

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. THOMAS JAMES CARR (CRD No. 1613787) Respondent.	Disciplinary Proceeding No. C01040029 Hearing Officer – AWH Hearing Panel Decision September 7, 2005
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Registered representative made unsuitable recommendations in a customer’s account, in violation of Conduct Rules 2310 and 2110; effected unauthorized trades in that customer’s account, in violation of Conduct Rule 2110; and failed to respond to requests for information in connection with an NASD investigation, in violation of Procedural Rule 8210 and Conduct Rule 2110. Respondent barred from association with any member firm in any capacity, and assessed costs.

Appearances:

David A. Watson, Esq., and David Greene, Esq., for the Department of Enforcement.

Leslie Akins, Esq., for Thomas J. Carr.

DECISION

Introduction

On November 19, 2004, the Department of Enforcement (“Enforcement”) issued a three-cause Complaint in this matter against Thomas James Carr (“Carr” or “Respondent”), alleging that he violated (1) Conduct Rules 2310 and 2110, by making unsuitable recommendations; (2) NASD Conduct Rule 2110, by effecting unauthorized transactions; and (3) Procedural Rule 8210 and Conduct Rule 2110, by failing to respond to NASD requests for information pertaining to the investigation of the first two causes.

Respondent filed an Answer to the Complaint on December 12, 2004, denying that he received a request for information from NASD, and claiming insufficient information to admit or deny the other allegations. A hearing was held on May 25, 2005, in San Diego, California, before a hearing panel composed of the Hearing Officer and two current members of the District 2 Committee. The parties filed post-hearing briefs on July 5, 2005.

Findings of Fact¹

I. THE RESPONDENT

Thomas James Carr was registered as a General Securities Representative with NASD member firm Wachovia Securities, Inc. (“Wachovia”) from April 30, 2001, until his registration was terminated on May 15, 2003.² In February 2002, he transferred to Wachovia’s Walnut Creek, California, Branch. Joe Evans (“Evans”) was the branch manager at Walnut Creek and became Respondent’s supervisor at the time of his transfer. Carr is currently registered as a General Securities Representative through another NASD member firm.

Initially, Carr was not producing business at the rate expected by his supervisor or Wachovia.³ Accordingly, Evans met with Carr in August to discuss his performance and to issue a written warning for him to increase his production, asset base, and new accounts.⁴ In the following month, Carr’s production began to increase, but not to the volume that Evans expected.⁵ Evans and Carr had another meeting at the end of

¹ References to the Department of Enforcement’s exhibits are designated as CX__ ; the Respondent’s exhibits, as RX__ ; and the transcript of the hearing, as Tr. __.

² CX-1 at 5.

³ Tr. 19-20.

⁴ *Id.*

⁵ *Id.* at 21.

September 2002, at which time Evans issued another written warning to Carr that his asset base and new accounts needed to increase, even though his production was increasing.⁶

Carr's production continued to increase after the second written warning, but the nature and level of activity in several of his customers' accounts continued to attract concern from Evans, who asked for an internal investigation by the Wachovia compliance department.⁷ That investigation resulted in the recommendation that Carr be terminated for making unauthorized trades.⁸ Following his termination from Wachovia, Carr was unemployed for a period of time.⁹ Since August 2004, he has been employed by NASD member Torrey Pines Securities. He became registered with NASD through that firm on November 4, 2004.¹⁰

II. UNSUITABLE RECOMMENDATIONS

A. LG's Account Opening

On November 11, 2002, customer LG opened a new account with Carr, indicating on the account form that his investment objectives were growth and income with moderate risk tolerance.¹¹ LG also indicated that he had 30 years of experience investing in securities markets. Consistent with his objectives, by the end of December, LG had approximately \$100,000 invested in each of the following five mutual funds:¹²

Alliance World Dollar	\$101,052.50
Gov't. Fund II, Inc.	

⁶ Tr. 21-22.

⁷ Tr. 36-37.

⁸ *Id.* at 37-38.

⁹ CX-1 at 2.

¹⁰ *Id.* at 4.

¹¹ CX-4. The account was actually opened in the name of a limited liability company owned by LG, who signed the new account form on behalf of the LLC.

¹² CX-2.

Eaton Vance Sr. Income Trust	\$110,825.00
John Hancock Pfd. Income Fund	\$100,000.00
Neuberger Berman Real Estate Income Fund	\$100,005.00
Pimco Corp. Opportunity Fund	\$100,056.66

B. The Trading Strategy

Over the next four months, Carr sold LG’s original account holdings and purchased other closed-end mutual funds in accordance with a trading strategy that Carr devised. Carr explained the theory underlying his strategy as follows: a syndicate that offers a new-issue closed-end mutual fund will stabilize bids for that issue during a short “support period.” It will support the bid in order not to accept any bids that are below the initial offering price. However, because there are internal sales fees – typically four and one-half percent – there is a spread between the initial offering price and the actual net asset value which is lower.¹³ Once the support period ends – typically after 30 days¹⁴ – the price of the issue usually declines to the actual net asset value, which reflects the effect of the internal sales fees. Carr asserted, without any factual support, that prior to the expiration of the support period, the price of the issue could “pop” – increase in value – and could be sold for a profit. If the price did not “pop,” the issue could be sold during the support period with no loss.

¹³ Tr. 180-82.

¹⁴ Tr. 115.

Carr's strategy was to sell the fund on the "pop" before the expiration of the support period.¹⁵ In addition, Carr claimed that LG "never paid a commission" as long as the fund "stayed in that support range."¹⁶ However, Carr received commissions on purchases of the funds, although he would not retain those commissions if the fund were sold during the support period.¹⁷ Moreover, although Carr claimed that LG enjoyed dividends from the funds, those dividends LG received were paid by funds that were held beyond the support period.¹⁸ Finally, most of the funds that Carr bought for LG's account were volatile and highly speculative: leveraged funds that invested in junk bonds or in foreign and emerging countries about which Carr knew little.¹⁹

C. The Trades

In January 2003, Carr sold two of LG's funds to buy a third fund. On January 28, 2003, nine days after LG left for Costa Rica, Carr sold the Alliance World Dollar Government Fund II and the Eaton Vance Senior Income Trust. With the proceeds of those two sales, he bought \$200,000 of a new issue of F&C/Claymore Pfd Securities Income Fund, for which he received a commission of \$6,000.²⁰

In February 2003, Carr sold three funds to buy two new issues. Carr sold essentially all but one share of the Neuberger Berman Real Estate Income Fund, all of the John Hancock Pfd Income Trust 2, and about 60 percent of of the Pimco Corp. Opportunity Fund. With the proceeds of the three sales, he bought \$200,000 of a new

¹⁵ Apparently, the strategy did not work. Moreover, had it worked, Carr could not have made a commission on the sale of a fund that "popped." If a sale of a fund is made before the expiration of the support period, the broker relinquishes any commission. Here, there is no evidence that any of the funds ever "popped," and, in almost every instance, Carr waited until the support period expired to sell the funds, thus earning and retaining a commission.

¹⁶ Tr. 182.

¹⁷ CX-21.

¹⁸ CX-2, RX-71, 72.

¹⁹ Tr. 185.

²⁰ CX-21, p. 2, RX-50.

issue of Blackrock Pfd Opportunity Trust, and a similar amount of a new issue of Evergreen Income Adv. Fund, for which he received commissions of \$12,000.²¹

In March 2003, Carr sold five funds to buy three new issues. Carr sold the F&C/Claymore Pfd Securities Income Fund, the remainder of the Pimco Opportunity Fund, all of the Blackrock Pfd Opportunity Trust, all of the Evergreen Income Adv. Fund, and one share of the Neuberger Berman Real Estate Income Fund. With most of the proceeds, he bought \$200,025 of a new issue of Nicholas-Applegate Conv and Income Fund, the same amount of a new issue of Nuveen Pfd and Conv Income Fund, and \$100,000 of a new issue of Preferred Income Strategies Fund, for which he received total commissions of \$15,001.²²

On April 24 and 25, 2003, Carr sold three funds to buy two new issues. Carr sold the Nicholas-Applegate Conv and Income Fund, the Nuveen Pfd and Conv Income Fund, and the Preferred Income Strategies Fund, which he had bought in March. Carr also bought just under \$100,000 of a new issue of Neuberger Berman Realty Income Fund, and the same amount of Pimco High Income Fund, for which he received commissions of almost \$6,000.²³

Evans, Carr's supervisor, was responsible for reviewing and approving all the transactions at issue in this proceeding. Evans testified that he became concerned during March 2003 that the trading activity in LG's account was inconsistent with the stated investment objectives and risk tolerance noted on the account application.²⁴ Evans claimed to have held a series of discussions with Carr, between January and March 2003,

²¹ CX-9, pp. 7-18, CX-21, p. 2.

²² CX-9, pp. 19-28, CX-21, pp. 2- 3.

²³ CX-9, pp. 29-36, CX-21A, p. 1.

²⁴ Tr. 29.

regarding what he felt were inappropriate transactions in LG's account.²⁵ Ultimately, Evans reported his concerns to Wachovia's Compliance Department, prompting an internal investigation.²⁶ According to Evans, upon completion of its investigation, the Compliance Department concluded that the pattern of trades in LG's account were of no benefit to the customer and were effected strictly to generate commissions for Carr.²⁷ As a result, Carr's employment with Wachovia was terminated on April 28, 2003.²⁸

III. UNAUTHORIZED TRADING

As noted above, LG opened his account with Carr at Wachovia in November 2002. Carr concedes that the account was not discretionary, and there is no evidence that Carr was given any authority to effect trades in the account without an express directive from LG.²⁹

On January 16, 2003, LG traveled to Austin, Texas, and subsequently embarked for Costa Rica on January 19, 2003. He remained out of the country until April 16, 2003.

²⁵ Tr. 34-35. Carr disputes Evans' claims, alleging that the first time Evans expressed concern was in a March 2003 e-mail (CX-20) that asked Carr to review and explain a list of transactions. Tr. 198-99. The credibility of Evans' testimony is not without some concern. His e-mail asks Carr to update the account application, with LG's signature, to indicate that the risk tolerance should be changed to "aggressive." However, the record contains such an account update that was signed by Evans as branch manager on March 21, 2003, four days prior to Evans' e-mail requesting the update. Carr claims that the update was signed by LG back on January 21, 2003. The date by Evans' signature is "3/21/03," but the "3" looks to have overwritten another number that could be a "1." LG did not testify at the hearing; nevertheless, in view of the ultimate conclusion of the Hearing Panel that, on the particular facts of this case, risk tolerance of the customer does not affect the suitability analysis, the discrepancies in the evidence, just noted, need not be resolved.

²⁶ *Id.* at 36.

²⁷ *Id.* at 37. Carr's Commission Activity report for the period between November 25, 2002 and April 25, 2003, shows commissions of \$52,001.35 as a result of trades in LG's account (No. 27997422). CX-21-21A. While LG's account equity increased in value from \$505,755 to \$522,877 over the same period, there were a number of monthly statements missing. Accordingly, the Hearing Panel can only conclude from the record that most of the increase occurred prior to the end of February 2003 (\$505,755 to \$519,640), and that at least \$2,243.05 of that increase was attributable to dividends received from funds held more than 30 days. RX-50-53, 71-72.

²⁸ RX-52; Tr. 37.

²⁹ Tr. 239-40. Nor is there any evidence that Wachovia accepted the account as discretionary.

During this period, LG spoke with Carr on no more than three occasions.³⁰ Carr and LG had no other contact with each other at all while LG was out of the country.

Nevertheless, Carr effected between 21 and 35 trades in LG's account between January 28 and April 25, 2003.³¹

Although Carr was not authorized to make trades without explicit authorization from LG, Carr claimed that he had "implied discretion to take care of [LG's] account" and to invest his funds according to the previously described trading strategy that Carr had devised.³² Carr admitted that he made a series of trades in January 2003, telling LG about them only after the fact.³³ He also admitted making three trades on the day of his termination from Wachovia in April 2003, without consulting LG.³⁴ Other than the three trades in April, Carr insisted that he had LG's "approval on every one of the trades."³⁵

On the other hand, LG states in his Declaration that while he was in Costa Rica, he neither requested nor approved any trades: "With the exception of one or two trades Mr. Carr mentioned over the phone – though only after he had already made the trades –

³⁰ Carr testified that he "spoke with [LG] on average once a month" during the three months that LG was in Costa Rica." Tr. 195. However, the Hearing Panel finds that Carr's testimony on this issue is inconsistent and not credible. On cross-examination, first he testified that he called LG four times in Costa Rica, and LG called him three times. Tr. 232. Then he testified that he could recall only two calls that he made to LG in Costa Rica. Tr. 232-33. Finally, he testified that, because he did not have LG's phone number, he did not call LG on the day of his termination to notify LG that he had just executed three sales in his account Tr. 205, 234. Although he admitted that he had LG's phone number at his office, he then claimed he did not have it on the date of his termination and his execution of the three trades, because the number was in his wallet. Tr. 234. Contradicting that testimony, he then testified that he "called him from the branch and I left him a message and I did the trades." Tr. 242

³¹ CX-9. The confirmation tickets for LG's account during this time show a total of thirty-five transactions effected by Carr. Carr argues that some of these are actually single orders that were split into more than one confirmation due to the firm's trading strategy. Tr. 196-97. However, even grouping confirmations pertaining to the same fund that occur in the same time frame, there were at least 21 transactions during the relevant three month period. CX-9.

³² Tr. 239-240. LG, on the other hand, states that he gave Carr clear instructions to leave the account alone, and Carr had no authority to make any trade without explicit authorization. CX-22.

³³ Tr. 192-93, 242; CX-22.

³⁴ Tr. 205, 242.

³⁵ Tr. 240.

nearly all of the trades made in my account while I was abroad, were made entirely without my knowledge or authorization.”³⁶

The Hearing Panel concludes that it is more likely than not that none of the trades executed by Carr had the prior approval of LG. Although LG did not testify at the hearing, his written Declaration is consistent with other evidence of record, and there appears to be no motive for LG to fabricate the Declaration. The Declaration is dated February 24, 2004, more than eight months after LG settled his claim against Wachovia in relation to this matter, accepting a sum close to \$25,000, and releasing Wachovia and Carr from any continuing liability arising out of the trading in his account.³⁷ A preponderance of the evidence demonstrates that Carr selected which funds to buy and/or sell,³⁸ determined when to buy and/or sell those funds,³⁹ and determined how much of each fund to buy and/or sell, all without LG’s prior knowledge or authorization.

IV. REQUESTS FOR INFORMATION

On June 5, 2003, Wachovia filed a Form U-5 on behalf of Carr, disclosing his termination for “violating firm policy regarding suitable transactions in client accounts.”⁴⁰ Subsequently, the NASD Staff (“the Staff”) initiated an investigation into Carr’s trading activities.

On August 26, 2003, in connection with its investigation, and pursuant to NASD Procedural Rule 8210, NASD staff sent Carr a letter requesting information.⁴¹

³⁶ CX-22.

³⁷ CX-7.

³⁸ See e.g. Tr. 205 (“ . . . I went back into my office . . . and I sold out [LG’s] positions that were more volatile to protect him); see also Tr. 193 (“ . . . he hadn’t called back yet, I did make the call and I traded funds. And I earmarked the F&C/Claymore to purchase to replace”).

³⁹ See Tr. 193 (“I told him about what I had done and locked in his 11,000 dollar profit. . . .”).

⁴⁰ RX-73.

⁴¹ CX-24.

The request was sent to Carr’s residential address on file with the Central Registration Depository (“CRD”), via first class and certified mail. It asked him to explain a series of transactions he had effected for LG between January 16, 2003, and May 28, 2003.⁴² The letter informed Carr of his duty to update his address information with CRD, included a telephone number at which the Examiner in charge of the investigation could be reached, and required his response no later than September 9, 2003.⁴³ The first class copy was not returned, and the copy sent by certified mail was returned, marked “Unclaimed.”⁴⁴

Having received no response to the initial 8210 request, the Staff sent a second request for information, via first class and certified mail, on September 11, 2003.⁴⁵ The second request sought the same information, attached a copy of the previous letter, and included a telephone number for the Examiner in charge of the investigation.⁴⁶ The request asked for a response by September 18, 2003.⁴⁷ Again, the first class mailing was not returned, and the certified mailing was returned, marked “Unclaimed.”⁴⁸

On September 17, 2003, the Staff received a letter from Carr, dated September 14, 2003, acknowledging receipt of the first request for information.⁴⁹ Carr’s letter was

⁴² *Id.*

⁴³ *Id.*

⁴⁴ CX-25; Tr. 138.

⁴⁵ CX-26.

⁴⁶ CX-26.

⁴⁷ *Id.*

⁴⁸ CX-27.

⁴⁹ CX-28.

addressed to Aylien Jani, the NASD Examiner in charge of the investigation.⁵⁰ The letter included a caption in the style of the requests for information from NASD:

Re: Examination No. E01030356 – Thomas J. Carr (#1613787)
Complaint by [LG].⁵¹

The return address on Carr's letter was the same as his CRD residential address to which the Staff had mailed each letter request.⁵² After receiving Carr's letter, on September 22, 2003, Examiner Jani sent a third request for information, in which she acknowledged receipt of Carr's letter.⁵³ The third request asked Carr for the same information as the first two, and included a copy of the written complaint by LG that had spurred the investigation.⁵⁴ This third request was mailed via first class and certified mail, included the Examiner's telephone number, and gave Carr until October 1, 2003, to respond.⁵⁵ Once again, the certified mailing was returned to NASD, marked "Unclaimed," and the first class mailing was not returned.⁵⁶

Having received no response to the third request, Examiner Jani sent a fourth request for information to Carr on October 3, 2003.⁵⁷ The fourth request was sent via first class and certified mail to Carr's CRD residential address, and required a response by October 14, 2003.⁵⁸ The certified copy of the fourth request was returned to NASD marked "Unclaimed," and the first class mailing was not returned.⁵⁹

⁵⁰ *Id.*

⁵¹ Compare CX-24 with CX-28.

⁵² CX-29.

⁵³ CX-30.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ CX-31; Tr. 140.

⁵⁷ CX-32.

⁵⁸ *Id.*

⁵⁹ CX-33; Tr. 140.

With the exception of Carr's September 14, 2003, letter that acknowledged receipt of a Rule 8210 request for information, Carr did not respond to any of the Staff's requests for information, and failed to provide any of the requested information.⁶⁰

Discussion

I. JURISDICTION

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a formerly associated person after the individual's termination of association. During the period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was associated with a member firm or based on such person's failure to provide information requested pursuant to Procedural Rule 8210, if the request was made, and the complaint is filed, during the period of retained jurisdiction.⁶¹

The Complaint in this matter was filed November 19, 2004, within two years of his termination from Wachovia, and while Carr was registered with another NASD member firm. The Complaint concerns conduct that occurred while he was registered with Wachovia, and his failure to provide information within the period of retained jurisdiction. Accordingly, NASD has jurisdiction over this matter.

II. UNSUITABLE RECOMMENDATIONS

A registered representative who exercises control over an account is deemed implicitly to have recommended the transactions that he executes in the account.⁶² In recommending the purchase, sale, or exchange of any security to a customer, NASD Conduct Rule 2310 requires that the member or registered representative have reasonable

⁶⁰ Tr. 141.

⁶¹ NASD By-laws Art. V. Sec. 4

⁶² *Clyde J. Bruff*, Exchange Act Release No. 40,583, 1998 SEC LEXIS 2266, **6-7 (Oct. 21, 1998).

grounds for believing the recommendation is suitable for the customer;⁶³ that is, the recommendation must fit the customer's investment objectives and be consistent with the customer's best interests.⁶⁴

NASD Conduct Rule 2310 and IM-2310-2 encompass a "fundamental responsibility for fair dealing" that a registered representative has to his customers.⁶⁵ The suitability requirement of Conduct Rule 2310 and IM-2310-2 is violated when the representative's recommendations are quantitatively unsuitable, i.e., when the recommendations generate excessive trading in the account in light of the customer's investment objectives and needs.⁶⁶ Moreover, IM-2310-2(3) provides that trading in mutual fund shares, particularly on a short-term basis, contravenes a representative's duty of fair dealing, because mutual fund shares "are not proper trading vehicles and such activity on its face may raise the question of Rule violation." Where a pattern of such transactions is evident, the broker's recommendations are subject to a closer examination.⁶⁷

Here, the trading strategy yielded no reasonable expectation for the customer to benefit. Instead, it generated significant commissions for Carr who, on an escalating basis, repeatedly purchased and sold closed-end funds on a cycle that insured that those commissions would not be reversed for trading within the support period. Carr's

⁶³ NASD Conduct Rule 2310(a).

⁶⁴ *Wendell D. Belden*, Exchange Act Release No. 47,859, 2003 SEC LEXIS 1154, at *11 (May 14, 2003) (citations omitted).

⁶⁵ *Larry Ira Klein*, Exchange Act Release No. 37,835, 1996 SEC LEXIS 2922, at **16-17 (Oct. 17, 1996) (citing *John M. Reynolds*, Exchange Act Release No. 30,036, 1991 SEC LEXIS 2725, at *10 n.13 (Dec. 4, 1991)).

⁶⁶ *Daniel Richard Howard*, Exchange Act Release No. 46,269, 2002 SEC LEXIS 1909, at *7 (July 26, 2002); *Dep't of Enforcement v. Stein*, No. C07000003, 2001 NASD Discip. LEXIS 38, at *9 (NAC Dec. 3, 2001).

⁶⁷ *Kenneth C. Krull*, Exchange Act Release No. 40,768, 1998 SEC LEXIS 2664 at *8 (1998), (the respondent "ignored his fundamental obligation of fair dealing by ... placing his own interests in garnering commissions above those of his customers") (citation omitted), *aff'd*, 2001 U.S. App. LEXIS 7644 (9th Cir. 2001).

commission runs show that although some of the funds were sold at a modest profit after the support period, a number made little, if any, profit on their sale, and there is no evidence of a sale on the supposed “pop” during the support period. Carr, himself, admitted that the price of such funds usually declined after the support period. Carr claimed LG was interested in dividends. However, Carr failed to demonstrate that LG received more dividend income from the various funds that were bought and sold for him than LG would have received had he retained the five funds he held at the end of December 2002. According to the June 3, 2003, complaint letter that LG sent to Wachovia, he claimed that he lost \$19,640 in interest from those funds, and another \$18,665 in principal that he would have received had he held the five funds.⁶⁸

Regardless of whether or when LG changed his risk tolerance on the account form from “moderate” to “aggressive,” the so-called “trading strategy” and its implementation were both unauthorized and unsuitable for the customer. Carr had no reason to believe that such a trading strategy would benefit LG. The Compliance Department at Wachovia did not believe the customer would benefit from it; LG made a claim against Wachovia because of it; and Wachovia settled LG’s claim within seven days of his June 3, 2003, letter complaining of it.⁶⁹ By making at least 21 unsuitable recommendations, Carr violated NASD Conduct Rules 2310 and 2110.

⁶⁸ CX-6.

⁶⁹ CX-7.

III. UNAUTHORIZED TRANSACTIONS

Unauthorized trading in a customer account amounts to a serious violation of just and equitable principles of trade.⁷⁰ Both the SEC and NASD have characterized unauthorized trading as “a fundamental betrayal of the duty owed by a salesman to his customers.”⁷¹

Carr admitted that he informed LG only after the fact that he had sold two funds and purchased a new issue in January 2003. He also admitted that he did not inform LG before the fact when he effected three trades when he was terminated in April 2003. Moreover, Carr’s claim of “implied discretion” from LG to effect trades is disingenuous at best. NASD Rule 2510 prohibits registered representatives from exercising “any” discretionary power in a customer’s account without prior written authorization from the customer and written acceptance by the NASD Member. Carr admitted that the account was not discretionary; his claim of “implied discretion” is merely a fiction, created to rationalize his unauthorized trading in LG’s account. By effecting at least 21 transactions in that account, without the authorization of LG, Carr violated NASD Conduct Rule 2110.

IV. FAILURE TO RESPOND TO NASD REQUESTS FOR INFORMATION

NASD Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under

⁷⁰ *Jeffrey B. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *13-14 (NAC Mar. 27, 2002) (citations omitted); *see also Robert Lester Gardner*, Exchange Act Rel. No. 35899, 1995 SEC LEXIS 1532 (June 27, 1995); *Department of Enforcement v. Baxter*, 2000 NASD Discip. LEXIS 3 (NAC April 19, 2000).

⁷¹ *Keith L DeSanto*, Exchange Act Release. No. 35860, 1005 SEC LEXIS 1500 (June 19, 1995), *aff’d.*, 1996 U.S. App. LEXIS 39269 (2d Cir. 1996); *District Business Conduct Committee v. Ted. D. Wells*, No. C07970045, 1998 NASD Discip. LEXIS 32 (NAC July 24, 1998).

investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power.⁷² When an individual fails to respond to information requests, NASD's ability to perform its regulatory responsibilities is subverted.⁷³ A violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110.⁷⁴

Here, Carr failed to cooperate with the investigation despite four attempts by the Staff to obtain information from him. Notice of a request for information under Rule 8210 is deemed received by the person to whom it is directed when it is sent to the last known residential address of the person as reflected in the Central Registration Depository.⁷⁵ In this case, the first and every subsequent request for information was mailed to Carr's residential address on file with CRD. Accordingly, he received constructive notice of those requests. Moreover, he acknowledged actual notice of the first request for information in his September 14, 2003, letter to the Staff.⁷⁶ The return address on that letter was the same as his CRD residential address.

Although Carr may not have been residing continuously at his CRD address because of marital difficulties, he failed to inform the Staff of any other address at which he might be contacted. He knew that the request for information related to an investigation into LG's complaint against him, yet he failed, without explanation, to produce any of the requested information or to respond to the subsequent requests for that information. Accordingly, by failing to produce that information and to respond to the

⁷² *Toni Valentino*, Exchange Act Release No. 24-49255, 2004 SEC LEXIS 330, at *15-16 (Feb. 13, 2004).

⁷³ *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998).

⁷⁴ *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC, Apr. 19, 2000).

⁷⁵ NASD Procedural Rule 8210(d).

⁷⁶ Carr further undermined his credibility by first admitting – in his September 14, 2003, letter to the Staff – that he received the August 26, 2003, request for information, and later denying – in his December 12, 2004, Answer to the Complaint – that he had ever received any request for information from the NASD.

Staff's requests, Carr violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Sanctions

Unsuitable Recommendations

The NASD Sanctions Guidelines for unsuitable recommendations call for a fine of \$2,500 to \$75,000, and a suspension for a period of 10 business days to a year, or a longer suspension or bar in egregious cases.⁷⁷ Here, Carr engaged in short-term trading of mutual funds - funds unsuited for such trading - for his own personal benefit. Because, as noted below, the trading was unauthorized, and Carr failed to cooperate in the investigation of those trades, those aggravating circumstances render the misconduct egregious. Accordingly, Carr will be barred for making unsuitable recommendations, in violation of Conduct Rules 2310 and 2110.

Unauthorized Transactions

For unauthorized transactions, NASD Sanction Guidelines recommend a fine of \$5,000 to \$75,000, and a suspension for 10 business days to one year. In egregious cases, a longer suspension or a bar should be considered. The principal considerations in determining the appropriate sanction are: (1) whether the respondent misunderstood his authority or the terms of the customer's orders; and (2) whether the unauthorized trading was egregious.⁷⁸

Here, Carr did not misunderstand his authority to make trades in LG's account. He knew that the account was not discretionary, and he knew that it would be difficult to contact a client who would be out of the country for several months while he effected a

⁷⁷ NASD SANCTION GUIDELINES, p. 97 (2004 ed.).

⁷⁸ NASD SANCTION GUIDELINES, p. 100.

large number of trades in the account. He also knew that his customer had 30 years of experience investing in securities, and would not reasonably agree to an untested trading strategy that was invented by Carr and had no realistic expectation of benefit for the customer. There is no evidence that Carr had any convincing explanation of how the trading strategy would outperform the original intent of LG to buy and hold just five funds. The unauthorized trades were the result of a deliberate strategy to increase his production and generate commissions.

The NAC has identified three categories of egregious unauthorized trading.⁷⁹ First, where the sheer number of unauthorized trades is so large as to be considered quantitatively egregious; second, where the unauthorized trading was accompanied by aggravating factors, such as an attempt to conceal the trading or avoid regulatory investigation; and third, where the unauthorized trading is considered to be qualitatively egregious because there is strong evidence that the respondent acted in bad faith.⁸⁰

Carr effected at least 21 unauthorized trades in LG's account over a period of approximately three months, a quantitatively egregious volume of unauthorized trades.⁸¹ Carr's refusal to cooperate with the Staff's investigation into the circumstances of the unauthorized trading is an aggravating factor that also renders the unauthorized trading

⁷⁹ See *District Business Conduct Committee v. Daniel S. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999); see also NASD Sanctions Guidelines p. 100, n. 2.

⁸⁰ *Id.*

⁸¹ See *Department of Enforcement v. James Henry Bond, III*, 2002 NASD LEXIS (NAC April 4, 2002) (NAC upholding a bar where the Respondent made 12 unauthorized trades); *DBCC v. Granath*, No. C02970007, 1998 NASD Discip. LEXIS 19, at *19-20 (NAC Mar. 6, 1998) (imposing a bar when the Respondent executed 24 unauthorized transactions); *DBCC v. Levy*, No. C07960085, 1998 NASD Discip. LEXIS 22, at *12 (NAC Mar. 6, 1998) (imposing a bar when the Respondent executed 16 unauthorized transactions).

egregious.⁸² Finally, Carr's actions were qualitatively egregious because the evidence is strong that he was motivated by his own self interest, and not that of his customer.⁸³ Accordingly, to protect the investing public, the Hearing Panel concludes that Carr should be barred for unauthorized trading, in violation of NASD Conduct Rule 2110.

Failure to Respond to Requests for Information

If a respondent does not respond in any manner to a request for information made pursuant to Procedural Rule 8210, the Sanction Guidelines provide that a bar is the standard sanction.⁸⁴ Where there are mitigating circumstances, a suspension for up to two years may be appropriate.⁸⁵ Here, there are no mitigating factors that would justify a lesser sanction. Carr had actual notice of the first request for information, and at least constructive notice of the next three. Carr may not have been living at his residence continuously because of his marital difficulties; nevertheless, "[r]egistered persons 'have a continuing duty to notify [NASD] of [their] current address, and to receive and read mail sent to [them] at that address.'"⁸⁶ Carr failed to inform the Staff of an address to which it might send mail for him to receive and read. Under the circumstances, a bar is the appropriate sanction for his complete failure to provide information, in violation of Procedural Rule 8210 and Conduct Rule 2110.

Conclusion

Thomas James Carr is barred from associating with any member firm in any

⁸² See *Hellen* at *16 citing *In re Johnathan Garrett Ornstein*, 51 S.E.C. 135 (1992) (noting that the SEC upheld an extensive suspension where the unauthorized trades were followed by the respondent's attempt to evade the NASD investigation).

⁸³ See *In re Ted D. Wells*, No. C07970045 at *6-7 (NAC July 24, 1998) (unauthorized trades at the customer's expense in order to benefit the respondent was analogous to conversion, and fit squarely into the category of egregious conduct).

⁸⁴ NASD SANCTIONS GUIDELINES, p. 37.

⁸⁵ *Id.*

⁸⁶ *Warren B. Minton*, Exchange Act Release No. 46,709, 2002 SEC LEXIS 2712, at *13 (Oct. 23, 2002).

capacity for recommending and effecting unsuitable transactions in a customer's account, in violation of Conduct Rules 2310 and 2110; effecting unauthorized transactions in that customer's account, in violation of NASD Conduct Rule 2110; and failing to provide information in connection with an investigation, in violation of Procedural Rule 8210 and Conduct Rule 2110. He is also assessed costs in the total amount of \$2,134, consisting of an administrative fee of \$750 and a transcript fee of \$1,384.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

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