

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION,

Complainant,

v.

MARK ALLEN BORSKY
(CRD No. 2492069),

Respondent.

Disciplinary Proceeding
No. 2005000078501

HEARING PANEL DECISION

Hearing Officer – SW

Date: May 25, 2007

Respondent is suspended for two years in all capacities from associating with any NASD member firm in any capacity for violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110 because he initially provided and caused his firm to provide false information to NASD although shortly thereafter he corrected the false information. For violating NASD Conduct Rules 3310 and 2110, and IM-3310, Respondent is suspended in all capacities for 30 days and fined \$5,000.

Appearances

Melanie L. Hilley, Esq., Counsel, and Michael R. Levy, Esq., Chief Counsel,
Rockville, MD, for the Department of Market Regulation.

Mark Allen Borsky, pro se.

DECISION

I. PROCEDURAL BACKGROUND

On August 14, 2006, the Department of Market Regulation (“Market Regulation”) filed a three-count Complaint against Respondent Mark Allen Borsky (“Respondent”). The Complaint’s allegations relate to Respondent’s failure to fill an order by Hill, Thompson, Magid & Co., Inc. (“Hill”) to purchase shares of Email Real Estate.com, Inc. (“EMLR”) at Respondent’s displayed quote of \$1.00 per share, and Respondent’s admittedly false claim that he was entitled to refuse to fill the Hill order

because prior to the receipt of the Hill order, he had received and executed an order from W.D. Latimer Co. Limited (“Latimer”) to purchase the EMLR stock.

Specifically, count one of the Complaint alleges that Respondent, while associated with VFinance Investments, Inc. (“VFinance” or the “Firm”), violated NASD Conduct Rules 3310 and 2110, and IM-3310 by knowingly reporting, through the Automated Confirmation Transaction Service, a trade in EMLR with Latimer that was not a bona fide trade.

Count two of the Complaint alleges that Respondent violated NASD Rules 8210 and 2110 by providing false information concerning the fictitious trade in EMLR to his employer, VFinance, when he knew that his employer would provide the false information to the NASD staff who, pursuant to Rule 8210, had inquired about the Latimer trade.

Count three of the Complaint alleges that Respondent violated NASD Conduct Rule 2110 by providing false information to an NASD staff member who telephoned Respondent with a routine inquiry shortly after Respondent’s refusal to fill Hill’s order.

Respondent admitted each of the violations, but argued that his full and prompt admission of his misconduct should be sufficiently mitigating to warrant a sanction less than a bar.

The Hearing Panel, consisting of two former members of the District 9 Committee and the Hearing Officer, conducted a Hearing on January 17, 2007, in Philadelphia, PA.¹

¹ Hereinafter, Market Regulation’s exhibits presented at the Hearing will be designated as “CX-”; Exhibit CX-11, Respondent’s Declaration dated August 23, 2004, will be designated as “DECL at ¶”; and references to the transcript of the Hearing will be designated as “Tr. p.”

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent entered the securities industry in 1999. (Tr. p. 36). From August 2003 to October 2005, Respondent was employed by NASD member VFinance as a trader. (DECL at ¶ 1; Tr. p. 12). Respondent has not been associated with an NASD member since 2005. (Tr. p. 12). However, 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 August 14, 2006, within two years after Respondent's association with VFinance was terminated, and (2) the Complaint charges Respondent with misconduct while he was associated with VFinance.

B. Background

The facts are not in dispute. As a trader and market maker for VFinance, Respondent maintained quotes for hundreds of stocks, although he focused primarily on executing orders for customers and other brokerage firms and institutions, rather than trading for VFinance's proprietary account.² (Tr. pp. 24, 38). As a market maker, Respondent was required to honor his quotes up to the displayed size.³ (Tr. p. 24).

²A market maker is a firm that maintains a firm bid and offer price in a given security by standing ready to buy or sell at publicly-quoted prices. See Glossary of Terms available at http://www.nasd.com/Resources/Glossary/NASDW_011116.

³ A market maker is relieved from its firm quote obligation if the market maker: (i) sends a quote change to NASD before an order is presented; or (ii) has effected or is in the process of effecting a transaction at the time an order sought to be executed is presented and immediately upon completion of the transaction communicates a revised quotation to NASD. See 1994 Notice to Members – For Your Information at http://nasd.complinet.com/nasd/display/display.html?rbid=1189&record_id=1159004816&element_id=1159004631&highlight=%22backing+away%22#r1159004816. Thus, a market maker's firm quote obligation with respect to a particular order is triggered when that market maker becomes aware of, or should reasonably be aware of, the pendency of that order. (Id.).

On June 24, 2004, while attempting to execute a customer order in another stock, Respondent failed to update his last bid and offer in EMLR from the day before. (DECL at ¶ 2; Tr. p. 25). As a result, Respondent displayed a firm offer to sell 2,500 shares of EMLR at \$1.00 per share. (CX-6, p. 6). Respondent had posted this offer the prior day based upon a day order from a customer. (Tr. pp. 22, 25; CX-6, p. 3). Respondent should have canceled this order at the end of the prior day and updated his bid and offer for EMLR, but he failed to do so. (Tr. pp. 22, 25).

At 11:26 a.m.,⁴ on June 24, 2004, Respondent received a Pink Link⁵ order to purchase 2,500 shares of EMLR at \$1.00 per share from Hill, which Respondent executed. (DECL at ¶ 2; CX-6, p. 6). After the transaction was completed, Respondent again failed to update his bid and offer in EMLR. (DECL at ¶ 3; Tr. p. 25).

Approximately eight minutes later, at 11:34 a.m., Respondent received a second Pink Link order from Hill, this time to purchase 5,000 shares of EMLR at \$1.00 per share (“Hill order”). (DECL at ¶ 4; CX-6, p. 5; CX-10). Respondent declined the Hill order, and updated VFinance’s quotation in EMLR to reflect an offering price of \$3.00 per share that was away from the market. (DECL at ¶ 4; CX-10).

Shortly thereafter, a representative of Hill called Respondent to find out why VFinance had not honored the Hill order. (CX-2, p. 3; CX-10). Respondent falsely represented that he was entitled to decline the Hill order because he had previously executed a trade in the EMLR stock in response to a telephone order from Latimer. (Id.).

⁴ All times referenced herein occurred on June 24, 2004, Eastern Time.

⁵ Pink Link is an electronic instant messaging service operated by Pink Sheets LLC as a replacement for telephone contact between subscribers’ trading desks. See Dec. 12, 2002 Interpretative Letter at http://www.nasdaq.com/RulesRegulation/PublicationsGuidance/InterpretiveLetters/MembershipandRegistrationRules/NASDW_002435.

Respondent advised Hill that he would not sell any additional shares of EMLR at \$1.00 per share. (DECL at ¶ 5). Hill asked where the transaction report was that would substantiate Respondent's representation. (CX-2, p. 3; Tr. p. 27).

At 11:39 a.m., Respondent entered a fictitious trade in the Automated Confirmation Transaction Service indicating that VFinance had sold 2,500 shares of EMLR at \$1.00 per share to Latimer ("Latimer trade"). (CX-1, pp. 1, 3; CX-10; DECL at ¶ 6; Tr. pp. 19-20). At the relevant time, Respondent had not received a telephone order from Latimer, nor had he sold Latimer 2,500 shares of EMLR. (CX-10; DECL at ¶ 6).

Next, Respondent received a telephone call from the NASD Market Regulation Department inquiring about the declined Hill order. (CX-10; DECL at ¶ 7). Respondent made the same misrepresentation to the NASD staff member that he had received a prior telephone order for the stock from Latimer. (*Id.*). Later, Respondent repeated the misrepresentation to his supervisor. (CX-6, p. 1).

At 11:54 a.m., in a second conversation with the NASD staff, Respondent offered to honor the Hill order for the displayed 2,500 shares. (CX-10; DECL at ¶ 8). The NASD staff then contacted Hill with the offer, and Hill indicated that it would accept. (DECL at ¶ 8). At 11:59 a.m., Respondent sold Hill 2,500 shares of EMLR at \$1.00 per share. (CX-6, p. 6).

At 12:04 p.m., Respondent cancelled the fictitious Latimer trade. (CX-1, p. 1; CX-10; DECL at ¶ 9). Upon noting that the Latimer trade had been canceled, the NASD staff decided to investigate whether the Latimer trade was a bona fide trade. Pursuant to NASD Procedural Rule 8210, the NASD staff sent inquiry letters to VFinance, Hill, and

Latimer, a Canadian company, requesting details concerning Hill's "backing away" complaint against VFinance. (CX-3; CX-4; CX-7).

The NASD Rule 8210 request for information sent to VFinance was dated June 30, 2004 and required a response no later than July 15, 2004. (CX-3). Due in part to Respondent's past excellent reputation, his supervisor drafted a response to NASD, dated July 13, 2004, defending Respondent's actions, based solely on Respondent's June 24, 2004 false explanation of the events. (Tr. p. 28; CX-6). Respondent knew that (i) the Firm had received the request from NASD, (ii) the request was issued pursuant to Rule 8210, and (iii) the Firm was submitting a response to the request for information, which incorporated Respondent's misrepresentation. (DECL at ¶ 10). Nevertheless, Respondent failed to advise his Firm of the misrepresentation because he hoped that the matter would go away. (Tr. p. 33).

On July 22, 2004, NASD sent a request for information to Latimer, via the Ontario Market Regulation Services, Inc. (CX-7). When it received the request for information, Latimer advised Respondent of NASD's inquiry, and Respondent realized that the issue was not going to go away. (Tr. pp. 29, 31).

On July 27, 2004, not wanting to risk harm to his supervisor or his Firm, Respondent told his supervisor the truth. (CX-10; Tr. pp. 29-30). On July 28, 2004, the supervisor advised the NASD staff of the truth orally and also wrote a letter, correcting the false information, which letter was received by the NASD staff on July 29, 2004.⁶ (CX-9; DECL at ¶ 12).

⁶ On July 30, 2004, NASD received a letter from Latimer that stated it had not executed a trade in EMLR on June 24, 2004. (CX-8).

Subsequently, on August 23, 2004, Respondent executed a declaration for the NASD staff, under penalty of perjury, setting forth an accurate account of the events that had occurred. (CX-11).

C. Respondent Violated NASD Conduct Rules 3310 and 2110, and IM-3310

Count one of the Complaint alleges that Respondent violated NASD Conduct Rules 3310 and 2110, and IM-3310 by reporting a transaction that was not a bona fide trade.⁷

Conduct Rule 3310 provides, in pertinent part, that no member shall cause to be published or circulated any communication that purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security.⁸

IM-3310 explains that it is “inconsistent” with the provisions of NASD Conduct Rules 3310 and 2110 to “publish or circulate or to cause to be published or circulated . . . any quotation for any security without having reasonable cause to believe that such quotation is a bona fide quotation, is not fictitious. . . .”

⁷ See Daniel D. Manoff, Exchange Act Rel. No. 46,708, 2002 SEC LEXIS 2684, at *2 n.1 (Oct. 23, 2002) (confirming that “associated persons have the same duties and obligations as NASD members under the NASD’s rules”); Michael B. Jawitz, Exchange Act Rel. No. 44,357, 2001 SEC LEXIS 1042, at *2 n.2 (May 29, 2001) (establishing that NASD Conduct Rules 2110, 2120 and 3310 apply to associated persons by virtue of NASD Rule 0115).

⁸ Rule 3310 provides:

No member shall publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such member believes that such quotation represents a bona fide bid for, or offer of, such security. If nominal quotations are used or given, they shall be clearly stated or indicated to be only nominal quotations.

There is no dispute that the Latimer trade was fictitious and not a bona fide trade and that Respondent caused the Latimer trade to be published or circulated through the Automated Confirmation Transaction Service. It is also well settled that a violation of another NASD Rule is also a violation of NASD Conduct Rule 2110.⁹ Accordingly, the Hearing Panel finds that Respondent violated NASD Conduct Rules 2110 and 3110, and IM-3310, as alleged in count one of the Complaint.

D. Respondent Violated NASD Rules 8210 and 2110

Count two of the Complaint alleges that Respondent violated NASD Rules 8210 and 2110 by providing false information concerning the fictitious trade in EMLR to his employer, when he knew that the NASD staff had inquired about the trade and that his employer would provide the false information to NASD in response to the Rule 8210 staff inquiry.

NASD Procedural Rule 8210, a crucial component of NASD's examinations and investigations, gives NASD the right to require a member or person associated with a member to provide information, orally or in writing, in connection with an examination or investigation. Procedural Rule 8210 further states that no member or person shall fail to provide such information. It is axiomatic that Procedural Rule 8210 prohibits an associated person from providing false or misleading information to NASD in connection with an examination or investigation.¹⁰

⁹ Guang Lu, Exchange Act Rel. No. 51,047, 2005 SEC LEXIS 117, at *15 n.17 (Jan. 14, 2005).

¹⁰ See Department of Enforcement v. Marlowe Robert Walker, III, No. C1097041, 2000 NASD Discip. LEXIS 2, at *31 (NAC Apr. 20, 2002) (finding that the respondent's untruthful testimony was "as harmful as a complete failure to respond").

In his declaration to NASD, Respondent admitted that he knew that the false information that he had provided to his employer would be provided to NASD as the Firm's response to NASD's June 30, 2004 Rule 8210 request for information. Consequently, although the Rule 8210 request was not directed expressly to Respondent, because Respondent was aware that the false information that he had provided to his employer was being provided to NASD in response to a Rule 8210 request for information, the Hearing Panel finds that Respondent violated NASD Rules 2110 and 8210, as alleged in count two of the Complaint.¹¹

E. Respondent Violated NASD Conduct Rule 2110

Count three of the Complaint alleges that Respondent violated NASD Conduct Rule 2110 by providing false information concerning the fictitious trade in EMLR to an NASD staff member during a routine telephone inquiry.

NASD Conduct Rule 2110 states, in its entirety, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Conduct Rule 2110 "is not limited to rules of legal conduct but rather . . . it states a broad ethical principle."¹² Consequently, other types of violations are viewed as violations of NASD Conduct Rule 2110 if the surrounding facts and circumstances indicate that the conduct was unethical.

¹¹ This case is thus distinguishable from Michael A. Rooms, Exchange Act Rel. No. 51,467, 2005 SEC LEXIS 728, at *11 (Apr. 1, 2005), aff'd Rooms v. SEC, 2006 U.S. App LEXIS 6513 (10th Cir. Mar. 14, 2006), where the SEC held that the record was insufficient to establish that Rooms violated NASD Rule 8210 by providing false information to his employer because the evidence did not establish that during the relevant period he was aware of the Rule 8210 request, but did establish a violation of Rule 2110. As in Rooms, even if Respondent's misconduct did not violate Rule 8210, because the staff's request was directed to the firm rather than to him, the misconduct violated Rule 2110.

¹² In re Timothy L. Burkes, 51 S.E.C. 356 (1993), aff'd mem., Burkes v. SEC, 29 F.3d 630 (9th Cir. July 24, 1994).

The Rule’s language requires that two tests be met: (1) the misconduct occurred “in the conduct of” the respondent’s business; and (2) the misconduct contravened high standards of commercial honor or violated just and equitable principles of trade.

There is no dispute that Respondent provided false information concerning the fictitious trade in EMLR to the NASD staff in response to a routine inquiry. There is no dispute that the misrepresentation occurred in the conduct of Respondent’s business and that on June 24, 2004, Respondent “deliberately sought to deceive NASD.”¹³

Accordingly, the Hearing Panel finds that Respondent violated NASD Conduct Rule 2110, as alleged in count three of the Complaint.

III. SANCTIONS

A. Respondent’s Violation of NASD Rules 8210 and 2110

The NASD Sanction Guidelines provide that a bar is the standard sanction if a respondent does not respond in any manner to a request for information under Rule 8210.¹⁴ The National Adjudicatory Counsel has advised that “untruthful responses [are] as harmful as a complete failure to respond.”¹⁵

Market Regulation argued that the allegations of counts two and three of the Complaint, involving a misrepresentation to NASD in response to the Rule 8210 request for information and in response to the routine inquiry, warrant a bar. Specifically, Market Regulation argued that (i) Respondent engaged in a pattern of misconduct over an extended period of time by not coming forward with the truth for five weeks,

¹³ Rooms at *13.

¹⁴ NASD Sanction Guidelines, p. 35 (2006).

¹⁵ Walker at *31.

- (ii) Respondent caused the NASD staff “to initiate a time consuming investigation,” and
- (iii) Respondent ultimately cooperated with the NASD’s investigation solely for self-serving reasons in an effort to avoid being barred.

In contrast, the Hearing Panel finds that Respondent repeatedly made the same affirmative misrepresentation during a period of approximately 20 minutes on one day, June 24, 2004, and then within a reasonable time corrected his misrepresentation. By July 28, 2004, Respondent had provided the correct information to the NASD staff. The NASD staff had set a deadline of July 15, 2004 for the Firm to respond to the Rule 8210 request for information concerning the trade. By August 23, 2004, Respondent had provided a signed a declaration under penalty of perjury to the NASD staff confessing his misconduct. Furthermore, the Hearing Panel finds that Respondent’s primary motivation for confessing was to avoid causing harm to his supervisor and his Firm, and to prevent a further waste of NASD’s time and resources, rather than for his own self-serving reasons.

In addition, the Hearing Panel finds that Respondent’s misconduct was aberrant compared with the honesty that he exhibited in his testimony at the Hearing and his overall reputation at his Firm, and that Respondent was genuinely remorseful about his conduct.

Under the unique facts and circumstances of this case, i.e., (i) Respondent corrected his error in judgment within a few weeks, prior to the initiative of any formal disciplinary action,¹⁶ (ii) the nature of the information requested involved a single

¹⁶ See Dep’t of Enforcement v. Erenstein, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at *19 (NAC Dec. 18, 2006) (NAC modified bar to a one year suspension giving consideration to the fact that the information was produced before the initiation of formal disciplinary action), appeal docketed, No. 3-12529 (SEC Jan. 9, 2007).

incident of backing away that was resolved on the same day,¹⁷ and (iii) the Hearing Panel's specific finding that NASD's investigation of the matter was not materially impeded, the Hearing Panel finds that a substantial suspension is sufficient to remediate Respondent's misconduct and deter others from engaging in similar misconduct. Accordingly, the Hearing Panel imposes a two year suspension in all capacities on Respondent for violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210 as alleged in counts two and three of the Complaint.

B. Respondent's Violation of NASD Rules 3310 and 2110, and IM-3310

There are no Sanctions Guidelines for causing publication of a trade report of a non bona fide transaction. In past cases, however, the NAC has looked to the Sanction Guidelines for marking the close or open as a helpful analogy in setting sanctions for reporting false information to the marketplace.¹⁸

For marking a close or open, the Guidelines recommend a fine of \$25,000 to \$200,000, or more than \$200,000 if the misconduct is egregious.¹⁹ In addition, for intentional or reckless misconduct, a suspension of up to two years is recommended, or a bar, if the misconduct is egregious.²⁰ The principal considerations are: (1) whether the misconduct resulted in protecting a securities position or enhancing size; (2) whether respondent received a benefit from the misconduct, including but not limited to increased

¹⁷ See Dep't of Enforcement v. Respondent, No. C02005006, 2007 NASD Discip. LEXIS 13 (NAC Feb. 12, 2007) (NAC remanded case indicating that the nature of the information requested should be considered in reaching a decision on sanctions).

¹⁸ See Market Regulation Committee v. Jawitz, No. CMS960238, 1999 NASD Discip. Lexis 24, at *26 n. 25 (NAC July 1999), aff'd, Michael B. Jawitz, Exchange Act Rel. No. 44,357, 2001 SEC Lexis 1042 (May 29, 2001).

¹⁹ Guidelines at 58.

²⁰ Id.

valuation of inventory, avoidance of margin calls or affecting month-end performance; (3) whether the activity affected the market at a particularly sensitive time, such as on an expiration date; and (4) whether the misconduct was an isolated incident involving one stock or a systemic pattern of behavior involving multiple stocks.²¹

Market Regulation requested a \$25,000 fine and a two-year suspension for Respondent's violations of NASD Conduct Rules 3310 and 2110, and IM-3310.

The Hearing Panel finds that: (i) this was an isolated event involving a single stock; (ii) there was no evidence that the fictitious report affected the market; and (iii) the matter was resolved in less than 20 minutes. The Hearing Panel also noted that on July 28, 2004, VFinance fined Respondent \$1,000 and required that he retake the Series 55 trading examination. (CX-9, p. 3). As set forth earlier, the Hearing Panel finds that Respondent was genuinely remorseful about his conduct.

Accordingly, the Hearing Panel imposes a fine of \$5,000 and 30-day suspension as an appropriate sanction for Respondent's violation of NASD Conduct Rules 3310 and 2110, and IM-3310.

IV. CONCLUSION

Respondent Mark Allen Borsky is suspended for two years from associating with any NASD member firm in any capacity for violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by providing and causing his firm to provide false information to NASD. Respondent is fined \$5,000 and suspended for 30 days, concurrent with the two-year suspension, for violating NASD Conduct Rules 3310 and 2110, and IM-3310. In addition, Respondent is ordered to pay costs in the amount of \$1,238.20, which

²¹ Id.

includes an administrative fee of \$750 and the \$488.20 cost of the Hearing transcript.

The fine and costs shall be due and payable when, and if, Respondent seeks to return to the securities industry.

If this Decision becomes the final disciplinary action of NASD, Respondent's suspension in all capacities shall commence at the opening of business on July 16, 2007, and conclude at the close of business on July 15, 2009.²²

HEARING PANEL.

by: _____
Sharon Witherspoon
Hearing Officer

Date: Washington, DC
May 25, 2007

Copies to:

Mark Allen Borsky (via FedEx and first class mail)
Jeffrey K. Stith, Esq. (via electronic and first class mail)
Michael R. Levy, Esq. (via electronic and first class mail)
Melanie L. Hilley, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)
Mark P. Dauer, Esq. (via electronic and first class mail)

²² The Hearing Panel 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.