks. In addition, Enforcement also recommends a re-qualification requirement for the totality of the misconduct in the first three causes. Finally, for the U-4, the Department requests a thirty-day suspension (to run concurrently with the above suspensions) and a $5,000 fine (Enforcement's Post-Hearing Br., pp. 25-28).

Sections 7(c), (d), and (f) of the Exchange Act, constitute serious misconduct. In directing the prevention of overextensions of credit, Congress was addressing one of the factors underlying the 1929 crash. See VII, Louis Loss and Joel Seligman, Securities Regulation, pp. 3221-3228 (3d. ed. 2003). As the SEC has said, "[s]ection 7(c) and Regulation T are integral parts of an over-all scheme designed to prevent dislocation of the economy by the excessive use of credit to finance securities transactions."[17]

For egregious cases of Regulation T violations, the Sanction Guidelines recommend suspensions for up to two years or a bar (NASD Sanction Guidelines, (2004) p. 33). Such egregious circumstances were certainly present here.

The record reflects repeated misconduct involving substantial sums. On three separate occasions during January, February, and March of 2000, Respondent committed credit violations in connection with his customer. Two occurred when she bought the securities. Payment for the first purchase (Audifferen's $7,000 check to cover the customer's dishonored check) arrived after the Regulation T deadline. The second purchase involved over $63,000, payment for which never arrived at all. In both instances, Respondent's firm was ultimately responsible for the resulting debts. These unlawful credit extensions were especially aggravated because, as explained above, Respondent knew or should have known that the customer could not cover these purchases on her own.

The next credit violation came when Respondent received $17,500 from sales of the securities purchased through the unlawful credit extensions and thereby himself obtained the "beneficial use" of those extensions, in violation of Section 7(f) of the Act.

[17] Billings Associates, Inc., Exchange Act Rel. No. 8217, 1967 SEC LEXIS 570 at *21 (December 28, 1967).

In the Panel's view, credit violations which enable a broker to profit, while leaving his firm liable, are especially serious.

The above misconduct also embraced other offenses: allowing the customer to meet the cost of purchased securities by selling the same securities ("free-riding" in violation of Rules 2520(f)(9) and 2110) and sharing of profits in a customer's account (in violation of Rules 2330(f) and 2110). Such violations are serious in themselves and, in egregious cases, can be sanctioned by lengthy suspensions or bars.[18] In this case, they are particularly aggravated when considered as part of the overall pattern of misconduct, highlighted by the credit violations.

Because the violations involving KW's account were the product of a single course of conduct (the EUNI and MXIP purchases and sales), a single set of sanctions may appropriately achieve NASD's remedial goals. See, e.g., Dep't. of Enforcement v. Respondent Firm 1, No., C8A990071, 2001 NASD Discip. LEXIS 6, at **30-31 (NAC Apr. 19, 2001). The Panel has considered the totality of Audifferen's misconduct pertaining to KW's account. It concludes that under the aggravated circumstances set out above, the appropriate sanctions require a bar in all capacities and a fine of $17,500, reflecting the amount which he wrongfully took from KW's account. Such fine shall be due and payable should Respondent later seek reinstatement in the securities industry

B. Violations involving his own account

This misconduct stemmed from three bad checks, totaling $50,000, which Respondent wrote to cover purchases in his own securities account. Because these checks

[18] See Guidelines, supra, at pp. 27, 33, 93. There is no specific guideline for profit-sharing. In these circumstances, as Enforcement says (Enforcement's Post-Hearing Br. p. 26), the appropriate analogous guideline is the provision pertaining to guarantees against loss, conduct also proscribed by Rule 2330.

bounced, they caused May, Davis improperly to extend credit to him for the purchases and gave him the beneficial use of that credit – i.e., ownership of securities for which he never paid. All of this conduct violated Regulations T and X, Section 7(f) of the Exchange Act, and NASD Rule 2110.

The circumstances surrounding these violations are aggravated. There were three separate checks – one of which was apparently deposited twice (Tr. 873-875) - written over a period of several days. In addition, the amounts were significant ($7,000, $13,000, and $30,000). As noted above, there is evidence that Audifferen knew or should have known that the checks would not clear. In issuing the bad checks, Respondent placed his firm at risk through unlawful credit extensions, while also engaging in reckless and irresponsible conduct. Audifferen's inattention to detail, reflected in a series of bad checks for substantial amounts, is unacceptable in securities professionals, who should be meticulous in financial dealings with customers and with their own firms.[19]

The violations involving Respondent's own account all stem from the same course of conduct, a series of bad checks to his own firm. In this context, again, a single sanction is appropriate. The Panel concludes that in light of the aggravating circumstances discussed above, the appropriate sanction for the totality of this misconduct is a bar in all capacities.

[19] See John Gordon Simek, Exchange Act Rel. No. 27528, 1989 SEC LEXIS 152 at *21 (Dec. 12, 1989) (Respondent "had a duty to ensure that there were sufficient funds available in his checking account…to cover the checks that he issued" to his firm and another Exchange member). See also Dist. Bus. Conduct Committee v. K. A. Knapp & Co., Inc., No. CHI-773 (NASD Board of Governors, Sept. 23, 1985), slip op., p. 7 ("Knapp's purported reliance on the continued goodwill of his bank in apparently honoring his checks when no funds were available in his account does not comport with high standards of commercial honor even if we were to credit this self-serving testimony").

C. The U-4

Because the Panel has barred Respondent for his misconduct involving customer KW's account and again for misconduct pertaining to his own account, further sanctions for the U-4 violation would be redundant and would serve no practical purpose. See Dep't of Enforcement v. Hodde, No. C10010005, 2002 NASD Discip. LEXIS 4 (NAC Mar. 27, 2002).

IV. Conclusion

Respondent's various actions involving the account of customer KW violated Sections 7(c), (d) and (f) of the Securities Exchange Act of 1934; Regulation T; and NASD Rules 2330(f), 2520(f)(9), and 2110. As sanctions for this misconduct, Respondent is barred from associating with any member in any capacity and fined $17,500, a sum which reflects his ill-gotten gains from the violations. That fine shall be due and payable at such time, if any, as Respondent may seek reinstatement in the securities industry. The bar shall become effective immediately upon this Decision becoming the final disciplinary action of the NASD.

Respondent's various actions involving his own account violated Section 7(f) of the Exchange Act, Regulations T and X, and NASD Rule 2110. As a sanction for this misconduct, Respondent is barred from associating with any member in any capacity. The bar shall become effective immediately upon this Decision becoming the final disciplinary action of the NASD.

Respondent is also assessed a total of $7,446.31 in costs ($6,696.31 for the transcript plus the standard $750 administrative fee).

HEARING PANEL

_____
Jerome Nelson
Hearing Officer

Dated: March 14, 2005
Washington, DC

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