NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. SHAWN E. AARON (CRD No. 2596836), Respondent.	Disciplinary Proceeding No. CLG050049 Hearing Officer – SNB **HEARING PANEL DECISION** March 3, 2006

Respondent violated Rule 2110 by making misrepresentations and threatening a Nasdaq-listed company. For these violations, Respondent is suspended in all capacities for two years, and required to requalify in all capacities and pay a fine of $50,000 prior to returning to the industry.

Appearances

Michael Dixon, Esq., Jeffrey Stith, Esq., Rockville, MD, for Complainant.

Liam O'Brien, New York, NY, for Respondent.

DECISION

I. Procedural History

On May 6, 2005, the Department of Market Regulation ("Market Regulation") filed a Complaint charging that Respondent Shawn E. Aaron ("Respondent") threatened and attempted to extort a Nasdaq-listed company (hereinafter referred to as the "Company"), and engaged in a scheme to defraud the Company, in violation of Rule 2110. Respondent filed an Answer denying the charges and requesting a hearing, which was held in Washington, DC on October 6, 2005, before a Hearing Panel that included a Hearing Officer, one former member of the District 9 Committee, and one former member of the NASD Board of Governors and the District 10

Committee.[1] Market Regulation called one NASD staff member, Faisal Sheikh, and two witnesses associated with the Company. Respondent testified on his own behalf.

II. Facts

A. Respondent

Respondent has been in the securities industry since 1995. Respondent registered with GunnAllen Financial, Inc. ("GunnAllen") in February 2000, and was there during the conduct in question. Respondent resigned from GunnAllen in July 2005, and was not registered with an NASD member at the time of the hearing in this matter. CX-10.

B. The Company and Respondent's Purchases of its Securities

The Company manufactures fiber optic video surveillance systems for commercial customers. CX-1. The Company's securities have traded on the Nasdaq Stock Market since 1979, and it had about 3,151,000 shares of common stock outstanding in April 2004. Tr. 8; Stip. 5.

On April 6, 2004, Respondent bought 5,180 shares of the Company's stock at $12.87, for a total cost of $66,683. Stip. 1. Beginning on the same day, and continuing through April 19, 2004, Respondent purchased 134,540 shares of the Company, at prices ranging from $13.02 through $14.78, on behalf of 54 customers. Stip. 2. In aggregate, Respondent and these investors held 139,720 shares, or approximately 4 % of the total shares outstanding as of April 2004.

C. Respondent's Telephone Conversation with the Company

This case essentially turns on what Respondent said to RA, a Company representative, during one telephone conversation. There is no dispute that this telephone conversation occurred

[1] Market Regulation offered Complainant's Exhibits ("CX") 1-12, which were admitted without objection. Respondent offered Respondent's Exhibits ("RX") 2-5, which were admitted without objection. Citations to the Hearing transcript are cited as "Tr. at p." Stipulations are cited as "Stip."

on April 19, 2004, and that it lasted approximately one hour. RX-5; Tr. 144. Respondent and RA do, however, dramatically differ in their accounts of what was said on the call. RA asserts that Respondent made a number of assertions regarding his holdings in the Company and other issuers (which, if said, Respondent and Market Regulation agree, were misrepresentations).[2] RA also claims that Respondent threatened to drive down the price of the Company's shares. On the other hand, Respondent says that he does not recall what he said on the call, other than that he criticized the Company's website and CEO's voicemail greeting. Tr. 277. Other than that, while Respondent cannot recall what he said, he asserts that he would not have said the things attributed to him in RA's notes and testimony.

As reflected below, the Panel generally found RA's testimony about the conversation more credible than Respondent's account, for several reasons. First, RA took contemporaneous notes for the purpose of memorializing the conversation, and these notes generally corroborated his testimony. Second, RA's testimony and notes referenced Respondent's securities holdings of the Company and other securities – information that RA would have no way of knowing unless Respondent told him. CX-6; Tr. 168-173. Third, the Panel did not find credible Respondent's assertion that he called the Company due to, among other reasons, a "precipitous" drop in the price of the Company's stock, given that the Company's stock price remained fairly flat leading up to the call.[3] Tr. 227-232. Fourth, the Panel did not find credible that Respondent could recall almost nothing about his conversation with RA, given the significant stock position that Respondent and his clients held in the Company at the time. Finally, the Panel found Respondent to be evasive in his answers and demeanor, in contrast with RA, who was straightforward.

[2] Tr. 218, 242, 243.

[3] The stock price ranged from $14.36 on April 12 to $13.63 on April 16 when Respondent first called the Company. C-5, C-9.

In light of these credibility determinations, the Panel's findings as to the conversation in question are as follows. On Friday, April 16, 2004, Respondent called EL, the Chairman and CEO of the Company, and left a voicemail stating that Respondent owned 10% of the Company's stock, and he wanted to talk to EL about taking the stock to "a new" or "the next" level. Tr. at 20, 56 – 58, 219-220. EL played the voicemail for the Company's investor liaison consultant, RA, and asked him to call Respondent back.[4] Tr. 59.

On Monday, April 19, 2004, RA returned Respondent's call.[5] Respondent did most of the talking during the one hour call. Tr. 71; RX-5. Respondent reiterated that he owned 10%, or some 300,000 shares, of the Company's stock. Tr. 61-62; CX-2; RX-2. When RA asked when he would be seeing Respondent's SEC filing, given his 10% ownership, Respondent replied by acknowledging that some of the shares were held by his clients. Id. Respondent asked RA for reasons to keep buying the Company's stock; otherwise, Respondent stated he could "drive the stock down to six bucks if I dumped 300,000 shares on the market, unless you have institutions lined up." Tr. 62-63; CX-2; RX-2.

Respondent also told RA that he wanted to take the Company's stock "to the next level." Respondent said that he was the top producer at GunnAllen and had a special relationship with GunnAllen's CEO. Respondent explained that the "best ideas" came to him, and after he positioned his clients in these best ideas, the ideas were turned over to the other brokers in the

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[4] Respondent's contact came at an important point in the Company's history. The Company had been extremely active in the first quarter of 2004. It signed a contract with a large, well-known company; filed an 8-K which included a PowerPoint presentation outlining the Company's plans to improve sales; and conducted road shows. The Company had record results for the year ended December 31, 2003, and the first quarter earnings, scheduled to be released shortly, would also show record results. Tr. 72-73.

[5] Respondent claimed that he called RA, pointing to a record showing that Respondent's firm paid for the call. RX-5; Tr. 213. However, the Panel did not find Respondent's argument significant or credible, particularly given that the charge of $1.90 for 63 minutes was quite low, indicating that it could have been for RA's incoming call on the firm's "800" line. Id. Tr. 286, 287. Moreover, Respondent was unsure how he got RA's direct dial telephone number. Tr. 268. In contrast, RA took contemporaneous notes of the call, and has a clear recollection that he returned Respondent's call, using the number Respondent left in his voicemail.

firm. Tr. 64-65; CX-2; RX-2. When RA asked him what he meant, Respondent said that he once owned 90% of a well known, mid sized, fast food company that he named, and he had worked closely with its CEO, taking the stock from $1 to $13 per share. Tr. at 65-67; CX-2; RX-2. Respondent said that he also took a 90% position in another company that he named, in the same general industry as the Company, taking the stock from single digits to $27 per share. Tr. at 67-68; CX-2; RX-2. Respondent also claimed that he was instrumental in the development of a third company that he named.[6] Tr. at 73.

Respondent also asked RA if the Company planned on "doing a raise," which RA understood to mean capital fund raising. Tr. 79. RA told Respondent that the Company already had an investment banking relationship, and had no current plans for fund raising. Id. RA asked Respondent what he knew about the Company. Tr. 130. Respondent indicated that he did not know much, and was too busy to read press releases. Id.; CX-2. RA gave Respondent a short summary of the Company, and referred him to the Company's 8-K that outlined its growth strategy, and mentioned a research paper about the Company. Tr. 78-80, 131; RX-3. The call then concluded. Id.

After the call, RA sent Respondent the research report he had mentioned during the call. Tr. 161; RX-3. RA also called the Company's CEO, EL, to tell him he had spoken with Respondent, and would be sending him an email summarizing the call. They briefly discussed Respondent's assertions on the call. Tr. 160-162. EL was concerned about Respondent's assertion that he could drive the stock down to "six bucks," which EL believed Respondent could do, if he owned 300,000 shares of the Company. Tr. 26. They then turned to a discussion of their upcoming annual shareholder meeting and first quarter conference call. Tr. 160-162.

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[6] At the hearing, Respondent acknowledged that he never held 90% positions in these companies, and asserted that RA must have misunderstood him. Tr. 218, 242-243.

RA in fact sent the email to EL on April 19, 2004, the same day the call with Respondent took place. Id. Apparently, the transmission of the email was delayed, and EL did not receive it until May 12, 2004.[7] Tr. 28-29. When EL received it, he called and received confirmation from RA that Respondent had not called again. Tr. 162. EL forwarded RA's email summarizing the conversation with Respondent to the Company's directors and outside counsel. Tr. 27. After discussion, the Board of Directors determined to monitor the share price, and inform NASD. Tr. 28, 31. Pursuant to the Board's determination, the Company's counsel contacted the NASD Investor Complaint Division regarding the incident. The NASD Staff investigated, leading to the filing of the Complaint in this matter. CX-4; Tr. 167, 168.

III. Violation

The Complaint alleged that Respondent violated Conduct Rule 2110 by making false representations and threatening the Company. In particular, the Complaint alleges that Respondent asserted that he owned a significant amount of the Company's stock and would, or could drive down the price of the Company's stock by dumping it on the market, unless he received inside information about the company or other consideration.[8]

Conduct Rule 2110 requires adherence to "high standards of commercial honor and just and equitable principles of trade." Rule 2110 prohibits "threats, coercion and intimidation." DBCC v. Aspen Capital Group, Inc. See also, Notice to Members 96-44 (July 1996). A violation

[7] Respondent asserted that this delay established that the email was not reliable. Respondent's Post Hearing Brief at 17. The Panel did not agree. While it is unclear why the email was delayed in reaching EL, based on its time stamp and RA's credible testimony, the Panel found that it was sent on April 19, 2006. Moreover, given the high level of activity at the Company at the time, including the Company's earnings release, investor telephone conference, annual board meeting, and road shows, as well as the absence of unusual market activity in the Company's stock following the telephone call, the Panel did not find it unreasonable that EL did not follow up with RA when he did not receive the email immediately following the telephone call. Tr. 31, 49, 153.

[8] In a second cause, the Complaint alleges that Respondent violated Rule 2110 by engaging in a scheme to defraud the Company, and specifically, that his conduct violated a federal criminal wire fraud statute. Because both counts allege a violation of Rule 2110 based upon the same underlying conduct, the Panel did not reach the issue whether this conduct constituted a violation of the federal statute.

of Conduct Rule 2110 may occur even where no legally cognizable wrong occurred. Id., Timothy L. Burkes 51 S.E.C. 356 (1993), aff'd mem., Burkes v. SEC 29 F.3d 630 (9th Cir. 1994).

Based on the record evidence, the Panel found that Respondent dramatically overstated his holding in the Company's stock, and threatened that he could "drive the stock down" unless Respondent was given a reason to keep buying, in order to intimidate the Company. While the record did not clearly establish precisely what Respondent was seeking to obtain through his intimidating conduct, this does not absolve Respondent of liability. Respondent's misrepresentations, threats, and intimidation plainly overstepped the bounds of Conduct Rule 2110.

Based on the foregoing, the Panel found that Respondent made material misrepresentations and threatened the Company, in violation of Rule 2110.

IV. Sanctions

The sanction guidelines most appropriate for Respondent's conduct are those for intentional or reckless misconduct involving misrepresentations or material omissions of fact. They recommend a fine of $5,000 to $100,000, and consideration of a 10-day to two-year suspension, or, in egregious cases, a bar. NASD Sanction Guidelines at p. 93 (2005 ed.). The Panel finds Respondent's conduct serious, warranting a two-year suspension and a $50,000 fine.

In reaching this determination, the Panel found the following considerations set forth in the Guidelines relevant. The Panel found that Respondent's conduct was not negligent, but intentional. Moreover, his conduct was for the purpose of some monetary or other gain. In addition, Respondent did not take responsibility for his actions.

Finally, Respondent has a disciplinary history involving fraudulent misconduct. In particular, the Enforcement Section of the Massachusetts Securities Division filed an Administrative complaint against Respondent, and others, alleging that Respondent, among

others, "committed fraud, used high pressure sales tactics, did not disclose material facts and made false and misleading statements to Massachusetts investors in an effort to sell 'penny stocks' and other speculative securities…its agents also refused to speak with investors about their accounts, made guarantees and price predictions, placed unsuitable trades in clients' accounts and opened accounts in investors' names without authorization." CX-11, p.1. The Complaint also alleged that Respondent failed to disclose to a customer the risks of investing in securities that were not properly registered for sale. Id. In July 1999, the Division accepted Respondent's Offer of Settlement, in which he agreed to withdraw his registration in Massachusetts and not re-apply for twenty-five years. CX-12.

Market Regulation asserts that a bar is the appropriate sanction in this case. However, this case involved one call, during which, Respondent made no specific demands or requests for a quid pro quo, which would reasonably leave the Company with the impression that Respondent would make further contact to explain what he was seeking to extort through his threats. However, Respondent never followed up with an explicit demand, and over time, the Company's initial concern faded. The facts of this case are less compelling than those in Aspen, where the respondent's threats and coercion resulted in a bar. Specifically, in Aspen the threats were of greater intensity, and the respondent demanded a specific quid pro quo – either he received discounted stock or he would cause the company's stock to be delisted.[9]

Based on their consideration of these factors, the Panel finds that Respondent's actions constituted a serious breach of Rule 2110, and imposes a two year suspension, and a requirement to requalify in all capacities and pay a $50,000 fine prior to Respondent's return to the industry.

V. Conclusion

[9] Aspen involved a taped telephone conversation during which respondent said among other things "I am gonna do what's called a magic trick—that's where I take your money and I turn it into my money…I am going to get that stock delisted next…if you want me to serve you up and wrap your f***ing nuts around your head I

For violating NASD Rule 2110, Respondent is suspended in all capacities for two years, and required to requalify in all capacities and pay a fine of $50,000 prior to returning to the industry. Respondent is also ordered to pay costs in the amount of $2,503.80, which includes an administrative fee of $750 plus the cost of the hearing transcript. These sanctions shall become effective on a date determined by NASD, but not sooner than thirty days from the date this Decision becomes the final disciplinary action of NASD, except that, if this Decision becomes the final disciplinary action of NASD, Respondent's suspension in all capacities shall commence on April 18, 2006, and conclude on April 18, 2008.[10]

HEARING PANEL

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By: Sara Nelson Bloom
Hearing Officer

Copies to:

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will…buy me some stock or I'm gonna f***ing –I'm going to go after [the Company's stock]. Aspen, supra, 1997 NASD Discip. LEXIS 53, *5. (Sept. 1997).

[10] The Hearing Panel has 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.