

**NASD OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
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	:	
Complainant,	:	Disciplinary Proceeding
	:	No. E072004087801
v.	:	
	:	
HUNG THE NGUYEN	:	Hearing Officer – David M. FitzGerald
(CRD No. 2532462),	:	
	:	<b>AMENDED PANEL DECISION<sup>1</sup></b>
	:	
Respondent.	:	May 22, 2006
	:	

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**Respondent is suspended from associating with any NASD member firm for 30 business days and fined \$5,000 for failing to disclose to his employer firm his activities relating to an outside securities account, in violation of Rules 3050 and 2110.**

*Appearances*

Joel R. Beck, Esq., Atlanta, GA (Rory C. Flynn, Esq., Washington, DC, and Roger D. Hogoboom, Esq., Denver, CO, Of Counsel) for Complainant.

Respondent pro se.

**DECISION**

**I. Procedural History**

The Department of Enforcement filed a Complaint on September 26, 2005, alleging that Respondent Hung The Nguyen violated Rules 3050 and 2110 by failing to disclose to his employer firm his discretionary trading in a customer’s account at another firm. Respondent filed an Answer in which he admitted that he had failed to notify his employer about his activities, stated that he was no longer employed in the securities industry and did not intend to return, and indicated that he would “accept the suspension of any length of time without fine” as a sanction.

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<sup>1</sup> This Panel Decision is amended to include the effective dates of the suspension.

On February 15, 2006, Enforcement filed a motion for summary disposition, pursuant to Rule 9264, supported principally by a declaration that Respondent provided to NASD staff during its investigation. In its motion, Enforcement requested that if the Panel found that Respondent had violated the rules as charged, it impose a 30-day suspension and a \$7,500 fine as sanctions. In response to Enforcement's motion, Respondent filed a statement in which he did not contest a finding that he violated the rules, as charged, or the imposition of a 30-day suspension, without a fine. For the reasons set forth below, the Hearing Panel, which includes the Hearing Officer and two members of the District 7 Committee, grants Enforcement's motion for summary disposition, finds that Respondent violated Rules 3050 and 2110 as charged, and imposes a 30-business-day suspension and a \$5,000 fine as sanctions.

## **II. Facts**

Respondent first became registered as a general securities representative in 1995. From 1997 until September 2003, he was registered in the same capacity through American Express Financial Advisors, Inc. (AEFA), now known as Ameriprise Financial Services, Inc. He was registered through another NASD member from April 2004 until September 2005 as a general securities representative. (Complainant's Exhibit 2 (CRD Composite).) Because he was registered at the time of the alleged violation and the Complaint was filed within two years after the termination of his last registration, NASD has jurisdiction, pursuant to Art. V, § 4 of NASD's By-Laws.

According to Respondent, in November 2002, one of his AEFA customers, GT, agreed to establish a securities account in which he would use a portion of his holdings for the purpose of day trading. Respondent and GT decided to open the account at Ameritrade, rather than at AEFA, so GT could save money on commissions. GT

deposited securities with a combined value of approximately \$70,000 in the Ameritrade account and gave Respondent discretion to trade the account. Thereafter, using his trading authority, Respondent sold seven of the positions that had been transferred into the account, purchased one stock and subsequently sold it, and then sold the final position that had been transferred into the account, leaving a cash balance of about \$70,000. These were the only trades that Respondent effected in GT's Ameritrade account, and Respondent received no compensation for the trades, because he "considered it to be a service which [GT] was entitled to as a result of his payment for a Financial Services Advisory Agreement with AEFA." (Complainant's Exhibit 1 (Respondent's Declaration).)

Respondent explained:

I did not inform AEFA of my day trading activities in the Ameritrade account as I assumed that as a financial advisor to [GT] that such activity was in the realm of my duties. At that time, I did not consider such activity to be conducting private securities transactions away from AEFA. I did not engage in this type of activity with any other customer of AEFA.

Id.

### **III. Discussion**

Rule 9264 provides that a party may move for summary disposition of any or all of the causes of action set forth in the Complaint, or any affirmative defense asserted in the Answer. The Hearing Panel may grant summary disposition if there is no genuine issue with regard to any material fact and the moving party is entitled to summary disposition as a matter of law. "[T]he moving party bears the burden of demonstrating the absence of a genuine issue of material fact....If the moving party meets this burden, the opposing party must come forward with specific facts showing that there is a genuine issue in dispute....Absent such a showing, summary disposition is appropriate."

Department of Enforcement v. Shvarts, No. CAF980029, 2000 NASD Discip. LEXIS 6, at \*10 n.11 (NAC June 2, 2000) (citations omitted).

There is no genuine dispute as to the material facts set forth above. Indeed, the substantive facts are taken from Respondent's own declaration. Based on those facts, Enforcement is entitled to summary disposition as a matter of law. Rule 3050(d) provides that a registered representative who has discretionary authority over a securities account at another firm must "notify his or her employer member in writing, prior to the execution of any initial transactions, of the intention to open the account or place [an] order [for the purchase or sale of securities]." Respondent admits that he exercised discretionary authority over the Ameritrade account and purchased and sold securities in that account without notifying AEFA, so it is undisputed that he violated this provision. A violation of another NASD rule is also a violation of Rule 2110. See Chris Dinh Hartley, Exch. Act Rel. No. 50031, 2004 SEC LEXIS 1507, at \*9 (July 16, 2004).

The only issue is sanctions. Respondent, who is not currently associated with any NASD member, does not oppose the requested 30-day suspension, but objects to any fine. For violations of Rule 3050, the Sanction Guidelines recommend a fine of \$1,000 to \$25,000. NASD Sanction Guidelines at 17. This is not an egregious case. It involved a few trades in a single account for a single customer for which Respondent sought and received no compensation. It appears that the violation was attributable to Respondent's good faith misunderstanding of his notification obligations under the rules. It is clear that Respondent has acknowledged his misconduct; indeed, he gave NASD the declaration that forms the basis for the Panel's findings.

This suggests that a fine near the low end of the recommended range is appropriate. But some fine is required to fulfill the Panel's responsibility under the Guidelines to impose "sanctions that are significant enough to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices." Particularly given that Respondent is not currently in the industry, a brief suspension alone would not accomplish those goals. Accordingly, Respondent will be fined \$5,000 in addition to the 30-day suspension.<sup>2</sup>

#### **IV. Conclusion**

Respondent Hung The Nguyen is suspended from associating with any NASD member in any capacity and fined \$5,000 for failing to disclose to his employer firm his activities relating to an outside securities account, in violation of Rules 3050 and 2110. If this decision becomes NASD's final disciplinary action in this matter, the suspension shall begin on July 17, 2006, and end at the close of business on August 25, 2006. The fine shall be due and payable when and if Respondent seeks to return to the securities industry.

#### **HEARING PANEL**

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By: David M. FitzGerald  
Hearing Officer

Copies to: Hung The Nguyen (*via overnight and first class mail*)  
Joel R. Beck, Esq. (*electronically and via first class mail*)  
Roger D. Hogoboom, Esq. (*electronically and via first class mail*)  
Rory C. Flynn, Esq. (*electronically and via first class mail*)

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<sup>2</sup> Under the Sanction Guidelines, a suspension of 30 days or less is measured in business days, rather than calendar days. NASD Sanction Guidelines at 9.