FINANCIAL INDUSTRY REGULATORY AUTHORITY[1]
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHN M. REPINE (CRD No. 1010844), Respondent.	Disciplinary Proceeding No. E0420030634-04 Hearing Officer— Sara Nelson Bloom Hearing Panel Decision February 21, 2008

For engaging in deception to facilitate market timing transactions, in violation of Rule 2110, and for failing to respond truthfully to requests for information and documents, in violation of Rules 8210 and 2110, Respondent is barred.

Appearances

James M. Stephens, Esq., and Jeffrey A. Ziesman, Esq., Kansas City, MO, appeared for the Department of Enforcement.

Respondent appeared on his own behalf.

I. Procedural History

On February 5, 2007, the Department of Enforcement ("Enforcement") filed a Complaint against John M. Repine ("Respondent"), alleging that he engaged in deception to facilitate market timing transactions, in violation of Rule 2110. The Complaint also alleges that Respondent failed to respond truthfully to FINRA requests for information, in violation of Rules 8210 and 2110. Respondent filed an Answer admitting the first count, denying the second count, and requesting a hearing.[2] The Hearing was held on November 13, 2007, before a hearing panel

[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of the NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA").

[2] The Complaint also named John Triglia as a Respondent, but he was removed from the case caption after he entered into a settlement with Enforcement.

composed of a Hearing Officer, a current member of the District 4 Committee, and a former member of the District 4 Committee.[3]

II. **Respondent**

In September 1998, Respondent and a partner founded Archer Alexander Securities Corp. ("Archer"). CX-1; Tr. 15. Respondent served as Archer's Chief Executive Officer in its main office in Overland Park, Kansas, and was registered as a financial and operations principal, general securities principal and general securities representative until December 2006. CX-1; Stip. 16. Respondent is currently registered with Chelsea Financial Services. CX-1; Tr. 107.

III. **Facts**

A. Market Timing

The facts underlying Enforcement's deceptive market timing charge are not in dispute. In May of 2002, a large hedge fund, Tower Research Capital, LLC ("Tower") opened five brokerage accounts at Archer, through a registered representative, John Triglia ("Triglia"), located in Archer's branch office in Smithtown, New York. Although the accounts had different names, they had the same mailing addresses, managing directors, and authorized agents. Stip. 17. Several months later, in August 2002, another large hedge fund, Millennium Holding Group, L.P., opened a brokerage account with Triglia at Archer. Stip. 18. Respondent supervised Triglia's activities, which would have included the opening of, and trading in, the Millennium and Tower accounts. Tr. 116-117.

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[3] References to the testimony of the hearing are designated as "Tr.__," with the appropriate page number. References to the exhibits provided by Enforcement are designated as "CX-___." References to the parties' stipulations are designated as "Stip. __." CX-1 – 186 and CX-191-198 were admitted into the record. Respondent offered no exhibits.

Once the accounts were opened, Tower and Millennium representatives directed short-term trading of significant positions in international mutual funds, with both the purchase and sale of the same funds occurring usually within one week and always within one month. From June through August 2002, there were dozens of such transactions in these accounts, with amounts traded ranging from $300,000 to $1,700,000. Stip. 20.

The Tower and Millennium accounts employed a strategy of "market timing" – the short-term buying and selling of mutual fund shares to exploit inefficiencies in mutual fund pricing, particularly present in international funds. Stip. 13. If it is subject to market timing strategies, a fund may be required to maintain a larger percentage of highly liquid assets to cover redemptions, and this may harm investors by raising costs, making management of the fund more difficult, and preventing the fund from being as fully invested as it could be absent the short term trades. Accordingly, mutual funds monitor for market timing transactions, and, as stated in their prospectuses, reserve the right to restrict or block an account and even its registered representative or firm from further transactions in the fund. Stip. 15.

And this is exactly what happened following the initial market timing transactions occurring in the Tower and Millennium accounts at Archer. Shortly after the trading began, Archer's clearing firm, RBC Dain Rausher, Inc. ("RBC") received letters and emails from mutual funds, restricting trading in the Tower and Millennium accounts. Stip. 21. These communications, which Respondent received, directed RBC to cancel trades and prevent further purchases by Tower and Millennium, and to notify the customers and their brokers of these restrictions. Stip. 21. For example, an August 14, 2002 restriction letter from Janus Funds to RBC regarding the market timing activity in one account stated:

> As stated in the shareholder's manual section of all Janus prospectuses, excessive trading of fund shares in response to short-term fluctuations in the market – also known as market timing – make it very difficult to effectively manage a Fund's investments. Janus Capital does not permit excessive trading or market timing. When excessive trading or market timing activity has been identified, Janus Capital reserves the right to refuse purchase orders and exchanges from or into a Fund by any person, group, or commonly controlled account.
>
> Based on the trade activity….we have witnessed year to date for [the account], please restrict your client [Tower] from buying additional shares of Janus Advisor Funds and exchanging from or into Janus Advisor Funds. This restriction is necessary due to the trading activity we have witnessed year to date.

Stip. 22.

RBC notified Respondent and Triglia of these restrictions by calling them and sending copies of the restriction letters from the mutual fund companies. Triglia, in turn, communicated these restrictions to Tower and Millennium. From June through August 2002, RBC notified Respondent and Triglia of at least five restriction letters blocking any further purchases by Tower or Millennium in all funds offered by the mutual fund companies. Stip. 24. Moreover, due to the numerous restriction letters from mutual fund companies, on August 15, 2002, RBC sent a separate letter to Respondent stating that, effective immediately, it would no longer accept orders that it judged to be "market timing" transactions. Stip. 25. Respondent informed Triglia of this, who in turn informed Tower and Millennium representatives. As a result, Tower and Millennium quickly closed their Archer accounts. Stip. 26, 27.

Respondent then circumvented the restrictions he knew that the mutual funds had imposed. He introduced Triglia to Mark Shiver ("Shiver"), another registered representative in Archer's Knightdale, North Carolina office, and proposed that Tower and Millennium open new accounts at Chares Schwab ("Schwab") through Shiver's investment advisory firm KCR Advisory Services, LLC ("KCR"). Pursuant to the plan, Triglia registered with KCR in order to continue servicing these accounts, and Archer, through Respondent, supervised the business by receiving duplicate statements and confirmations from Schwab. CX-192 p. 7, CX-193, CX-194. The parties agreed that management fees would be split, with 88.5% to Triglia, 8.5% to Archer, and 3% to KCR. This arrangement was memorialized in an October 14, 2002 agreement signed by Respondent on behalf of Archer. Stip. 28-30.

From October through December 2002, Tower opened two accounts, and Millennium opened eight accounts at KCR, with Schwab as the custodian. As before, although the accounts had dissimilar names, they had identical mailing addresses, officers and directors, and authorized agents. Stip 31, 32.

Again, Triglia entered trades for these accounts based upon instructions received from Tower and Millennium. Respondent, through his firm, received duplicate account statements from Schwab. Stip. 33. As before, trading in the Tower and Millennium accounts consisted almost exclusively of short-term trading of international mutual funds, with both the purchase and sale of the same fund occurring usually within one week, and almost always within one month. There were hundreds of such transactions in these accounts, with most of the trades in the $500,000 to $1,000,000 range. Stip. 34.

As a result, in November 2002, Schwab began receiving restriction notices from mutual fund companies for these accounts, stating that the accounts were engaged in market timing. From November 2002 through February 2003, Schwab received trading restriction letters from at least seventeen mutual funds, fourteen of which instructed Schwab to block <u>all</u> KCR accounts from purchasing any of their mutual funds, and the remaining three blocking the purchase of specified mutual funds. Stip. 37-39. Schwab communicated these restrictions to Triglia, who in turn informed Tower and Millennium. Stip. 38.

Respondent, Triglia and Shiver again shifted their strategy to circumvent the restrictions. They opened different KCR accounts for Tower and Millennium, this time replacing Schwab with TD Waterhouse Institutional Services ("TDW") as the custodian. In December and January 2003, Tower opened two such accounts, and Millennium opened four such accounts. Stip. 41, 42. As before, Respondent received duplicate account statements from TDW. Stip. 43. As expected, these accounts again engaged in the same type of market timing transactions. Stip. 44.

Perhaps in anticipation of what was to come, Triglia opened his own investment advisory firm, Manna Advisory Services, LLC, ("Manna"). Beginning in February 2003, Tower and Millennium each opened four accounts through Manna. Stip. 49-51, 53-55. Manna used several different custodians for these accounts, including Schwab, Ameritrade, and Fidelity. Stip. 49-55. As before, Tower and Millennium engaged in market timing transactions in these accounts. Again, Respondent arranged for Archer to receive duplicate account statements from the custodians. Stip. 57. Respondent and Triglia again shared the management fees, with 90% going to Triglia, and 10% going to Archer. Stip. 48.

In total, with Respondent's assistance, Tower and Millennium opened at least 30 accounts under various names, at Archer, KCR, and Manna, in order to circumvent the restrictions imposed by the mutual fund companies. When mutual fund companies restricted trading based upon market timing activities, at Respondent's suggestion, Tower and Millennium simply opened new accounts and continued in their market timing trading. Stip. 61.

A total of 526 trades in these accounts occurred after mutual fund companies restricted further trading. Through these trades, Tower and Millennium collectively made over $2 million in profits. Stip. 63. Repine profited from this; Archer's share of the management fees was $38,450. Triglia fared even better; he made at least $400,000 in management fees. Stip. 64.

B. The Rule 8210 Requests

In late 2003, FINRA Staff ("Staff") initiated an investigation into market timing transactions. Tr. 20. The investigation followed a highly publicized action brought by Elliot Spitzer, the New York State Attorney General, against Millennium, among others, involving market timing activities. In the course of its investigation, Staff reviewed mutual fund distributor records referencing Shiver and Triglia, who, they learned, were associated with Archer. Tr. 21. Accordingly, on January 30, 2004, Staff sent Respondent, Archer's Chief Executive Officer, a request pursuant to Rule 8210 for, among other things, the names of any investment advisory firms with which Shiver or Triglia was associated, an explanation of how Archer supervised their activities, and any documentation of Archer's supervision. Staff also requested activity runs for Shiver's and Triglia's top 25 investment advisory accounts, in terms of dollars, for the period January 2002 through December 2003. CX-181; Tr. 23.

On February 13, 2004, Respondent sent an answer to Staff's request. Among other things, he claimed that there were no written communications among Archer and Triglia or Shiver from January 2002 to January 2004. Respondent also claimed that while Triglia and Shiver conducted advisory activities at a broker dealer away from Archer, Archer did not supervise these activities. Staff had no reason to question Respondent's representations, and planned to pursue an investigation into Respondent's apparent failure to supervise Triglia and Shiver. Tr. 27, 28.

Thereafter, Shiver contacted Staff and confessed that he, Triglia, and Respondent used deceptive tactics to facilitate continued market timing activities in the Tower and Millennium accounts, after the mutual fund companies imposed restrictions on further trading. Shiver told Staff that Respondent had forwarded Staff's January 30, 2004 request, and he had just seen a news report showing a Millennium trader being led away in handcuffs. Shiver determined that the best course of action was to tell Staff everything he knew. Tr. 29, 30.

Based upon the preliminary information provided by Shiver, Staff was able to make more focused requests for information from Respondent. On March 2, 2004, Staff sent Respondent another request for information and documents, this time requesting, among other things, all documents relating to any Tower and Millennium accounts, and information on when and why each account was closed. CX-183.

On March 11, 2004, Respondent sent Staff a letter in answer to its request, detailing the closing dates on several accounts, but claiming that he was "unaware of the particular reasons the accounts were closed and transferred." Respondent also reiterated that Archer had no continuing oversight of the accounts once the initial accounts were closed, and stated that he did not know who was responsible for supervision of the accounts after their transfer. He also acknowledged that Archer received 10% of the fees collected by Triglia. CX-184.

On July 13, 2004, Staff sent Respondent another request for information and documents, this time requesting, among other things, information and documents relating to fee sharing arrangements regarding any Tower and Millennium accounts, and any compensation received by Archer regarding these arrangements. CX-185. On July 26, 2004, Respondent sent Staff a blotter reflecting the fees received by Archer. Respondent asserted that Archer received from 7.5% to 8.5% of the fees collected by Shiver and Triglia, but there was no written agreement memorializing this arrangement. CX-186.

At approximately the same time, Staff took on-the-record ("OTR") testimony of Shiver, and learned more details about Respondent's market timing activities. Tr. 47. Following this OTR, on August 16, 2004, Shiver provided additional documentation, including a written agreement between Archer, Shiver and Triglia to share management fees generated by the Millennium and Tower accounts. CX-191; Tr. 47-49. Shiver also provided letters from Respondent to Schwab, TD Waterhouse, and Fidelity, permitting Shiver to maintain the KCR advisory account, with the understanding that Repine would receive duplicate account statements and confirmations for Shiver's transactions through these firms. CX-192 p. 7, CX-193, CX-194; Tr. 50-53.

After receipt of this information, Staff decided to take Respondent's OTR testimony. When confronted with documents discrediting his previous version of events, Respondent for the first time admitted to his involvement in deceptive activities to facilitate continued market timing in the Tower and Millennium accounts. Tr. 54-56.

IV. Discussion

A. Respondent's Deception to Facilitate Market Timing Transactions

The Complaint charges, and Respondent does not dispute, that he participated in the opening of multiple accounts with different clearing firms for the purpose of circumventing trading restrictions imposed on Tower and Millennium by mutual fund companies.[4]

Rule 2110 provides that "[a] member, in the conduct of business shall observe high standards of commercial honor and equitable principles of trade." The SEC has held that Rule 2110 "sets forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." Daniel Joseph Alderman, 52 SEC 355, 2369 (1995), aff'd, 104 F.3d 285 (9th Cir. 1997). Accordingly, Rule 2110 is violated not only when a member violates the federal securities laws, regulations, or FINRA rules, but

[4] Enforcement does not allege that the initial trading violated Rule 2110. Rather, the complaint focuses on Respondent's activity to conceal the source of the orders in order to circumvent trading restrictions imposed by mutual funds.

also when a member engages in unethical behavior, even if it is not "unlawful." Dep't of Enforcement v. Shvarts, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (NAC June 2, 2000).

Here, a number of mutual fund companies detected that Archer customers Tower and Millennium were engaged in market timing transactions, and, consistent with the protection of their investors and their prospectus disclosures, the fund companies restricted further market timing transactions in these accounts. Despite this, Respondent designed a strategy to hide the identity of his customers in order to circumvent these trading restrictions, which was unethical and in bad faith, and inconsistent with the obligations imposed by Rule 2110. Respondent claims, without any evidence other than his self-serving testimony, that it was common practice to do this, and he did not realize that it was improper. Tr. 129. However, "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner." Patricia H. Smith, 52 SEC 346, 348 (1995).

Accordingly, the Hearing Panel finds that Respondent's deceptive activity to facilitate his clients' market timing after the mutual funds restricted such trading violated Rule 2110.

B. Respondent's Failure to Respond Truthfully to Staff's Rule 8210 Requests

The Complaint alleges that Respondent failed to respond truthfully to FINRA requests for information as to the market timing activity in the Tower and Millennium accounts, in violation of Rules 8210 and 2110.

Rule 8210 authorizes FINRA to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in FINRA's oversight function and allows FINRA to carry out its regulatory functions without subpoena power. See, e.g., Dep't of Enforcement v. Valentino, No. FPI010004, 2003

NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), aff'd, 2004 SEC LEXIS 330 (Feb. 13, 2004)("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.")(citation omitted); Joseph G. Chiulli, Exchange Act Release No. 42359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000)(noting that Rule 8210 provides a means for FINRA effectively to conduct its investigations, and emphasizing that FINRA members and associated persons must fully cooperate with requests for information). When an individual fails to provide requested documents and information, FINRA's ability to perform its regulatory responsibilities is subverted. Joseph P. Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998).

It is self-evident that failing to respond truthfully to FINRA requests for information is a violation of Rule 8210. DBCC v. Doshi, Complaint No. C10960047, 1999 NASD Discip. LEXIS 6 (NAC Jan. 20, 1999). A violation of Rule 8210 is also a violation of Rule 2110, because it is inconsistent with "high standards of commercial honor." Dep't of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC Apr. 19, 2000).

At the hearing, Respondent blamed Archer's in-house attorney, who he claimed prepared the responses to FINRA Staff, and suggested that he was simply negligent in not reviewing the correspondence more closely. Tr. 106, 112-114. Respondent claimed that he did not recall reading the responses before signing them, and that it was possible that he did not review them. Id. Respondent provided no evidence to support this account, other than his belated and self-serving testimony, which the Panel did not find credible. In any event, Respondent cannot shift responsibility for responding truthfully to Staff's 8210 requests to Archer's lawyer. Dep't of Enforcement v. Walker, No. C10970141, 2000 NASD Discip. LEXIS 2 at *22 (NAC April 20, 2000)(a registered representative cannot evade responsibility for regulatory filings by shifting responsibility to his attorney).

Accordingly, the Panel finds that Respondent submitted false, misleading and inaccurate information in response to the Staff's 8210 requests, in violation of Rules 8210 and 2110.

V. Sanctions

A. Respondent's Deception to Facilitate Market Timing Transactions

There is no specific FINRA Sanction Guideline ("Guideline") for deceptive market timing. The most closely analogous Guideline is that for Misrepresentations and Material Omissions of Fact, which provides for fines of $10,000 to $100,000 for intentional or reckless misconduct, a suspension of 10 days to two years, or, in egregious cases, a bar. Guidelines, at p. 93 (2007 ed.). Enforcement requests that Respondent be barred, and Respondent urges that no sanctions be imposed.

The Panel finds that Respondent's conduct was egregious and warrants a bar. In reaching this determination, the Panel considered that: (1) Respondent acted intentionally to deceive the mutual fund companies in an effort to circumvent restrictions against further market timing activities; (2) the misconduct was extensive – 526 market timing transactions spanning more than a year using multiple broker-dealers; (3) Respondent concealed his misconduct for several months by providing false answers to Staff requests for information; (4) Respondent took no responsibility for the misconduct, claiming that Staff has overreacted to Eliot Spitzer's prosecution of market timers; and (5) Respondent profited from the misconduct.

Accordingly, Respondent is barred for engaging in deception to facilitate market timing transactions, in violation of Rule 2110. In light of the bar, no monetary sanctions are imposed.

B. Respondent's False 8210 Responses

For violations of Rule 8210, the Guidelines provide: "[i]f the individual did not respond in any manner, a bar should be standard. Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years." Guidelines, at p. 35. Again, Enforcement argues that a bar is the appropriate sanction in this case; Respondent urges the Panel to impose no sanction.

In this case, Respondent's untruthful responses, which were intentional or at least reckless, were even more egregious than a complete failure to respond, because Respondent's assertions mislead the Staff and put the investigation off course. See, Dep't of Enforcement v. Walker, No. C10970141, 2000 NASD Discip. LEXIS 2 at *n.26 (NAC April 20, 2000)(holding that untruthful responses were as harmful as a complete failure to respond). There are no mitigating circumstances that would warrant a lesser sanction; in particular, Respondent's purported reliance on counsel, if it occurred, was not reasonable, and therefore not mitigating. Accordingly, Respondent is barred for failing to respond truthfully to FINRA requests for information and documents, in violation of Rules 8210 and 2110. In light of the bar, no monetary sanctions are imposed.[5]

VI. Conclusion

For engaging in deception to facilitate market timing transactions, in violation of Rule 2110, and for failing to respond truthfully to requests for information and documents, in

[5] 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.

violation of Rules 8210 and 2110, Respondent is barred. The bars shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.

HEARING PANEL

By: Sara Nelson Bloom
Hearing Officer

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