

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

DOYLE MARK WHITE
(CRD No. 2212634)

Respondent.

Disciplinary Proceeding
No. C06030035

Hearing Officer—AWH

AMENDED HEARING PANEL DECISION¹

October 12, 2005

Registered Representative barred from associating with any member firm in any capacity for attempting to mislead NASD staff, in violation of NASD Conduct Rule 2110. In light of the bar, no further sanctions are imposed for failing to register as a General Securities Principal while managing the Firm, in violation of NASD Conduct Rule 2110. Respondent also assessed costs.

Appearances

George C. McGuigan, Jr., Esq., and Karen E. Whitaker, Esq.,
for the Department of Enforcement.

Jerome M. Selvers, Esq., for Doyle Mark White.

DECISION

Introduction

On December 18, 2003, the Department of Enforcement (“Enforcement”) issued a four-cause Complaint, naming five individual registered representatives and their employer, NASD member firm Richmark Capital Corporation (“Richmark”), as Respondents in this proceeding. Three of the registered representatives settled the

¹ This decision has been amended to eliminate any reference to NASD Rule 3010.

allegations in the Complaint against them, and the Complaint against one of them was dismissed. Because Richmark and Respondent Doyle Mark White (“White”) failed to appear at a scheduled hearing, a Default Decision was issued on December 15, 2004, against them. The Default Decision fined Richmark and suspended it from principal trading activity for one year for violations of various SEC and NASD Rules. The Default Decision barred White from associating with any member firm in any capacity for (1) failing to register as a General Securities Principal while managing Richmark, in violation of NASD Conduct Rule 2110; and (2) attempting to mislead NASD staff, in violation of NASD Conduct Rule 2110 – the two allegations in the Complaint against him. In January 2005, White filed a motion to set aside the Default Decision against him on the grounds that, for personal reasons beyond his control, he was unable to participate in pre-hearing conferences or attend the hearing. Finding that good cause had been shown, on February 2, 2005, the Hearing Officer set aside the Default Decision against White.

A hearing on the two causes in the Complaint against White was held on June 7, 2005, in Dallas, Texas, before a hearing panel composed of the Hearing Officer and two current members of the District 6 Committee. Both parties filed post-hearing submissions on August 5, 2005.

Findings of Fact²

I. Respondent

White first became registered as a general securities representative with NASD

² References to Enforcement’s Exhibits are designated as CW-__; Respondent’s, as R-__; and the transcript of the hearing, as Tr. __.

through member firm Harris Securities in March 1992.³ Between leaving that firm and starting Richmark in 1997, White was registered with several other firms as a general securities representative.⁴ In 1997, White started Richmark with his partner, Richard Monello.⁵ Monello was President of Richmark from its inception until 2001, when White bought him out.⁶ At that time, White became 100% owner and sole director of RMC 1 Capital Markets, Inc. (“RMC”), the holding company for Richmark.⁷ RMC owned more than 75% of Richmark, and no other individual or company owned a share greater than five percent.⁸ Accordingly, White was the only individual with a substantial ownership interest in Richmark, and he was the sole member of its Board of Directors.⁹

From January 1999 through February 2004, White periodically was scheduled to take the Series 24 examination to become a general securities principal. He failed the examination twice; he failed to appear for the examination twice; and the window within which he could have taken the examination expired four times.¹⁰ Accordingly, White has never qualified or been registered as a general securities principal with NASD.¹¹

II. White’s Management Activities

White incorporated Richmark and registered the firm with NASD in 1997.¹² Initially, and throughout his association with Richmark, White held the positions of

³ CW-1 at 8.

⁴ *See id.* at 3-8.

⁵ Tr. 182-84.

⁶ Tr. 192.

⁷ Tr. 192; CW-2 at 3-4.

⁸ CW-2.

⁹ CW-12 (White signed several written consent forms as “all of the Members of the Board of Directors of RichMark Capital Corporation”).

¹⁰ CW-1 at 11.

¹¹ CW-1.

¹² Tr. 182.

“executive vice president, secretary and treasurer.”¹³ White was also effectively the controlling shareholder in the firm.¹⁴

In March 2001, White hired Ken Wiseman to be the firm’s trader. He made a written offer to Wiseman that included a compensation package of a \$5,000 draw against commissions and half of the firm’s trading profits.¹⁵ In October 2001, White fired Wiseman.¹⁶

In November 2001, White hired Michael Claiborne to be the firm’s trader.¹⁷ However, for approximately four months, from late 2001 through early 2002, Richmark conducted no securities business because it was in violation of its net capital requirements. In order to rectify the violation, White made six capital contributions to Richmark, and signed, as “Director,” corporate resolutions acknowledging receipt of those contributions.¹⁸ Richmark notified NASD when it came back into net capital compliance, and then resumed trading operations.¹⁹

Claiborne was hired to run and oversee the firm’s trading department, although he could not hire staff without the approval of White.²⁰ After White bought out Monello, he asked Claiborne to assume the role of President of Richmark because Claiborne was registered as a general securities principal. Claiborne agreed in February 2002 to assume the presidency for “a short while,” so that White could take and pass the Series 24

¹³ *Id.* at 183; CW-2 at 3.

¹⁴ *See supra*, Facts, Section I.

¹⁵ CW-10.

¹⁶ *Id.* at 2.

¹⁷ Tr. 20-21.

¹⁸ CW-12.

¹⁹ Tr. 190-93.

²⁰ Tr. 21.

examination.²¹ Richmark's Form BD listed Claiborne as a principal as well as a control person.²² White was also listed as a control person, but was not listed as a principal.²³

From March to October 2002, White instructed Claiborne to make a market in 18 different securities.²⁴ Also in March 2002, White signed a Letter of Acceptance, Waiver and Consent ("AWC") in an NASD regulatory proceeding, agreeing to pay a fine of \$15,000 and consenting to findings that Richmark both had failed to disclose the risks of day trading, and had operated a website that contained exaggerated and unwarranted claims.²⁵

In June 2002, White fired broker Anthony Matthews and closed Matthews' branch office, which was an office of supervisory jurisdiction, because of numerous regulatory inquiries involving the branch.²⁶ In July 2002, White offered John St. Thomas a position as a registered representative, and gave him permission to conduct outside business with another firm.²⁷

From June to September 2002, White signed more than 35 checks drawn against Richmark's business checking account to pay ordinary business expenses of the firm.²⁸ In August 2002, on his own and the firm's behalf, White signed a Settlement Agreement to resolve an arbitration claim that two former customers filed against White, Richmark,

²¹ Tr. 34; CW-2 at 3. Also in February 2002, White offered Scott Martinson a position as a registered representative, and gave him permission to conduct outside business through another firm. CW-11.

²² CW-2 at 3.

²³ *Id.*

²⁴ Tr. 23-25; CW-17.

²⁵ CW-15 at 3, 6.

²⁶ CW-13.

²⁷ CW-11 at 3.

²⁸ CW-14; *see also* Tr. 31 (Claiborne testified that he could request a check from the firm's "financial man," but he "couldn't receive the funds without the approval of D. Mark White").

and several other individuals. He also signed the settlement check in the amount of \$12,500.²⁹

A routine NASD investigation of Richmark in 2001 resulted in a Letter of Caution to the firm, dated September 11, 2002, detailing several deficiencies and requiring that the firm address them. In the Letter of Caution, the staff wrote:

- 2) The firm failed to comply with NASD Rule 1021(a) in that Mark White was operating in the capacity of a general principal without obtaining a general principal license. During the examination the staff noted that Mark White, (GS), has been designated as a director, officer and control person of Richmark since he owns 50% of the broker dealer. It was also noted that Mr. White is involved in the investment banking aspect of the firm's operations. However, Mr. White does not maintain a general principal license and is not listed in the firm's written supervisory procedures as a general principal.³⁰

In response to the Letter of Caution, Richmark, through counsel, provided an outline of its plans to address the enumerated shortcomings.³¹ With regard to the status of White's registration, Richmark wrote: "Mr. White anticipates completing his test and obtaining his Series 24 license by the end of 2002."³² Others in the Firm were concerned about White's failure to register, and, according to Mike Claiborne, he strongly urged White to register on multiple occasions.³³

On November 16, 2001, NASD Field Examiner Michael Malone conducted an examination exit conference with White, Claiborne, and another Richmark employee who was not a principal. At that conference, Malone informed White that, because he was involved in the firm's investment banking business and was a director and control person, his failure to register as a principal was an apparent violation of NASD Rules. White

²⁹ CW-15, 16.

³⁰ CW-7 at 1.

³¹ CW-8.

³² *Id.* at 5.

³³ Tr. at 30.

signed the Exit Conference Summary form acknowledging that he was informed that he needed to register as a general securities principal.³⁴

As it did in the Letter of Caution, the staff wrote in the Exit Conference Summary Form:

- 2) During a review of the firm's ownership structure the staff noted that Mark White, (GS), had been designated as a director and officer of Richmark Capital Corporation. It was also noted that Mr. White meets the definition of a control person since he owns 50% of the broker dealer. Lastly, the staff has observed that Mr. White is involved in the investment banking aspect of the firm's operations. However, it should be noted that Mr. White does not maintain a general principal license. At this time the staff informed the firm that failure to register a director or control person as a general principal is an apparent violation of NASD Rule 1020(a).³⁵

III. Attempting to Mislead NASD

During a routine examination of Richmark that occurred in late October or early November 2002, Examiner Malone requested a copy of the Management Agreement between Richmark and RMC, its holding company.³⁶ Malone asked for the document several times before the firm provided it.³⁷ After receiving the Management Agreement, on or about November 5, 2002, Malone discovered an e-mail, dated November 5, 2002, from White to Harold McKamy, the firm's compliance officer. The e-mail stated:

Find out the date that Mike Claiborne was hired and have him sign the Management Agreement that Malone is requesting. Susan has type [sic] up a new agreement. Date the Agreement about a week or so after he came on board.

This will do 2 things

1. further deflect that I am acting as a principal.

³⁴ CW-6 at 1,7; Tr. 100-01.

³⁵ CW-6 at 1.

³⁶ Tr. 123-25. The Management Agreement provides only that Richmark engages its holding company, RMC, to render "managerial services as advisor" to Richmark. It names no individuals to render those services, and is signed by the "President" of Richmark and the "Vice President" of RMC. CW-18, at 2, 3.

³⁷ Tr. 124. In the exit conference, Malone noted his concern about the adequacy of the Management Agreement's contents, as well as the propriety of the discretionary monthly management fee that was a provision in the Management Agreement. CW-9 at 6.

2. Make it look like we had it in place all along and did not prepare as a knee jerk reaction to his request.

Thanks.³⁸

On its face, the Management Agreement purports to be dated and signed on August 1, 2002. The Management Agreement is for a term of five years, ending on July 31, 2007. According to those dates, the original Management Agreement would have been for a term beginning in August 1997 (just after White created Richmark and RMC) and ending on July 1, 2002.³⁹ However, McKamy told Malone that the current Management Agreement had been signed on or about November 5, 2002.⁴⁰ Claiborne could not remember the specific date upon which he signed the document; however, he was certain it was not in August 2002, and he believed it was in November 2002.⁴¹

White testified that he intended the e-mail to be a joke to “jerk [Malone’s] chain.”⁴² He also claimed that Malone was in possession of the Management Agreement for about two weeks prior to the time White wrote the e-mail.⁴³ The Hearing Panel concludes that White’s testimony is, at best, disingenuous. White was unable to explain, and the Hearing Panel is unable to understand, how the e-mail could be interpreted to be humorous and/or, at the same time, calculated to elicit anger from the NASD Examiner, as White claimed. Moreover, the Hearing Panel is not persuaded that White could know, prior to writing the e-mail, that the Examiner would search the firm’s e-mails or uncover this particular message. It is more likely than not that White realized that the original Management Agreement had expired, and that a new one should have been in place as of

³⁸ Tr. at 125-26; CW-18.

³⁹ White’s testimony confirm’s this assumption. Tr. 224-25.

⁴⁰ Tr. 128.

⁴¹ Tr. 33, 91.

⁴² Tr. 202.

⁴³ Tr. 235-37.

August 1, 2002, the purported date of the subject Management Agreement. White would not have wanted to sign that document as an officer of Richmark, an individual who would be required to be licensed as a Series 24 principal.

Discussion

I. Failure to Register as a General Securities Principal

NASD Membership and Registration Rule 1021(a) requires any individual who functions in a principal capacity to register as a principal. Part (b) of that Rule defines “Principals” as:

[p]ersons associated with a member, enumerated in subparagraphs (1) through (5) hereafter, who are actively engaged in the management of the member’s investment banking or securities business, including supervision, solicitation, conduct of business or the training of persons associated with a member Such persons shall include: (1) Sole Proprietors, (2) Officers, (3) Partners, (4) Managers of Offices of Supervisory Jurisdiction, and (5) Directors of Corporations.

Here, White is listed as a director and an officer of Richmark on the firm’s BD. He is the sole owner and director of Richmark’s holding company, and, accordingly, controls Richmark. Under the circumstances, White cannot claim that he is merely a “nominal” officer of the firm.⁴⁴ To be considered “actively engaged” in the management of the firm’s securities business, he does not have to be shown to be responsible for day-to-day management of the member firm.⁴⁵

⁴⁴ See *District Business Conduct Committee v. Bruce L. Pecaro*, 1998 NASD Discip. LEXIS 13, at *16 (NBCC Jan. 7, 1998) citing *In re Samuel A. Sardinia*, 46 S.E.C. 337, 342 (1976) (a director is unlikely to be considered a nominal officer.) The respondent in *Pecaro* was a director, officer, and sole shareholder of the firm, using those positions to control and direct the firm’s activities, a situation not unlike the instant case.

⁴⁵ *Id.* n. 11 citing *American Nat’l Equities*, No. LA-4323, 1991 NASD Discip. LEXIS 86, at *20 (NBCC Nov. 25, 1991).

Here, White signed every check written on two separate Richmark accounts for at least three months, and there is no evidence that anyone else had authority to write checks on the firm's account. White arranged capital infusions to cure Richmark's net capital noncompliance. He not only maintained a physical presence at the firm as evidenced by his participation in the 2001 Exit Conference with Examiner Malone, but he executed a settlement agreement with the firm's former clients, signed an NASD Letter of Acceptance, Waiver and Consent on behalf of the firm, offered and terminated employment of representatives, and terminated a branch office, all on company letterhead. On various forms of correspondence, White identified himself as "Executive Vice President," a term that connotes management of the firm. Finally, White took an active part in the firm's trading activities by frequently directing Claiborne to make a market in specific stocks. In short, White was the nucleus of the operation, directing and controlling firm strategy and policy. By so acting as a principal, without the benefit of a Series 24 license, White violated NASD Registration Rule 1021, and Conduct Rule 2110.

II. White's Attempt to Mislead NASD

NASD Conduct Rule 2110 requires associated persons to "observe high standards of commercial conduct and just and equitable principles of trade." Entering false information on official firm records is a serious violation of Rule 2110. "The entry of accurate information on official Firm records is a predicate to the NASD's regulatory oversight of its members. It is critical that associated persons, as well as firms, comply with this basic requirement."⁴⁶

The language of the e-mail unambiguously demonstrates that White knowingly and willfully attempted to mislead NASD staff. His claim to have intended a joke or a

⁴⁶ *Charles E. Kautz*, Exchange Act Rel. 37072, 1996 SEC LEXIS 994, at **11-12 (April 5, 1996).

provocation is simply not credible. If, as White testified, he knew Malone was in possession of the Management Agreement prior to the time White wrote the e-mail, White would have had no credible reason for sending the instruction to his compliance officer to falsify the document. The obvious consequence, under those circumstances, would only have been to subject White to a charge of NASD Rule violation where none had occurred. Malone would not likely be amused or angry. The likely, as well as actual result, was that Malone comported himself as would any competent, conscientious staff examiner, charging White with a violation of Rule 2110. By causing that falsification of the Management Agreement, White attempted to mislead NASD staff and dispel the appearance that he was controlling and managing Richmark. By so doing, he violated NASD Conduct Rule 2110.

Sanctions

Although there is no Sanction Guideline for misleading NASD, the Guideline for failing to respond truthfully to a request made pursuant to Rule 8210 is analogous.⁴⁷ That Guideline suggests a fine of \$25,000 to \$50,000. A suspension or a bar may also be considered. Here, the November 2002 e-mail demonstrates a knowing and willful attempt to mislead NASD staff into believing that White was not acting as a principal without being so registered, and that the firm was operating with a management agreement in place. There is simply no justification for White's actions. Given the documentary facts, White's description of his conduct as a joke in bad taste is patently absurd. His blatant attempt to mislead NASD staff is particularly egregious and demonstrates White's unwillingness to conform his conduct to the ethical requirements of

⁴⁷ NASD SANCTION GUIDELINES, at 35 (2005 ed.).

NASD. Accordingly, White will be barred from associating with any member firm in any capacity for misleading NASD staff in violation of Conduct Rule 2110.

The Sanction Guidelines for failing to register suggest a fine in the range of \$2,500 to \$50,000, and a suspension or bar in egregious situations.⁴⁸ The principal considerations are (1) whether White had filed a registration application, and (2) the nature and extent of his responsibilities at Richmark.

White's misconduct is egregious and warrants a severe sanction. While he applied to take the Principal's examination several times, he never passed it. On more than one occasion, he simply failed to appear for the examination. Nevertheless, he actively managed Richmark for nearly two years, while he installed a nominal president, to whom he gave no real power over the business. His failure to register as a principal was aggravated by his attempt to mislead NASD about that activity. Furthermore, his level of involvement persisted in the face of warnings from NASD that he could not continue to manage the firm without registering as a General Securities Principal, and assurances from him that he would obtain the Series 24 license. Accordingly, the Hearing Panel concludes that White should be suspended for one year and fined \$50,000 for violating NASD Conduct Rule 2110. However, in light of the bar for misleading NASD staff, the sanctions for failing to register as a General Securities Principal will not be imposed. White will be assessed costs in the total amount of \$2,128.25, consisting of an administrative fee of \$750 and a \$1,378.25 transcript fee.

Conclusion

Doyle Mark White is barred from associating with any member firm in any capacity for attempting to mislead NASD staff, in violation of NASD Conduct Rule

⁴⁸ *Id.*, at 48.

2110. In light of the bar, no further sanctions imposed for failing to register as a General Securities Principal, in violation of NASD Conduct Rule 2110. He is also assessed costs in the total amount of \$2,128.25.

The bar shall become effective immediately if this decision becomes the final disciplinary action of NASD.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:

Via First Class Mail & Overnight Courier
Doyle Mark White

Via First Class Mail & Facsimile
Jerome M. Selvers, Esq.

Via First Class & Electronic Mail
George C. McGuigan, Jr., Esq.
Karen E. Whitaker, Esq.
Rory C. Flynn, Esq.