

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C01050008

**Hearing Panel Decision and
Order Granting
Complainant's Motion for
Summary Disposition**

Hearing Officer – SW

Dated: December 21, 2005

Respondent violated NASD Rules 1120(a) and 2110 by executing trades during a period when his registration was inactive. The Hearing Panel imposed a Letter of Caution on Respondent for the violation.

Appearances

Mark P. Dauer, Esq., Senior Counsel, Atlanta, GA, and Rory C. Flynn, Esq., Of Counsel, Washington, DC, for the Department of Enforcement.

Respondent, pro se.

DECISION

I. PROCEDURAL BACKGROUND

On May 4, 2005, the Department of Enforcement (“Enforcement”) filed a two-count Complaint against three respondents: (i) _____; (ii) _____; and (iii) Respondent.¹

On August 25, 2005, Enforcement filed a Motion for Summary Disposition (“Summary Motion”) as to the three respondents. Subsequently, on November 16, 2005, NASD accepted the offers of settlement executed by _____ and _____.

¹ Respondent filed an Answer to the Complaint on July 19, 2005.

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Accordingly, in ruling on the Summary Motion, the Hearing Panel only considered the allegations of count two of the Complaint that allege that Respondent violated NASD Rules 1120(a) and 2110 by acting in a registered capacity while his registration was inactive because he failed to complete the Regulatory Element of NASD's Continuing Education Requirement. Respondent failed to respond to Enforcement's Summary Motion.²

Based on a review of the record, the Hearing Panel grants Enforcement's Summary Motion as to liability holding that Respondent violated NASD Registration Rule 1120(a) and NASD Conduct Rule 2110. Rather than imposing the \$2,000 minimum fine recommended by Enforcement, this Decision will serve as a Letter of Caution to Respondent.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent first became registered with a member firm as a general securities representative in May 1998. (CX-9, p. 15). On September 9, 2003, Respondent was registered as general securities representative with Redwood Trading, LLC ("Redwood Trading"). (CX-9, p. 13). Redwood Trading terminated Respondent's registration on March 11, 2004. (Id.). Respondent is not currently associated with any NASD member firm. (Id.).

Nevertheless, Respondent remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws, because (1) the Complaint was filed on May 4, 2005, within two years after his association with Redwood Trading

² Enforcement's Summary Motion was accompanied by (i) a Statement of Undisputed Facts, (ii) a Memorandum of Points and Authorities, (iii) the declaration of an NASD staff member, (iv) the declaration of an employee of Respondent's former firm, and (v) 13 exhibits. Hereinafter, the statements in the Statement of Undisputed Facts will be designated as "Statement at ¶," statements in the Memorandum of Points and Authorities shall be designated as "Memo, p.," statements in the declaration of the employee of Respondent's former firm shall be designated as "____ DECL at ¶," and Enforcement's exhibits will be designated as "CX- " with the appropriate page or paragraph numbers.

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terminated, and (2) the Complaint charges Respondent with misconduct while he was associated with Redwood Trading.

B. Respondent Violated NASD Registration Rule 1120(a) and Conduct Rule 2110

1. Background

The Complaint alleges that Respondent violated NASD Registration Rule 1120(a) and NASD Conduct Rule 2110 by acting in a capacity requiring that he be registered while his registration was inactive.

Specifically, on September 9, 2003, Respondent became registered as a general securities representative with Redwood Trading. (CX-9, p. 13). On September 10, 2003, NASD informed Redwood Trading, via email, that Respondent had a window from May 29, 2003 to September 25, 2003, to complete the Regulatory Element of NASD's Continuing Education Requirement. (CX-5, p. 1).

On September 10, 2003, Redwood Trading's Compliance Department sent a notice to Respondent's branch manager, _____, noting that Respondent needed to complete his Continuing Education Requirement. (CX-5, p. 1; _____ DECL at ¶¶ 1, 3). Redwood Trading's Compliance Department sent Mr. _____ a second email on September 17, 2003, indicating that "[Respondent] needs to complete his Reg. Continuing Education" with no reference to the specific deadline for completing the requirement. (CX-5, p. 2). Mr. _____ spoke with Respondent on September 10, 2003 regarding his Continuing Education Requirement. (CX-6, p. 2). Although Mr. _____ received the September 17, 2003 email regarding Respondent, Mr. _____ did not realize that Respondent was CE deficient until October 1, 2003, and Mr. _____ did not address the matter with Respondent until October 1, 2003. (CX-6, pp. 1-2).

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On September 26, 2003, Respondent was deemed inactive based upon his failure to complete the Regulatory Element. Respondent completed his Continuing Education Requirement on October 1, 2003. (CX-12). During the period September 26, 2003 to October 1, 2003, acting in a capacity requiring registration, Respondent effected approximately 69 securities transactions while his registration was inactive. (CX-2).

Respondent does not dispute that his registration was inactive or that he traded during the time that his registration was inactive. However, in his Answer, Respondent stated that Mr. _____ told him that Redwood Trading would obtain “a new window of time to complete my continuing ed.” (Answer).

2. Registration Rule 1120(a)

Registration Rule 1120(a)(1) provides that each registered person must complete the Regulatory Element of NASD’s Continuing Education Requirement on the second anniversary of his or her registration date and every three years thereafter. The Registration Rule further provides that the Regulatory Element must be completed within 120 days after the person’s registration anniversary date.

Registration Rule 1120(a)(2) provides that any registered person who does not complete the Regulatory Element within the prescribed time frame will have his or her registration deemed inactive until such time as the requirements of the program have been satisfied. Registration Rule 1120(a)(2) further provides that any person whose registration has been deemed inactive shall cease all activities as a registered person and is prohibited from performing any duties and functioning in any capacity requiring registration.

Registration Rule 1120(a)(2) also provides that NASD may, upon application and a showing of good cause, allow additional time for a registered person to satisfy the program requirements.

3. Motion For Summary Disposition is Appropriate

Arguing that there were no material facts in dispute, Enforcement filed its Summary Motion on the issue of whether Respondent violated NASD Registration Rule 1120(a) and Conduct Rule 2110.

Pursuant to NASD Procedural Rule 9264(e), a Hearing Panel may grant a motion for summary disposition when “there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law.” This is identical to the standard under Rule 56(c) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) governing motions for summary judgments. It is well established under Fed. R. Civ. P. 56 that the moving party bears the initial burden of showing “the absence of a genuine issue of material fact.”³

The substantive law governing the case will identify those facts that are material and “only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”⁴ Factual disputes that are irrelevant or unnecessary will not be counted.⁵ All inferences, doubts, and conflicts must be resolved in the non-movant’s favor. If the moving party meets the initial burden, the opposing party must come forward with specific facts “showing that there is a genuine issue for trial.”⁶

³ Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986).

⁴ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

⁵ Id.

⁶ Matsushita Elec. Indus. Corp., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

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In this case, it is undisputed that Respondent was required to complete the Regulatory Element of NASD's Continuing Education Requirement within the 120-day period beginning on May 29, 2003 and ending on September 25, 2003.⁷ (CX-5, p. 1). It is also undisputed that there was a misunderstanding between Mr. _____ and Respondent regarding the deadline for Respondent to complete his Continuing Education Requirement. Based on his conversations with Mr. _____, Respondent believed that the deadline would be extended.⁸ In a letter to the NASD, Mr. _____ admitted that he did not realize that Respondent was CE deficient until October 1, 2003. (CX-6, p. 1).

When advised by Mr. _____ of the need to complete his Continuing Education Requirement, Respondent immediately completed his Continuing Education Requirement on October 1, 2003. (CX-12).

As a result, Respondent's registration was inactive between September 26, 2003 and October 1, 2003. (CX-9, p. 5). Despite being inactive during the four-day period between September 26, 2003 and October 1, 2003, Respondent effected approximately 69 securities transactions, acting in a capacity requiring registration, without registration. (CX-2).

Non-compliance with regulatory requirements "cannot be excused for lack of knowledge, understanding or appreciation of [the] requirements."⁹ Because the responsibility for meeting the Continuing Education Requirement is the responsibility of the registered representative, Respondent cannot shift his responsibility to his Firm or to NASD. It was Respondent's

⁷ Redwood Trading was aware of Respondent's continuing education window. (CX-5, p. 1).

⁸ At the November 14, 2005 pre-hearing conference, Enforcement confirmed that it accepted Respondent's statement that it was Respondent's understanding that a new deadline would be obtained. (Transcript of November 14, 2005 pre-hearing conference, p. 8).

⁹ Kirk A. Knapp, 51 S.E.C. 115, 134, 1992 SEC LEXIS 2971 (1992).

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responsibility to follow up with Redwood Trading and confirm that the deadline for his Continuing Education Requirement had been extended.

Enforcement carried its initial burden, and Respondent failed to identify concrete evidence from which a reasonable Hearing Panel could find in his favor. Because there are no genuine issues of material fact in dispute, the Hearing Panel finds that Enforcement is entitled to a finding that Respondent violated NASD Registration Rule 1120(a). A violation of any NASD rule constitutes a violation NASD Conduct Rule 2110.¹⁰

Accordingly, the Hearing Panel grants Enforcement's Summary Motion as to liability for Respondent.

III. SANCTIONS

The Sanction Guidelines for a Continuing Education Violation (Regulatory Element) recommend a fine of \$1,000 to \$5,000.¹¹ In egregious cases, where there is intentional misconduct or a repeat violation, a suspension of 30 days or more (up to two years) or a bar is recommended. The Guidelines also provide that the fine may be increased by the amount of the respondent's financial benefit¹²

Noting that Respondent received no commissions or other compensation for the transactions effected during the period of his inactivity, Enforcement recommended that Respondent be fined \$2,000 for engaging in 69 securities transactions while his registration was inactive.

¹⁰ Steven J. Gluckman, Exchange Act Release No. 41628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

¹¹ NASD Sanction Guidelines, p. 45 (2005).

¹² Id.

The principal considerations in determining the sanction under the Guidelines are (i) the nature and extent of the responsibilities of the inactive person, and (ii) whether the person knowingly functioned with an inactive registration.¹³

In supporting its recommendation, Enforcement simply cited the number of securities transactions in which Respondent engaged as an aggravating factor that justified a fine in excess of the Guidelines' \$1,000 minimum fine. The Hearing Panel, however, considered not only the number of securities transactions, but also considered that Respondent's registration was inactive for only four days. Respondent immediately fulfilled his Continuing Education Requirement on October 1, 2003 when he was advised by Mr. _____ that his registration was inactive.

In addition, the Hearing Panel also considered as a substantial mitigating factor that Respondent did not knowingly function as a registered representative with an inactive registration. It is undisputed that there was a misunderstanding regarding Respondent's deadline for completing his Continuing Education Requirement, and that Respondent was not the only one of Mr. _____'s registered representatives who had a misunderstanding regarding his deadline for completing the requirement.¹⁴ Accordingly, although Respondent should have followed-up on his discussion with Mr. _____ regarding his deadline, Respondent did not intentionally violate NASD Registration Rule 1120(a).

Taking the above matters into account, the Hearing Panel finds that a letter of caution is the appropriate sanction for Respondent's violation of Registration Rule 1120(a) and Conduct Rule 2110.

¹³ Id.

¹⁴ Mr. _____ was the branch manager for Mr. _____, who executed securities transactions between January 8, 2004 and February 13, 2004 while his registration was inactive. (Statement at ¶¶ 1, 2, 11). In response to an NASD request for information regarding his failure to comply with Registration Rule 1120(a), Mr. _____ wrote, "I was under the impression that the CE window was open until later in the year." (CX-3, p. 7).

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IV. CONCLUSION

The Hearing Panel grants Enforcement's Motion for Summary Disposition as to liability, and finds that Respondent violated NASD Rules 1120(a) and 2110, as charged. With respect to sanctions, the Hearing Panel deems this Decision a Letter of Caution as to Respondent.¹⁵

HEARING PANEL.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
December 21, 2005

Copies to:

Respondent (via Federal Express and first class mail)
Lewis Taylor Egan, Esq. (via electronic and first class mail)
Mark P. Dauer, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

¹⁵ The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.