

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

Wanda P. Sears
(CRD No. 2214419),

Respondent.

Disciplinary Proceeding
No. C07050042

Hearing Officer—Rochelle S. Hall

HEARING PANEL DECISION

September 19, 2006

Respondent violated Conduct Rule 2110 by making unauthorized trades in customer accounts and violated Conduct Rules 3030 and 2110 by engaging in outside business activity without providing her member firm with prompt written notice. For these violations, Respondent is barred from associating with any member firm in any capacity.

Enforcement failed to prove by a preponderance of the evidence that Sears forged customer signatures and imposed unauthorized fees on customers as alleged in the Complaint.

Appearances

Joel R. Beck, Esq., Gene E. Carasick, Esq., Atlanta, GA, Regional Counsel (Rory C. Flynn, Esq., Washington, DC; Andrew A. Favret, Esq., New Orleans, LA, Of Counsel) for the Department of Enforcement.

Anthony Paduano, Esq., Paduano & Weintraub, New York, NY, for the Respondent.

DECISION

I. Procedural History

On June 20, 2005, The Department of Enforcement (“Enforcement”) filed a Complaint against Wanda P. Sears (“Sears” or “Respondent”) charging that she violated Conduct Rule 2110

by making unauthorized trades in customers' accounts; that she violated Conduct Rules 3030 and 2110 by engaging in outside business activities without providing her employer, an NASD member firm, with prompt written notice; and that she violated Conduct Rule 2110 by forging customers' signatures and imposing unauthorized fees on customers. Sears filed an Answer denying the charges and requesting a hearing, which was held in Roanoke, VA on March 27 and 28, 2006. The hearing was held before a Hearing Panel composed of the Hearing Officer, a current member of the District 5 Committee, and a former member of the District 9 Committee.¹

At the hearing, Enforcement called as witnesses four of Sears' former customers, Sears' former assistant, Sears' former supervisor and an NASD examiner. Sears testified, but did not call any witnesses.

II. Findings of Fact

A. Background

Sears began her career in the securities industry in February 1992 with American Express Financial Advisors, Inc. ("American Express") and was registered as a General Securities Representative with American Express until April 2002. She is currently registered with another NASD member.²

According to her Central Records Depository ("CRD") record, American Express discharged Sears effective April 5, 2002, because of a "Violation of several company polices.

¹ The hearing transcript is cited "Tr."; Enforcement's exhibits are cited as "CX"; and Respondent's exhibits are cited as "RX."

² CX-26 at 1-2.

These include: exercising discretion on clients' accounts...[and] failure to report outside activity (tax preparation)...”³

NASD commenced the investigation that led to the Complaint in this matter upon receipt of the Form U-5 American Express filed on Sears' behalf, which reflected that she had failed to disclose her outside business activities. Over the course of the next two years, American Express amended Sears' Form U-5 to disclose numerous customer complaints and settlements that American Express discovered during the course of its own internal investigation.⁴

B. Unauthorized Trading in Customer Accounts

Enforcement alleged that Sears made unauthorized trades in customer accounts. Three of Sears' former customers—Ms. DM and Mr. and Mrs. G—testified at the hearing that Sears made trades in their accounts without their consent.

1. Ms. DM

Ms. DM testified that she and her late husband became customers of Sears' in 1999 after having been referred to Sears by an American Express tax advisor. Ms. DM and her husband purchased funds and annuities as part of their retirement planning. She testified that they did not buy any individual stocks.⁵ Ms. DM's husband died in 2001 and thereafter, Ms. DM relied on Sears to advise her on managing her investments.⁶ In early February 2002, Ms. DM received a confirmation from American Express showing that she had purchased 450 shares of AOL/Time

³ CX- 26 at 3.

⁴ Tr. at 410.

⁵ Tr. at 37-38, 55.

⁶ Tr. at 56.

Warner stock for \$13,225.50. The confirmation was marked “unsolicited;”⁷ however, Ms. DM testified that she had never discussed the purchase of AOL stock with Sears or anyone else at American Express.⁸

On April 26, 2002, after speaking to American Express personnel, Ms. DM wrote a letter to American Express stating that Sears had purchased AOL without her knowledge. At that point, Ms. DM had lost over \$4,500 on the stock.⁹ Ultimately, American Express reimbursed Ms. DM for her losses on the AOL purchase as well as other transactions in her account.¹⁰

2. Mr. and Mrs. G

Mrs. G testified that she and her husband became Sears’ clients in 1998 after her husband’s co-worker recommended Sears.¹¹ Sometime after January 2002, Mrs. G was reviewing account statements and noticed a purchase of 3,675 shares of XO Communications in her husband’s IRA account. She wondered about the purchase, but “did not think much of it at the time.” When she met with an American Express representative later, she remembered the transaction and told him that she had not authorized it. In October, 2003, Mr. and Mrs. G signed a declaration stating, “Sears did not request or receive permission from either of us to buy [3,675 shares of XO Communications]. In fact, we did not even discuss this stock with Sears.”¹²

⁷ CX-13.

⁸ Tr. at 39, 63.

⁹ CX-11 at 1.

¹⁰ Tr. at 41.

¹¹ Tr. at 167.

¹² CX-7 at 1.

At the hearing, Mrs. G testified that she did not authorize Sears to buy the stock.¹³

Likewise, Mr. G testified that he did not authorize Sears to purchase the stock.¹⁴

3. Other Customers Who Claim Sears Made Unauthorized Trades

American Express first became aware of possible unauthorized trades during a review of trading activity in Sears' clients' accounts that was conducted by Richard Zue ("Zue") in February and March 2002.¹⁵ Zue is currently a registered representative and a registered principal of Ameriprise Financial (formerly American Express Investment Advisors). He has been registered with Ameriprise or American Express since 1992 and was Sears' supervisor from January 2001 until her termination in April 2002. Zue testified at the hearing about the events leading to Sears' termination by American Express.¹⁶

Four additional customers of Sears signed declarations stating that Sears made a total of 18 unauthorized trades in their accounts during January and February 2002. Twelve of these trades were made in the accounts of Ms. LR, a widow and novice investor who hired Sears to invest the proceeds of her husband's life insurance.¹⁷

In addition, Zue testified that during the course of his inquiry into Sears' customers' accounts, he spoke to numerous customers who had purchased shares of Interdigital Communications ("IDCC"). Most of the customers told Zue that they had not authorized the purchases of IDCC. At least three of the customers—SS, JW and FW—were elderly widows.

¹³ Tr. at 176-178.

¹⁴ Tr. at 214.

¹⁵ Tr. at 318.

¹⁶ Tr. at 308-310.

¹⁷ CX-25 at 1-4.

JW had been sick for weeks during the time the purchase of IDCC was made in her account and had no contact with Sears.¹⁸

4. Sears' Response to Customers' Claims that She Made Unauthorized Trades

Sears did not deny that she had made the trades that her customers said were unauthorized. Instead, Sears testified that all of her customers were “mistaken,” “confused,” or had “forgotten” that she had discussed the trades with them.¹⁹ Sears contradicted, not just those customers who had provided written declarations, but those who testified at the hearing. Contrary to Ms. DM’s testimony, Sears testified that she spoke to DM prior to buying AOL/Time Warner stock for her account. Sears said Ms. DM was “just mistaken” when she testified that Sears had bought the stock without her permission.²⁰ Sears’ testimony was completely at odds with Mr. and Mrs. G’s testimony; she stated that she talked to both of them prior to making the trade in XO Communications.²¹

The Hearing Panel, having heard all of the witnesses testify and having observed their demeanor, did not find Sears’ testimony to be credible. Simply put, the Hearing Panel did not believe that all of Sears’ former customers were either lying or mistaken when they said they did not give Sears permission to make trades in their accounts.

¹⁸ Tr. at 315-317; CX-24 at 1.

¹⁹ Tr. at 607,667-669.

²⁰ Tr. at 614, 616.

²¹ Tr. at 609.

C. Sears' Outside Business Activities

Enforcement alleged that from 1998 to 2002, Sears prepared income tax returns for American Express customers, that she received compensation for her tax preparation services and that she did not disclose this outside activity to American Express. Sears admitted that she had prepared tax returns for her customers, but stated that American Express was aware of this “value-added” service she provided to her customers.²²

Zue testified that he first learned that Sears had been preparing tax returns for her customers while he was conducting a supervisory review of her files. He noticed numerous customer files containing “self-prepared” tax returns. One in particular caught his attention because it was a return that had been “self-prepared” by a customer who was legally blind. When Zue asked Sears how a blind person could do her own taxes, Sears replied that the customer’s “son or son-in-law did her return.” After seeing additional self-prepared tax returns in customer files, Zue checked Sears’ assistant’s computer and found a TurboTax program installed. Upon opening TurboTax, Zue found numerous client names for tax files. This discovery, together with an investigation of trading in certain customers’ accounts, led to American Express’s decision to suspend Sears pending further inquiry.²³

In March 2002, on the day Sears was being suspended from American Express, Zue accompanied another American Express supervisor to notify Sears in person of her suspension. After a long discussion with Sears, Zue agreed that, to spare her embarrassment, he would return to secure her office after the other office personnel had left for the day. Zue then went to dinner

²² Tr. at 584-585.

²³ Tr. at 344-346.

and returned to Sears' office at approximately 9 p.m. Through an office window, Zue saw tax return files stacked on a table and Sears' assistant and a friend "digging in the client files." When Zue went inside the office and checked Sears' assistant's computer, he discovered that the TurboTax program had been deleted. At that point, Zue secured Sears' office.²⁴

Zue testified that Sears had never told him that she prepared tax returns for her customers, and that none of her previous supervisors told him that they were aware that she had been preparing tax returns.²⁵ He stated that he had relied on American Express's annual Outside Activities Disclosure Form, which Sears signed in March 2001, stating that she conducted no activities outside of American Express.²⁶

Sears admitted in her Answer that she had, in fact, prepared tax returns for approximately 40 of her customers, and that some of the clients gave her money as "gifts" or "reimbursements."²⁷ Sears also stated in her Answer that all of her supervisors were aware that she prepared tax returns as a service for her customers.²⁸ Sears admitted, however, that she never disclosed to American Express in writing that she was preparing tax returns for customers. She said American Express had "constructive receipt" of documents concerning her tax preparation services, so it should have been aware of her activities.²⁹

²⁴ Tr. at 364-366.

²⁵ Tr. at 394-396.

²⁶ Tr. at 318-319; CX-4 at 5.

²⁷ Answer at 2.

²⁸ Answer at 3.

²⁹ Tr. at 648-649.

Sears' claims that she prepared tax returns for her customers merely as an accommodation to them are belied by documents she created herself. In response to an NASD inquiry in April 2003, Sears produced spreadsheets from memory showing that she received amounts ranging from \$25 to \$100 from clients whose tax returns she prepared. Sears' spreadsheet shows that one client, RF, paid her \$1,000.³⁰ In October 2003, RF signed a declaration stating that the "\$1,000 check was for tax services performed by Sears and nothing else. This was not a gift. Sears did my taxes again the next year and charged me \$100."³¹ Todd Nellis ("Nellis"), the NASD examiner investigating this matter, testified that RF's declaration accurately reflects the substance of the conversations he had with RF during the course of his investigation.³² Finally, American Express produced from Sears' files an invoice from Sears to a customer requesting "payment" of \$40 for the preparation of 2001 federal and state tax returns. Attached to the invoice was the customer's check for \$40, made payable to Sears.³³

The Hearing Panel concluded that Sears conducted outside business activities for which she was paid without giving written notice to her member firm.

D. Forgery of Customer Signatures and Imposition of Unauthorized Investment Advisory Fees

1. Ms. AL

Ms. AL and her husband became clients of Sears in November 1998 after having been referred to Sears by a friend from their church. Ms. AL's husband died in November 2000.³⁴

³⁰ CX-1.

³¹ CX-3.

³² Tr. at 418.

³³ CX-2.

³⁴ Tr. at 88-89.

When Ms. AL first opened her account with Sears she wrote a check in the amount of \$350 as a “one-time fee that you paid to go with her.”³⁵ Following her husband’s death, Ms. AL noted a \$450 charge in her account. When she asked Sears about the charge, Sears told her “Oh, that is just what I made off of you for the year.”³⁶

In April, after Sears had left American Express, Ms. AL met with Eddie Barnes (“Barnes”), the American Express representative who took over Ms. AL’s account. During their meeting, Ms. AL asked Barnes about the \$450 charge. Barnes told Ms. AL that the charge was an annual investment advisory fee and that Ms. AL had signed a form authorizing American Express to deduct the fee each year. She later signed an Affidavit of Forgery, which she submitted to American Express, stating that her signature on the form was a forgery.³⁷

At the hearing, Ms. AL testified that the signature on the form was not hers and that she had never given anyone permission to sign her name; the signature was a forgery. She noted that the signature on the form used the middle initial “M,” while her middle initial is “H.” Ms. AL testified that she had never authorized any investment advisory fees other than the one she paid to open the account.³⁸

2. Mr. and Mrs. G

After Sears left American Express, Zue called Mrs. G and said that American Express was conducting an investigation. Mr. and Mrs. G met with Zue and were shown “a stack” of documents which appeared to contain their signatures. Included among the documents was an

³⁵ Tr. at 89.

³⁶ Tr. at 90-91.

³⁷ Tr. at 98-103; CX-21 at 7, 9; RX-41, 42.

³⁸ Tr. at 103.

investment advisory agreement which contained a “Good Until Changed or Cancelled” (“GTCC”) order giving American Express authorization to deduct an annual \$500 fee for investment advisory services. In June of 2002, Mr. and Mrs. G signed an affidavit swearing that their signatures on 19 forms and letters were forgeries.³⁹

At the hearing, Mr. and Mrs. G testified that none of the signatures was theirs and that they did not authorize anyone to sign their names to the documents.⁴⁰ Mr. and Mrs. G testified that they had never authorized Sears to deduct investment advisory fees from their account. Nevertheless, a \$500 fee was deducted annually in accordance with the GTCC order form.⁴¹

3. Clara McCune

Clara McCune (“McCune”) worked as Sears’ assistant at American Express from February 1999 until early spring of 2000. As a registered person, McCune placed orders for customers that Sears did not place herself. She also processed paperwork for customers.⁴² McCune testified that during the time she worked with Sears, she witnessed Sears sign customers’ names to documents on 20-25 occasions. McCune testified that each time Sears signed a customer’s name to a document, it was after a meeting when a customer had neglected to sign the document. McCune testified that Sears stated that the customers had given her permission to sign their names.⁴³ McCune admitted that she could not recall the name of a single customer whose name Sears signed in this fashion, nor could she recall the first time she saw

³⁹ CX-7 at 2-3.

⁴⁰ Tr. at 170-173; 212-213; CX-9 at 6.

⁴¹ Tr. at 174, 226.

⁴² Tr. at 250-251.

⁴³ Tr. at 252-254, 281-282.

Sears do it.⁴⁴ McCune also could not recall the forms Sears signed.⁴⁵ McCune testified that she never told anyone at American Express that she had seen Sears sign customer names to documents.⁴⁶

Sears denied forging her customers' signatures on the investment advisory fee authorization forms.⁴⁷

Although the Hearing Panel believed that Sears' customers' signatures were forged, as they testified, Enforcement provided no evidence proving that Sears committed the forgeries. Therefore, the Hearing Panel found that Enforcement failed to prove, by a preponderance of the evidence, that Sears was responsible for the unauthorized deduction of investment advisory fees from her customers' accounts.

III. Conclusions of Law

A. Unauthorized Trading

The evidence establishes that Sears made unauthorized trades in numerous customer accounts. Moreover, none of the transactions resulted from a misunderstanding or a miscommunication. The customers who testified were adamant that they did not give Sears permission to purchase the stocks in question for their accounts. Although Sears denied the allegations, the Hearing Panel did not believe her.

Based on the foregoing findings, the Hearing Panel concludes that Sears made unauthorized trades in customer accounts, as alleged in the Complaint. The SEC and NASD

⁴⁴ Tr. at 281-282.

⁴⁵ Tr. at 286.

⁴⁶ Tr. at 284-286.

⁴⁷ Tr. at 628-630, 638.

have consistently held that “unauthorized trading in a customer’s account violates Conduct Rule 2110.”⁴⁸

B. Outside Business Activities

NASD Conduct Rule 3030 provides: “No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member. Such notice shall be in the form required by the member.”

In 1988, when the NASD Board of Governors proposed Article III, Section 43 of the NASD Rules of Fair Practice, now Conduct Rule 3030, the Board concluded that “it would be appropriate for member firms to receive prompt notification of all outside business activities of their associated persons so that the member’s objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.”⁴⁹ NASD adopted the Rule to prevent harm to the investing public and to limit member firms’ entanglements in legal difficulties that can result from unsupervised outside business activities, which may be unrelated to the securities industry.⁵⁰ In light of these

⁴⁸ *Jeffrey B. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4 at *13-14 (NAC Mar. 27, 2002) (citations omitted); see also *Robert Lester Gardner*, Exch. Act Rel. No. 35,899, 1995 SEC LEXIS 1532, at *1 n.1 (June 27, 1995); *Keith L. DeSanto*, Exch. Act Rel. No. 35,860, 1995 SEC LEXIS 1500 (June 19, 1995), *aff’d*, 101 F.3d 108 (2d Cir. 1996).

⁴⁹ *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988); Notice to Members 88–86, 1988 NASD LEXIS 207 (Nov. 1988).

⁵⁰ See Notice to Members 88–86, 1988 NASD LEXIS 207 (Nov. 1988). See also, e.g., *District Bus. Conduct Comm. v. Micah C. Douglas*, Nos. C06920046 and C06930068, 1995 NASD Discip. LEXIS 217, at *18 (N.A.C. Sept. 19, 1995).

important protective goals, engaging in unreported outside business activities is considered a serious violation.

Accordingly, considering all of the evidence, the Hearing Panel finds that Sears' preparation of tax returns for her clients was an outside business activity and that she failed to provide the requisite notice to American Express, in violation of NASD Conduct Rules 3030 and 2110, as alleged in the Complaint.

IV. Sanctions

A. Unauthorized Trading

According to the NASD Sanction Guidelines ("Guidelines"), the recommended range for unauthorized transactions is a fine of \$5,000 to \$75,000 and a suspension of 10 business days to one year, or, in egregious cases, a bar.⁵¹ Based on the Guidelines and the decision in *District Business Conduct Committee No. 10 v. Hellen*,⁵² the Hearing Panel has determined to bar Sears.

The Hearing Panel finds that Sears' conduct was egregious under the criteria set forth in *Hellen*. In that decision, the National Adjudicatory Council described, *inter alia*, "quantitatively egregious" unauthorized trading, which is characterized by a large number of unauthorized transactions.⁵³ The existence of numerous unauthorized transactions "often constitutes

⁵¹ NASD Sanction Guidelines, 103 (2006 Ed.).

⁵² No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999).

⁵³ See also, *DBCC v. Granath*, No. C02970007, 1998 NASD Discip. LEXIS 19, at *19-20 (NAC Mar. 6, 1998) (imposing a bar when the Respondent executed 24 unauthorized transactions); *DBCC v. Levy*, No. C07960085, 1998 NASD Discip. LEXIS 22, at *12 (NAC Mar. 6, 1998) (imposing a bar when the Respondent executed 16 unauthorized transactions).

compelling circumstantial evidence that the [trades] were not the result of miscommunications or mistakes.”⁵⁴

In this case, the Hearing Panel concludes that the evidence supports a finding that Sears’ unauthorized trading is both quantitatively and qualitatively egregious. As found above, Sears intentionally effected at least 23 unauthorized trades in numerous customers’ accounts. The trading was also qualitatively egregious -- evidence shows that Sears abused the trust of her customers, some of whom were elderly and ill, by trading without their consent. She then had the audacity to claim at the hearing that they were all “mistaken” or had faulty memories. The Hearing Panel concluded that Sears lied to everyone involved in this case—her clients, her firm and ultimately, the Hearing Panel.

Because Sears has filed for bankruptcy, Enforcement did not request monetary sanctions in this case. Pursuant to an Order of the Bankruptcy Court, and representations made by NASD to the Court, if the Hearing Panel finds that Sears committed any or all of the violations set forth in the Complaint, the Hearing Panel may only censure, suspend or bar her from associating with any NASD member.⁵⁵

Accordingly, the Hearing Panel finds that Sears should be barred from the securities industry.

⁵⁴ *Hellen*, 1999 NASD Discip. LEXIS 22 at *16 (NAC June 15, 1999) (“In addition, the volume of the violations significantly increases the gravity of the respondent’s transgression.”).

⁵⁵ Enforcement’s Post-Hearing Brief at 7.

B. Outside Business Activities

For violation of Conduct Rules 2110 and 3030 that do not involve aggravating circumstances, the Guidelines recommend a fine of \$2,500 to \$50,000 and a suspension of up to 30 business days. When the outside business activities involve aggravating conduct, the Guidelines provide for a longer suspension of up to one year.⁵⁶ Citing what it considers aggravating circumstances, and mindful of NASD's representation to the Bankruptcy Court, Enforcement requested a one-year suspension.

The Hearing Panel begins its analysis with the Principal Considerations listed in the applicable Sanction Guideline. First, the Hearing Panel notes that Sears' outside activity involved some American Express customers. This is a significant aggravating factor. When NASD amended the Sanction Guideline governing violations of Conduct Rule 3030, NASD noted that it did so to stress the importance of determining whether the outside activity involved customers of the respondent's firm and whether the respondent's marketing activities could have created the impression that the member firm approved the subject product or service.⁵⁷

Here, Sears prepared tax returns in her American Express office, giving her customers the impression that American Express approved of her activity.

Second, the Hearing Panel notes that although Sears "hid the tax returns in plain sight," in her office files, she nonetheless attempted to conceal her activity from American Express by certifying annually that she had no undisclosed outside activities.

⁵⁶ Guidelines at 14 (2006 Ed.).

⁵⁷ *Id.*

Taking these aggravating factors into account, the Hearing Panel concludes that the appropriate remedial sanction for this offense is a one-year suspension in all capacities. Because Sears is being barred for unauthorized trading, however, a suspension would be redundant and will not be imposed.

V. Order

Therefore, having considered all of the evidence,⁵⁸ Wanda P. Sears is hereby barred from associating with any member firm in any capacity. The sanction shall become effective immediately when this Decision becomes the final disciplinary action of NASD.

HEARING PANEL

By: Rochelle S. Hall
Hearing Officer

Copies to: Wanda P. Sears (*via overnight and first class mail*)
Anthony Paduano, Esq. (*via facsimile and first class mail*)
Joel R. Beck, Esq. (*electronically and via first class mail*)
Gene E. Carasick, Esq. (*electronically and via first class mail*)
Rory C. Flynn, Esq. (*electronically and via first class mail*)
Andrew A. Favret, Esq. (*via first class mail*)

⁵⁸ The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.