

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT E. ELKINS
(CRD No. 2618105),

Respondent.

Disciplinary Proceeding
No. E8A2003080701

Hearing Officer – DRP

PANEL DECISION

July 21, 2006

Respondent is suspended from association with any member firm in any capacity for one year and fined \$5,000 for violating NASD Conduct Rule 2110 by selling more shares than authorized in a customer's account.

Appearances

For the Department of Enforcement: Richard S. Schultz, Regional Counsel, and Pamela Shu, Regional Counsel, Chicago, IL (Rory C. Flynn, Esq., Washington, DC, Of Counsel).

For the Respondent: Robert E. Elkins, *pro se*.

DECISION

I. Procedural History

The Department of Enforcement filed a one-count Complaint on September 20, 2005, charging that Robert E. Elkins (Elkins or Respondent) violated NASD Conduct Rule 2110 by selling, or causing the sale of, 4,672.897 shares of a mutual fund for the account of a customer who had only authorized the sale of 3,738.318 shares. Elkins submitted a letter denying the charges on November 14, 2005, and at a pre-hearing conference held on December 5, 2005, he requested a hearing. On March 21, 2006, a one-day hearing was held in Chicago, before a

hearing panel composed of the Hearing Officer, a current member of NASD's District 8 Committee, and a former member of the same District Committee.

At the hearing, Enforcement called five witnesses: Customer MH, Wilfred Brockman, Jr. and Joseph Koch, who are registered with Respondent's former member firm, NASD Special Investigator Philip Clary, and Respondent. Enforcement also offered nineteen exhibits, all of which were admitted in evidence. Respondent offered three exhibits, two of which were admitted in evidence.¹

II. Findings of Fact and Conclusions of Law

A. Respondent Elkins

Elkins was registered as a general securities representative with NASD member Ferris, Baker Watts Inc. (Ferris Baker) from January 24, 2003, until his registration was terminated on October 7, 2003. During the period relevant to the Complaint, he worked in the firm's Plymouth, Michigan office, where Joseph Koch was the branch manager. (Tr. 91-92; CX-1.)

Prior to joining Ferris Baker, Elkins was registered with Prudential Securities Inc. (Prudential) from 1995 to 2003. Since October 2003, he has not been associated or registered with any NASD member. Elkins is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the Complaint, which was filed within two years of the termination of his registration with Ferris Baker, charges misconduct that occurred while he was registered. (Tr. 212-213; CX-1.)

¹ References to the hearing transcript are noted as Tr. Enforcement's exhibits are cited as CX; Respondent's exhibits are cited as RX.

B. Customer MH

MH is 89 years old and resides in Howell, Michigan with her husband, AH. After serving in the Navy as a secretary during World War II, she married AH and became a housewife. She handles their household finances. (Tr. 18-20, 23-24, 65, 69; CX-6 at 9.)

MH first met Respondent when he took over her account from another broker at Prudential in 2001 or 2002. Respondent visited MH at her home and impressed her as someone who was “interested in what he was doing,” which was a quality she sought in a broker. While Respondent handled her account at Prudential, she followed his recommendation to purchase Class B shares of the Evergreen Adjustable Rate Fund (Evergreen fund). (Tr. 21-22, 47, 74.)

When Respondent moved to Ferris Baker in early 2003, MH transferred her account to the firm. At the time of the transfer, more than 90% of her portfolio was invested in the Evergreen fund.² Respondent did not have discretion to trade her account.³ (Tr. 21-22, 26, 28, 76, 191-192; CX-1; CX-2 at 1-4.)

C. Transactions in MH’s account

According to Respondent, he spoke with MH about several proposed transactions in her account. Respondent recommended that MH invest \$40,000 in an initial public offering of Evergreen Managed Fund (ERC) and \$10,000 in an initial public offering of Blackrock Limited

² According to her February 2003 account statement, the total value of MH’s account was \$388,546.02. She held 21,409.733 Class B Evergreen shares, worth a total of \$206,818.02. Though not an issue in this proceeding, she also held 15,596.503 Class C Evergreen shares worth \$150,662.21 and \$20,563 in municipal bonds. But for \$10,502.79 in a money market account, her entire portfolio was held in the margin account. (CX-2 at 1-4.)

³ The Hearing Panel rejects Respondent’s claim that he had limited discretion to trade MH’s account and his uncorroborated and self-serving testimony that MH told him to do “whatever he thought was right [if] something came up” and he was unable to contact her. (Tr. 28, 206-207.)

Duration Income Trust (Blackrock).⁴ According to Respondent, MH, who had approximately \$13,000 in cash in her account at the time, agreed to sell \$36,000 of her Evergreen fund to cover the ERC purchase and send a \$10,000 check to cover the Blackrock purchase. (Tr. 195-198, 204-205, 207-208.)

On June 24, 2003, Respondent purchased 2,000 shares of ERC for MH's account, at a cost of \$40,004. On June 30, Respondent sold \$45,000 worth of Class B Evergreen (4,672.897 shares), which he admits was more than MH had authorized. He deposited the \$5,000 cash proceeds in her account.⁵ On July 29, Respondent bought \$10,000 of Blackrock for MH's account, which he sold for a small loss on August 19. On August 28, 2003, Respondent purchased 550 shares of ERC at a cost of \$9,964.61. (Tr. 176, 190, 193-194, 204; CX-2 at 15-18, 20, 24; CX-6 at 10-14.)

Respondent claims that MH agreed to all of these transactions, except he admits that he sold more Evergreen on June 30 than she had authorized. Respondent testified he did so because MH had failed to send in the \$10,000 check to pay for the Blackrock purchase. Under the circumstances, Respondent believed he had three choices: (1) sell the authorized amount of Evergreen and use cash in the account to buy Blackrock, which would leave MH short on cash;⁶ (2) sell more Evergreen than MH had authorized, again ask her to send in a check for \$10,000 to

⁴ This conversation may have occurred on June 16, 2003. The firm's records show a 34-minute call to MH's home telephone number that day and her indication of interest in the Evergreen Managed Fund (ERC) initial public offering was recorded on June 17, 2003. However, MH's account statement shows a June 1 transfer of \$26,810.07 from her margin account to cash, funds that Respondent appears to have used to pay for the ERC purchase on June 24. (CX-2 at 16; CX-8 at 72; CX-12.)

⁵ Respondent testified that the purchase and sale order were to have been executed the same day but claimed the back office made an unspecified error regarding the order to sell MH's Class B Evergreen. (Tr. 207-208.)

⁶ According to Respondent, MH liked to keep \$9,000 to \$10,000 in cash. Even if true, MH would have had approximately \$9,000 cash in her account had Respondent sold \$36,000 worth of Evergreen as authorized, and taken \$4,000 from cash to pay for the ERC purchase. (Tr. 199; CX-2 at 15-16.)

pay for Blackrock, then reduce the Evergreen trade; or (3) forego the Blackrock purchase.⁷

Respondent further testified that he did what he thought was right under the circumstances, and if faced with the same situation today, he would make the exact same choice as on June 30, 2003, i.e., he would sell more shares than authorized by the customer. (Tr. 176, 190, 195-198, 201-205, 213-216, 220-221.)

According to MH, she did not authorize any of these transactions. MH testified that during this period, she did not watch her account very closely, because her contact with Respondent was “infrequent” and she did not expect to see any activity in an “inactive” account. When reviewing her August 2003 account statement, however, she noticed that the account value had decreased \$4,000. She started to investigate and asked another broker to analyze her account. In early September, she complained about Respondent to Wilfred Brockman, the broker who took over her account, and to Joseph Koch, Respondent’s branch manager. (Tr. 28-29, 31-32, 41, 46-47, 67, 76-77, 81-85; CX-2 at 23; CX-3.)

When Koch spoke with MH on or about September 10, 2003, she had already transferred her account to another brokerage firm. MH told Koch that she had not authorized several trades in her account. MH and her husband also wrote to Ferris Baker to complain about unauthorized trades in her account, including the sale of \$45,000 worth of Class B Evergreen shares on June 30, 2003. On November 21, 2003, the firm sent her a check for \$2,612 to settle all claims against Respondent and/or the firm. (Tr. 35-36, 81-85, 94; CX-3; CX-6 at 15; CX-8 at 22-27, 105.)

⁷ The Panel does not credit Respondent’s testimony that he made attempts to call MH before selling more shares than authorized. The firm’s telephone records show no calls to MH’s phone number between June 16 and July 15, 2003. Furthermore, NASD staff asked Respondent to provide his cell phone records for June, July and August 2003, but he only supplied records for August. (Tr. 162, 203; CX-10 at 35-88; CX-18.)

For reasons unrelated to his handling of MH's account, Ferris Baker fired Respondent in September 2003.⁸ As part of a routine investigation of the firm's discharge of Respondent, NASD Special Investigator Philip Clary contacted MH, who confirmed that she had complained about unauthorized trading in her account. MH said that she would sign a statement to that effect but declined to testify against Respondent if there were a disciplinary hearing. She subsequently "ignored" a declaration NASD sent her, but ultimately agreed to testify when Enforcement staff contacted her a second time. (Tr. 36-38, 71, 158-159, 163-167, 180-181.)

At the hearing, MH's recollection about any conversation with Respondent regarding Evergreen was "vague." However, she confirmed the accuracy of an October 3, 2003 letter to Ferris Baker, which she authorized her husband to write on her behalf, as well as the complaint letter she personally wrote on October 13, 2003. In both letters, MH insisted that Respondent had engaged in unauthorized trading in her account, including the Evergreen transaction on June 30, 2003, which is the sole transaction at issue in this proceeding. (Tr. 31-32, 34, 41-42, 51-52, 75-76; CX-3 at 1-2, 4.)

D. Discussion

While MH's recollection was admittedly vague regarding her conversations with Respondent, she nonetheless confirmed the accuracy of the contemporaneous complaint letters she sent to Ferris Baker in October 2003, in which she accused Respondent of several

⁸ Koch testified that during the summer of 2003, he was displeased with Respondent's productivity and performance. He was primarily concerned that Respondent was doing little to develop new business and thought Respondent might be churning clients' accounts. In late August 2003, Koch asked Respondent to devise an action plan to bring in more clients. When Respondent did not comply, Koch fired him for inadequate production and insubordination. Ferris Baker reported on Respondent's Form U-5 Notice of Termination that he was fired for inadequate production, but noted allegations of unauthorized trading were received from two of Respondent's customers, including MH, after his employment was terminated. Respondent believes he was fired after Koch learned that he had contacted regulatory authorities about alleged improprieties involving Prudential. The record does not demonstrate any connection between Respondent's termination and the issues in this case; the reason for his termination is thus not relevant to this proceeding. (Tr. 103-106, 152, 154, 171; CX-1 at 3, 11; CX-6 at 17; CX-8 at 4-5, 8-13.)

unauthorized trades. The Panel makes no findings regarding uncharged transactions, but Respondent acknowledges, and the record supports his concession, that he sold more Class B Evergreen shares than MH had authorized, as charged in the Complaint.

According to Respondent, he did so to fund a subsequent purchase of Blackrock, but Respondent's explanation makes no sense. The Blackrock IPO was not available for another month, which afforded Respondent several more weeks to obtain a check from MH or to discuss using cash in her account to fund the Blackrock purchase. Moreover, firm records show a phone call to MH on July 15 and her indication of interest in Blackrock on July 22, evidence that further undermines Respondent's story that he needed to sell more Evergreen than authorized *on June 30* in order to buy Blackrock.⁹ Notwithstanding Respondent's belief that he was forced to make an unpalatable choice, there was absolutely no legitimate reason to sell more shares than MH had authorized.¹⁰

Unauthorized trading is defined as "causing the execution of transactions which are not authorized by customers"¹¹ The SEC and NASD have consistently held that "unauthorized trading in a customer's account violates NASD Conduct Rule 2110."¹² Respondent concedes that on June 30, 2003, he sold more Evergreen shares than MH authorized, and the Hearing Panel rejects his defense that he had no other choice. We thus find that Respondent violated NASD Conduct Rule 2110, as charged in the Complaint.

⁹ CX-10 at 88; CX-18.

¹⁰ Respondent compared the situation he faced on June 30 with having someone point a gun at, and threaten to kill, one's child unless the parent agrees to rob a bank. (Tr. 15, 205.) The Panel does not find his analogy apt or persuasive.

¹¹ NASD IM-2310-2(b)(4)(iii).

¹² *Jeffrey B. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *13-14 (NAC Mar. 27, 2002) (citations omitted); *see also Robert L. Gardner*, Exchange Act Release No. 35,899, 1995 SEC LEXIS 1532, at *1 n.1 (June 27, 1995); *Keith L. DeSanto*, Exchange Act Release No. 35,860, 1995 SEC LEXIS 1500 (June 19, 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996).

III. Sanctions

For unauthorized transactions, NASD Sanction Guidelines recommend a fine of \$5,000 to \$75,000, plus the amount of a respondent's financial benefit, and a suspension in any or all capacities for a period of 10 business days to one year.¹³ A longer suspension of up to two years or a bar is recommended in an egregious case. The principal considerations in determining sanctions for unauthorized transactions are whether a respondent misunderstood his or her authority or the terms of the customer's orders, and whether the unauthorized trading was egregious.¹⁴

Enforcement contends this is an egregious case and requests a bar, or in the alternative, a two-year suspension and \$5,000 fine. After reviewing the evidence and the Guidelines, the Panel has reached a different conclusion.¹⁵ There was no "quantitatively egregious" unauthorized trading, which is characterized by a large number of unauthorized transactions. Nor was the unauthorized trading accompanied by "aggravating factors," such as an attempt to conceal the misconduct or evade NASD investigative efforts, or a history of prior unauthorized trading. Finally, the unauthorized trading was not "qualitatively egregious."¹⁶ There is no evidence that Respondent was motivated to make money at his customer's expense or that he intimidated and induced the customer to authorize the trades.¹⁷

¹³ *NASD Sanction Guidelines* (2006 ed.) at 103.

¹⁴ *Id.*

¹⁵ In addition to the Guideline for unauthorized transactions, the Panel also considered the General Principles Applicable to All Sanction Determinations, as well as the Principal Considerations in Determining Sanctions. *Id.* at 2-7.

¹⁶ *See id.* at 103, n.2. *See also Dist. Bus. Conduct Comm. v. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999).

¹⁷ *See Hellen* at *17-18.

Respondent admits that he sold more Evergreen Class B shares than MH had authorized.¹⁸ However, the Panel does not credit Respondent's explanation for his misconduct, and though only one unauthorized transaction was charged in the Complaint, we are not convinced that MH authorized any of the transactions. Furthermore, we are greatly disturbed by Respondent's testimony that if faced with the same situation today, he would make exactly the same choice and effect an unauthorized trade.¹⁹ Respondent never admitted that he had choices beyond those he mentioned. More importantly, he never conceded that his conduct was wrong. Instead, Respondent shifted the blame to the customer, the back office, his branch manager and the environment at the firm.²⁰ None of his explanations or excuses was credible.

Unauthorized trading is a "fundamental betrayal of the duty owed by a salesman to his customers."²¹ Though the Panel does not find that Respondent's misconduct was egregious, we are deeply troubled by his unwillingness to assume full responsibility for his behavior. We believe that Respondent's wrongdoing warrants and requires a significant sanction to prevent the recurrence of misconduct, despite the fact that only one unauthorized transaction was charged and there is no evidence of customer harm.

Accordingly, Respondent is suspended for one year from association with any member firm in any capacity. The evidence does not quantify any financial loss for the customer or

¹⁸ Prior to the hearing, Respondent admitted selling more Evergreen shares than MH had authorized, yet he repeatedly argued that this disciplinary proceeding was retaliatory. In Respondent's view, NASD staff filed charges against him because he had contacted the SEC and New York's Attorney General, rather than NASD, about alleged improprieties at Prudential. The Hearing Officer did not permit Respondent to raise this specious "defense" during the hearing.

¹⁹ Tr. 213-216, 220-221.

²⁰ Respondent testified that Koch was hostile to him, so he could not discuss this situation with his manager. Respondent thus argued that what happened to MH "was the result of the environment" at Ferris Baker. (Tr. 116, 198, 202.)

²¹ *Dep't of Enforcement v. Bond*, No. C10000210, 2002 NASD Discip. LEXIS 6, at *12 (NAC Apr. 4, 2002) (citation omitted).

benefit to Respondent. The Panel will thus impose the minimum fine of \$5,000 but declines to impose any additional financial sanctions.

IV. Conclusion

Respondent Robert E. Elkins violated NASD Conduct Rule 2110 by selling more shares than authorized in a customer's account.²² For that violation, Respondent is suspended from association with any member firm in any capacity for one year and fined \$5,000. Respondent shall also pay costs of \$2,193.28, which includes an administrative fee of \$750 and transcript costs of \$1,443.28.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of NASD, except that if this Decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on Monday, September 18, 2006, and end with the close of business on Monday, September 17, 2007.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: July 21, 2006
Washington, DC

Copies to: Robert E. Elkins (*via overnight and first class mail*)
Richard S. Schultz, Esq. (*via electronic and first class mail*)
Pamela Shu, Esq. (*via electronic and first class mail*)
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Rory C. Flynn, Esq. (*via electronic and first class mail*)

²² The Hearing Panel has considered all of the arguments of the parties. They are sustained or rejected to the extent they are in accord or inconsistent with the views expressed in this Decision.