

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

BEERBAUM & BEERBAUM FINANCIAL
AND INSURANCE SERVICES, INC.
(BD #17099)

and

HANS N. BEERBAUM
(CRD #717043)

Respondent.

Disciplinary Proceeding
No. C01040019

Hearing Officer – Sara Nelson Bloom

Corrected Hearing Panel Decision¹

April 18, 2005

Beerbaum acted as a principal for Respondent Firm without being registered as principal, in violation of NASD Registration Rule 1021 and Conduct Rule 2110. Accordingly, Beerbaum is barred in all capacities. Firm Respondent is fined \$15,000. Respondents are ordered to pay costs.

Appearances

Mark A. Graves, Esq., and David A. Watson, Esq., San Francisco, CA (Rory C. Flynn, Esq., Washington, DC, of Counsel) for Complainant.

Hans N. Beerbaum, for Respondents.

¹ This decision is issued to correctly reflect Enforcement's staff witness as Robert Kormos (not Donald K. Lopezi), and to correctly reflect Enforcement's attorney as Mark A. Graves (not Mark R. Graves).

DECISION

I. Procedural History

On June 29, 2004, the Department of Enforcement filed a one-cause Complaint in this matter, alleging that from July 2002 until June 2004, Respondent Hans N. Beerbaum (“Beerbaum”) functioned, and Respondent Beerbaum Financial & Insurance Services, Inc. (“the Firm”) allowed him to function, in various capacities requiring that he be registered as a principal, during the period when his principal registration was suspended. Beerbaum was not registered as a principal because he had been suspended for failing to comply with a prior Hearing Panel decision requiring him to re-qualify as a General Securities Principal.

On July 20, 2004, the Respondents filed an Answer admitting certain allegations, but disputing others, and requesting a hearing.² A hearing was held in San Francisco, California, on November 16, 2004, before a Hearing Panel that included a Hearing Officer and two members of the District 1 Committee.³ The Department of Enforcement called one witness, NASD staff member Robert Kormos. Beerbaum testified on his own behalf.

² Respondents admitted conduct alleged in Complaint paragraphs 11(a) (Beerbaum signed the Oath or Affirmation page as President on the Firm’s Annual Audit Reports), 11(e) (Beerbaum filed Form BD amendments on the Firm’s behalf), and 11(h) (Beerbaum was listed as the Firm’s Chief Executive Officer, Executive Representative, Chief Financial Officer, contact for compliance issues, and supervisor in charge of training registered representatives).

³ Enforcement offered Complainant’s Exhibits (“CX”) 1-31, and Respondents offered Respondent’s Exhibits (“RX”) 1-9, all of which were admitted without objection. Citations to the Hearing transcript are cited as “Tr. at p.”

II. Facts

The Firm became an NASD member in 1986 and conducts a general securities business. Beerbaum founded the firm, and was originally registered with the Firm as a General Securities Principal and a General Securities Representative from February 1986 through March 1996. He was then registered with another NASD member firm in these same capacities from March 1996 through December 1997. During this period, his registration with the Firm was terminated. In February 1998, he once again became registered with the Firm as a General Securities Principal until July 2002. His General Securities Principal's registration was suspended in July 2002 when he failed to requalify as a General Securities Principal, as required by a prior Hearing Panel decision.⁴ Beerbaum eventually requalified and he has been registered with the firm as a General Securities Principal since June 2004. He is also currently registered through the Firm as a General Securities Representative.

III. Discussion

On February 15, 2002, another Hearing Panel issued a decision finding that Respondents had violated NASD Rules 1021 and 2110 as a result of Beerbaum acting in a principal capacity at the Firm during the 1996-1997 period when he was registered through another NASD member. Among other things, the Hearing Panel found that Beerbaum prepared and filed the Firm's FOCUS reports and an amendment to the Firm's Form BD. The Hearing Panel imposed sanctions against the Respondents including a requirement that Beerbaum requalify as a General Securities Principal within 90 days of

⁴ CX-1 at 11.

the date the decision became final, and ordered that if Beerbaum failed to requalify during that period he would be suspended until he requalified. This Decision became final on April 4, 2002.⁵

Beerbaum did not requalify within the time specified, and therefore on July 5, 2002 he was suspended as a General Securities Principal. Beerbaum did not take the Series 24 Examination required to requalify until July 31, 2002, nearly six months after the Hearing Panel Decision was issued and over three months after it became final. He failed the Examination and did not take it again until over a year later, on August 13, 2003, when he again failed.⁶ He took the Examination a third time on November 4, 2003, but was again unsuccessful. At this point, because he had failed three times, Beerbaum was required to wait six months before attempting the Examination again. Beerbaum finally passed the Examination on June 2, 2004, nearly two years after he was suspended. At the hearing in this proceeding, Beerbaum argued that he made a good faith effort to pass the Examination, but it was too difficult, not relevant to his firm's business and "useless."⁷

At issue in this case is the extent to which Beerbaum functioned as a principal of the Firm while he was suspended. Beerbaum admits that he violated Rule 1021 and the prior Hearing Panel Decision. In that regard, he admits to certain conduct that establishes a violation, but disputes or offers explanations as to other violative conduct.

⁵ CX-1 at 10.

⁶ In August 2003 Beerbaum was notified by NASD that "if you do not pass the [Series 24] test you should file a Form BDW to withdraw your membership since the firm is not meeting the qualification for membership in that its sole owner and officer is not a registered principal of the firm." CX-19.

⁷ Answer to Complaint, p. 1-2.

First, it is undisputed that Beerbaum signed the Firm's Annual Audit Reports for the 2002 and 2003 fiscal years. Beerbaum explained that in doing so he knew that he was violating NASD Rules, but his CPA advised him that as President of the Firm, he was required to sign the reports, and he felt he had no choice but to sign them in order to avoid late filing penalties.⁸

Second, in April 2003 Beerbaum signed, as President, the Firm's Anti-Money Laundering Program Compliance and Supervisory Procedures ("AML Procedures").⁹ While the CRD designated Gary Lee ("Lee") as the Anti-Money Laundering contact person, the AML Procedures designated Beerbaum as the Anti-Money Laundering Compliance Officer.¹⁰ Beerbaum acknowledges this, but attempts to minimize the importance of the report: "[m]y name is on the form, but we really don't take this issue very seriously because money laundering is not something that we have suspected from our clients..."¹¹

Third, from July 1, 2002 through January 9, 2004, the Firm filed seven FOCUS reports with Beerbaum designated on the form as the principal submitting the report electronically. Lee is listed on the form as the contact person,¹² and Beerbaum asserts that Lee, a General Securities Principal with the Firm, was ultimately responsible for them. Beerbaum claimed that his name was listed as the principal in 1994 by CRD and he could not see his name on the electronic form, so he did not know that he needed to

⁸ CX-4, CX-5, CX-30; Tr. at 69-70.

⁹ CX-6; Tr. at 23-24.

¹⁰ Tr. at 48, 70; CX-6 at 2, CX-18.

¹¹ Tr. at 70-71.

¹² CX 7-13.

change it.¹³ In a Letter to Enforcement during the investigation, Lee did claim that when Beerbaum's principal registration lapsed, Lee automatically became the managing principal.¹⁴ However, in fact, the Firm would have been required to submit a Form BD amendment along with supporting documentation regarding ownership and corporate minutes to effect this change, which the Firm did not do.¹⁵ Beerbaum also seemed to argue that, again, he had no choice but to file the FOCUS reports in order to avoid late filing fines and a disciplinary action.¹⁶

Fourth, on December 19, 2002 and February 5, 2003, Beerbaum filed amendments to the Firm's Form BD on the Firm's behalf, as the Firm's authorized signatory and President.¹⁷ Beerbaum explained that the updates related to the withdrawal of a registration in Utah (which was done to accommodate a registered representative that never joined the firm) and to reflect the results of his prior disciplinary hearing. Beerbaum admitted filing these reports, and stated that his internet connection was slow, so he unfortunately postponed the updates until after he was suspended.¹⁸

Fifth, Beerbaum does not dispute that throughout the period of his suspension as Principal of the Firm, he conducted business and supervised himself. Beerbaum attempted to defend this by claiming that his activities were limited, and consisted largely

¹³ Tr. p. 71-73. Beerbaum does acknowledge that he was originally designated as the principal submitting the report. The Panel did not find credible Respondents' argument that the designation would have automatically changed to Lee upon Beerbaum's suspension.

¹⁴ CX-17; Tr. at 34-35.

¹⁵ Tr. at 35.

¹⁶ Tr. at 44.

¹⁷ CX-14; Tr. at 31-33.

¹⁸ Tr. at 73-75.

of systematic investments.¹⁹ It is undisputed, however, that Beerbaum engaged in 615 periodic purchase transactions, four direct investments in variable annuities, and one fund purchase.²⁰ He also pointed out that his Series 7 license was not suspended, so he was permitted to function as a registered representative. Beerbaum received compensation, including trailing commissions, for these transactions, as well as overrides from Lee, which Beerbaum asserts, were “not large enough for anyone to make a big deal over.”²¹

Finally, throughout the period when Beerbaum was suspended, he was listed in CRD as the Firm’s Chief Executive Officer, Executive Representative, Chief Financial Officer, contact for compliance issues, and supervisor in charge of training registered representatives.²² Although Beerbaum updated the CRD firm contact sheet on February 4, 2003, the CRD continued to reflect that Beerbaum was the Chief Executive Officer, Chief Financial Officer, Compliance Officer, and person in charge of training registered representatives and sales and marketing.²³ Beerbaum does not dispute this, but explains: “it’s just a form that we haven’t looked at in years and years ... things hardly ever change ... since we are on dial-up [internet connection] changing anything is so time consuming we don’t even think of doing it.”²⁴

IV. Violations

The Complaint alleges that during the period from approximately July 5, 2002 through June 3, 2004, Beerbaum functioned, and the Firm allowed him to function, in

¹⁹ RX-8.

²⁰ CX-17; Tr. at 34-36.

²¹ CX-17 at 2-24; Tr. at 76-77.

²² CX-18.

²³ CX-18; Tr. at 37-38.

²⁴ Tr. at 77.

various capacities requiring that he be registered as a principal during the period when his principal registration was suspended. NASD Registration Rule 1021 provides that all principals must be registered. That Rule defines principals as those “who are actively engaged in the management of the member’s . . . securities business, including supervision, solicitation, conduct of business . . .” Such persons include “officers” and “directors of corporations” who are actively engaged in management. NASD Notice to Members, 99-49 (1999). A violation of the registration rule is also a violation of Conduct Rule 2110.²⁵

The Panel found that Beerbaum engaged in numerous activities requiring his registration as a principal at a time when he was suspended from acting as such, and the firm permitted him to do so. Respondents do not dispute that Beerbaum signed the firm’s Annual Audit Reports, filed Form BD amendments on the Firm’s behalf, and was listed in CRD as the Firm’s Chief Executive Officer, Executive Representative, Chief Financial Officer, contact for compliance issues, and supervisor in charge of training registered representatives. Nor do Respondents dispute that Beerbaum supervised himself. Additionally, the Panel found that Beerbaum acted as a principal because he served as the Firm’s Anti-Money Laundering Officer and signed the Firm’s Anti-Money Laundering Program. The fact that Lee was designated as the contact person on the filing does not address the issues raised by Beerbaum’s signing of the Program or his designation as the responsible Officer. Beerbaum also filed the Firm’s FOCUS reports, which only a principal may do. Although Lee was designated as the contact person on the reports, Beerbaum was the person authorized to sign the FOCUS reports on behalf of the Firm.

²⁵ William S. Mentis, Exch. Act Rel. No. 37952, 1996 SEC LEXIS 3192 at *5 (Nov. 15, 1996).

The Panel therefore finds that the Firm violated NASD Registration Rule 1021 and Conduct Rule 2110 by allowing Beerbaum to function as a principal and that Beerbaum violated the same Rules by acting in that capacity while suspended.

V. Sanctions

The Panel consulted the NASD Sanction Guidelines (2005 ed.) (“Guidelines”) to determine the appropriate sanctions in this case.

For registration violations, the Guidelines recommend a fine of \$2,500 to \$50,000. In egregious cases, the Guidelines recommend that consideration should be given to suspending the firm for up to 30 business days. In the case of an individual, the Guidelines recommend consideration of a suspension for up to six months, and in egregious cases, a lengthier suspension or bar.²⁶

Enforcement requests that Beerbaum be fined \$50,000, required to disgorge any and all income earned from the Firm during the period he was acting as a principal while suspended, and barred in all principal and supervisory capacities. Enforcement also requests that the Firm be fined \$50,000 and suspended for 30 days. Beerbaum asserted that the \$100,000 in fines requested by Enforcement would bankrupt him, and argues that, in any event, he and his firm should not be treated as distinct entities because they are effectively a single entity.

It is important for registrants to comply with NASD registration requirements. The National Business Conduct Committee stated:

The requirement that a person . . . must register as a principal when actively engaged in a firm’s securities business is an important one. This requirement assists in the policing of the securities markets. It also ensures that a person in a position to exercise some degree of control over

²⁶ Guidelines at 48.

a firm has a comprehensive knowledge of the securities industry and its related rules and regulations. This, in turn, enhances investor protection. We deem it essential to the well being of the investing public that persons engaged in a firm's securities business strictly adhere to the proper registration requirements.²⁷

The Panel applied the "General Principles" suggested in the Guidelines, which provide in part:

The overall purposes of NASD's disciplinary process and NASD's responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public. Toward this end, Adjudicators should design sanctions that are significant enough to prevent and discourage future misconduct, and to modify and improve business practices. Depending on the seriousness of the violations, Adjudicators should impose sanctions that are significant enough to ensure effective deterrence. . .

When applying these principles and crafting appropriately remedial sanctions, Adjudicators also should consider firm size with a view toward ensuring that the sanctions imposed are not punitive but are sufficiently remedial to achieve deterrence.²⁸

The guidelines also suggest that sanctions should be more severe for recidivists. This is a case of recidivism in the extreme. Respondents acted in direct violation of a prior Hearing Panel Decision almost immediately after it became final, and expressed no remorse at having done so. Nor did Beerbaum make a reasonable effort to comply with the requirement that he requalify – waiting until after he was suspended to attempt the examination for the first time; when he failed, waiting over a year to take the exam again; and passing over two years later after a fourth try.

During the time that Beerbaum was not registered as a principal, Beerbaum engaged in multiple activities, each of which required registration as a principal. These

²⁷ DBCC v. Pecaro, No. C8A960029, 1998 NASD Discip. LEXIS 13, at *22 (NBCC Jan. 7, 1998)

²⁸ Guidelines at 2.

activities included some of the very same activities, such as submitting FOCUS reports and amendments to the Firm's Form BD, that were the subject of the prior Hearing Panel Decision. Thus, Beerbaum must have known that his actions were in direct contravention of NASD rules and the prior Hearing Panel Decision. The violations were thus knowing and intentional.

Beerbaum's view seems to be that compliance with the Registration Rules is unimportant. He believes he can be the judge of whether a rule is worth following – and generally, he seems to believe that Rule 1021 is not.

Beerbaum argues that the NASD should simply ignore his persistent violations of the Rules. To illustrate his point, he tells of his experience with the IRS. Apparently, Beerbaum was told that his income was not high enough to qualify for a mortgage. To solve this problem, Beerbaum falsified the mortgage application, to increase his income. When the IRS inquired about the discrepancy, Beerbaum explained what he had done, and the IRS did nothing further. Beerbaum urges the NASD to do the same.²⁹ The Panel found this story extremely troubling, as it reflects Beerbaum's view that he is above the rules. In this regard, the Panel had no comfort that Beerbaum would honor a supervisory suspension if the Panel chose to impose one. Moreover, based on Beerbaum's knowing failure to comply with NASD rules and his stated disregard for them, the Panel considered barring Beerbaum, not just in a supervisory capacity, but in all capacities. In that regard, while the Panel believed Beerbaum to be a kindly person who would not intentionally harm an investor, they nonetheless were concerned with Beerbaum's total lack of respect for NASD rules. Based upon his prior conduct and his testimony at

²⁹ Tr. at p. 116-117.

hearing, the Panel had no confidence that Beerbaum would follow NASD rules on a going forward basis. For these reasons, Beerbaum is barred from association with an NASD firm in all capacities.

Finally, Enforcement seeks a total of \$100,000 in fines against Respondents. With respect to Beerbaum, in light of the bar, a monetary fine would serve no additional remedial purpose. See, e.g., Dep't of Enforcement v. Castle Securities Corp., No. C3A010036, 2004 NASD Discip. LEXIS 1, at **36–37 (NAC Feb. 19, 2004) With respect to the Firm, given its size, the Panel concluded that a \$100,000 fine would be punitive.³⁰ Accordingly, the Firm is fined \$15,000.³¹

VI. Conclusion

The Hearing Panel finds that the Firm and Beerbaum violated NASD Conduct Rule 2110 and Registration Rule 1021. Accordingly, Beerbaum is barred in all capacities from associating with an NASD member firm. The Firm is fined \$15,000. Respondents are ordered to pay costs in the amount of \$1,620, which includes an administrative fee of \$750 plus the cost of the hearing transcript.³²

The foregoing sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the

³⁰ CX-13.

³¹ Enforcement also requested disgorgement of all income received by Beerbaum during the time that his registration as a principal was suspended. However, Beerbaum correctly points out that his Series 7 license was active, and so disgorgement is not warranted for income derived from activities not related to his role as a principal. The Panel is unable to require disgorgement of income Beerbaum derived while acting as a principal, as there is insufficient record evidence to establish the amount of income attributable to these activities.

³² The Hearing Panel has 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.

NASD, except that if this Decision becomes NASD's final disciplinary action the bar will become effective immediately.

HEARING PANEL

By: Sara Nelson Bloom
Hearing Officer

Copies to:

Hans N. Beerbaum (via overnight and first class mail)
Mark A. Graves, Esq. (via electronic and first class mail)
David A. Watson, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)