FINANCIAL INDUSTRY REGULATORY AUTHORITY[1]
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant v. ROBERT CONWAY (CRD No. 2329507), and KAKIT NG (CRD No. 2677132), Respondents.	Disciplinary Proceeding No. E102003025201 **HEARING PANEL DECISION** Hearing Officer – SW Date: April 23, 2008

Respondents Conway and Ng violated NASD Conduct Rule 2110 by (i) executing late trades, in violation of the forward pricing rule (Investment Company Act Rule 22c-1(a)), and (ii) executing deceptive market timing trades. For violating NASD Conduct Rule 2110, Respondent Conway is fined $178,720 and suspended for 18 months in all capacities, and Respondent Ng is fined $20,000 and suspended for nine months in all capacities.

Appearances

Elissa M. Meth, Esq., Senior Regional Attorney, New York, NY, Frank M. Weber, Esq., Regional Counsel, New York, NY, and Philip J. Berkowitz, Esq., Assistant Chief Litigation Counsel, Washington, D.C., for the Department of Enforcement.

Robert Bertsch, Esq., New York, NY, for Respondent Robert Conway.

Kakit Ng, *pro se*.

[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD.

DECISION

I. PROCEDURAL HISTORY

A. Complaint and Answer

On March 15, 2006, the Department of Enforcement ("Enforcement") filed a five-count Complaint containing allegations involving the mutual fund trading at A.B. Watley Direct, Inc. ("ABW Direct") and A.B. Watley, Inc. ("ABW Inc.") (collectively "AB").[2] The Complaint, as amended on January 26, 2007, initially listed five Respondents: (i) ABW Direct; (ii) Robert Malin; (iii) Linus Nwaigwe; (iv) Robert Conway; and (v) Kakit Ng. Prior to the Hearing, Respondents ABW Direct, Malin, and Nwaigwe submitted proposed settlement agreements, which were subsequently accepted by FINRA.[3]

Accordingly, the Hearing only addressed counts one and three of the Amended Complaint, which contained allegations against Respondents Conway and Ng (collectively, the "Respondents"). Count one of the Amended Complaint alleged that Respondents Conway and Ng violated NASD Conduct Rule 2110 by engaging in late trading in at least 145 transactions, in violation of the forward pricing rule of the Securities and Exchange Commission ("SEC"). Count three of the Amended Complaint alleged that Respondents Conway and Ng violated NASD Conduct Rule 2110 by

[2] Prior to June 2003, ABW Direct was known as Integrated Clearing Solutions, Inc. (CX-1, p.11; Tr. pp. 44-45). ABW Direct is a subsidiary of A.B. Watley Group, Inc., a publicly-traded company that also owned former FINRA member ABW Inc. (Stip. at ¶¶ 3-4; CX-1, p. 11). ABW Inc. was expelled by FINRA for failure to pay fines on July 2, 2004. (Stip. at ¶ 4; CX-2, p. 2).

[3] Respondents ABW Direct, Malin, and Nwaigwe entered into settlement agreements with respect to the Amended Complaint that included the following allegations: (i) count two--violation of NASD Conduct Rules 2110 and 3110, Section 17(a) of the Securities Exchange Act of 1934, and SEC Rules 17a-3 and 17a-4, involving failures to maintain appropriate records; (ii) count four--violation of NASD Conduct Rules 2110 and 3010(a), involving failures to implement an adequate supervisory system for mutual fund trading; and (iii) count five--violation of NASD Conduct Rules 2110 and 3010(b), involving failures to maintain and enforce an adequate supervisory system for mutual fund trading.

permitting their hedge fund customers to evade attempts by mutual fund companies to block or restrict their market timing transactions in a deceitful manner in at least 210 transactions.[4]

Respondents Conway and Ng denied that their actions violated NASD Conduct Rule 2110.

B. Hearing

The Hearing Panel, consisting of a former member of the District 10 Committee, a former member of the District 11 Committee, and a Hearing Officer, conducted a Hearing in New York, NY, on July 10-13, 2007, and July 17-19, 2007.[5]

The Hearing Panel finds that Enforcement met its burden of showing by a preponderance of the evidence that during the period October 2003 to September 2004, Respondents Conway and Ng violated NASD Conduct Rule 2110 when they: (i) engaged in late trading in at least 145 transactions, as alleged in count one of the Amended Complaint; and (ii) participated in their customers' efforts to deceptively evade market timing restrictions in at least 210 transactions, as alleged in count three of the Amended Complaint.

[4] "Market timing" involves frequent purchases and sales of mutual fund shares that take advantage of small, short-term fluctuations in mutual fund share prices.

[5] "Tr." refers to the transcript of the Hearing held on July 10-13, 2007, and July 17-19, 2007; "CX" refers to the exhibits submitted by Enforcement; "RX" refers to the exhibits submitted by Respondent Conway; and "JX" refers to the exhibits submitted jointly by Enforcement and Respondents Conway and Ng.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

1. Respondent Conway

Respondent Conway was registered as a general securities representative with ABW Inc. from July 3, 2002 through February 3, 2004, and with ABW Direct from July 23, 2002 through April 16, 2004. (Stip. at ¶¶ 6, 7; CX-3, pp. 7-8).

As of November 18, 2005, Respondent Conway has been and remains associated with FINRA member Grossman & Co., LLC ("Grossman"). (Stip. at ¶ 8; CX-3, p. 6; Tr. p. 55).

2. Respondent Ng

Respondent Ng was registered as a general securities representative with ABW Inc. from October 28, 2002 through February 3, 2004, and with ABW Direct from January 16, 2003 through March 17, 2004. (Stip. at ¶¶ 10, 11; CX-5, p. 6).

On March 16, 2006, Respondent Ng became associated with Grossman. (CX-5, p. 5). Respondent Ng's association with Grossman was terminated on June 28, 2006, without his registration becoming effective. (Stip. at ¶ 12; CX-5, p. 5).

Respondent Ng is not currently associated with any FINRA member. (Stip. at ¶ 13; CX-5, p. 5). However, FINRA retains jurisdiction over Respondent Ng, pursuant to Article V, Section 4 of the NASD By-Laws, because the Complaint was filed within two years of the termination of his association with a FINRA member and the Complaint alleges misconduct while Respondent Ng was associated with a FINRA member.

B. Background

1. Respondents Conway and Ng's Hedge Fund Business

ABW Direct and ABW Inc. hired Respondent Conway to establish a business servicing hedge fund customers in the purchase and sale of mutual fund shares.[6] (Stip. at ¶ 24; CX-3, pp. 7-8; Tr. pp. 44, 46). Soon after Respondent Conway joined AB, Respondent Ng was hired to assist Respondent Conway service the hedge fund clients.[7] (Stip. at ¶ 26; Tr. pp. 49-50, 53).

Respondents Conway and Ng had serviced hedge fund customers that engaged in mutual fund trading, specifically market timing, for a number of years prior to joining AB.[8] (Tr. p. 42). Respondent Conway's first experience with market timing clients was at Bear Stearns & Co., Inc. ("Bear Stearns") in 1999. (Tr. pp. 42, 1119).

C. Count One: Late Trading

Count one of the Amended Complaint alleges that Respondents Conway and Ng violated NASD Conduct Rule 2110 when they processed at least 145 transactions in violation of the SEC forward pricing rule.

1. SEC Forward Pricing Rule

The SEC forward pricing rule (Investment Company Act Rule 22c-1(a)) requires that shares of registered investment companies, *i.e.*, mutual funds, be sold and redeemed

[6] Respondent Conway's customers compensated AB through monthly wrap fees, ranging from 1.10 percent to 1.20 percent, which were assessed on the assets held in the customers' accounts. (Tr. pp. 222, 227). The customers also paid ticket charges based on their trades. (Tr. p. 222; CX-421). Respondent Conway received 82% of the fees, resulting in earnings of approximately $863,000. (Tr. pp. 236-237).

[7] Respondent Ng earned $4,000 to $5,000 a month. (CX-401, pp. 3, 9-10, 20; Tr. p. 283). Respondent Ng's salary was deducted from Respondent Conway's 82%. (CX-401, p. 9).

[8] Respondent Conway first became registered with FINRA in 1993. (Stip. at ¶ 5; CX-3, p. 15). Respondent Ng first became registered with FINRA in 1996. (Stip. at ¶ 9; CX-5, p. 9; Tr. p. 262).

at a price based on the net asset value ("NAV") of the fund "next computed" after receipt of the order.

In response to the SEC's forward pricing rule, mutual fund companies generally announced and stated in their prospectuses that (i) NAV was determined as of the 4:00 p.m., Eastern Time, closing of the New York Stock Exchange, and (ii) customers purchasing mutual fund shares were required to submit their orders by 4:00 p.m., Eastern Time, in order to receive the NAV computed for that date. (CX-44, p. 9; CX-47, p. 10; CX-50, p. 6; CX-56, p. 12; CX-63, p. 6; CX-102, p. 14; CX-145, p. 8).

2. Hedge Fund Customers

During the period July 2002 to September 2003, Respondents Conway and Ng serviced four hedge funds customers: (i) Chronos Asset Management ("Chronos"); (ii) Simpson Capital Management ("Simpson"); (iii) Nettcorp Group ("Nettcorp"); and (iv) Parametric Capital Management ("Parametric"). (Stip. at ¶ 31; CX-375, p. 2).

Chronos initially became a client of Respondent Conway at Bear Stearns and moved with him to Prudential and finally to AB.[9] (Tr. pp. 188-189). At AB, customer Chronos held six accounts in total, two accounts at ABW Direct and four accounts at ABW Inc. (Stip. at ¶ 32). Four of the Chronos accounts were named Standard Atlantic, Ltd., and two of the accounts were named Hutchkins, LLC. (*Id.*).

Simpson was also Respondent Conway's client at a prior firm. (Tr. p. 155). The Simpson hedge fund held one account at ABW Direct under the name Bridgehampton Investments LLC. (CX-22, p. 2; CX-37, p. 1; Stip. at ¶ 34).

[9] In December 1999, Respondent Conway left Bear Stearns for Prudential Securities Incorporated ("Prudential"), where he began working with Respondent Ng. (CX-3, pp. 9, 11; Tr. pp. 54, 264). When Respondent Conway left Prudential, Respondent Ng also left, and he followed Respondent Conway first to Harmonic Research, Inc., then to Trinix Securities, LLC, and finally to AB. (Tr. pp. 54-55, 267, 269-270).

Nettcorp and Parametric became clients of Respondent Conway at AB. (Tr. pp. 197, 255). The Nettcorp hedge fund held two accounts at ABW Direct, Boston Pipes and NettFund (Portfolio 7). (Stip. at ¶ 33). The Parametric hedge fund held six active accounts at ABW Inc. under the names Troybilt, Doublecut, Pine Brook, Allencord, Green Brook, and Bluecrab.[10] (Stip at ¶ 35; CX-14, CX-15; CX-16; CX-17; CX-18; CX-20).

3. Executing Trades Through Penson

During the business day, the hedge fund customers forwarded to the Respondents emails containing "indications of interest" for potential purchase, sale, and exchange transactions that the customers might or might not elect to have executed that day. (Stip. at ¶ 29; Tr. p. 93). The "indications of interest" were preliminary and required a subsequent verbal communication from the client to become a *bona fide* customer order. (*Id.*). The customers' verbal communications primarily involved telephone calls, stating, "do everything," or "we are doing nothing." (Tr. p. 98).

When the Respondents began working at AB, they placed their customers' orders through the clearing firm. As soon as either of them received a hedge fund's verbal communication, they would transmit the customer's order via facsimile or email to personnel at Penson Financial Services, Inc. ("Penson"), the clearing firm that AB primarily used. (Stip. at ¶ 27; CX-1, p. 12; CX-2, p. 13; Tr. pp. 120, 122).

Penson's procedures provided that customer orders were to be accepted by Penson's mutual fund department and priced at that day's NAV until 5:00 p.m., Eastern

[10] The Parametric hedge fund also opened two accounts at ABW Direct, which were never funded. (CX-19, pp. 5-8; CX-21, pp. 1-2; Stip. at ¶ 35; Tr. p. 331). After reporters released news of an investigation into market timing in September 2003 by Eliot Spitzer, the former New York Attorney General, Respondent Conway's mutual fund business declined substantially, and the business was effectively finished by December 2003. (Tr. pp. 223-224).

Time, if the correspondent provided sufficient documentation that the customer order was actually received by the correspondent prior to the 4:00 p.m., Eastern Time, market close. (CX-387, p. 3).

Shortly after the Respondents began working at AB, Penson rolled out a new web-based application on the Penson website (the "OSI system"), which enabled Penson's correspondent, AB, to enter its mutual fund orders into a system that directly interfaced with the mutual fund clearing system, Fund/Serv.[11] (CX-387, p. 2; CX-404, p. 2; Tr. pp. 125-126, 763).

The OSI system also permitted Respondents Conway and Ng to submit mutual fund orders into the system after 4:00 p.m., Eastern Time, but, consistent with the forward pricing rule, they were not supposed to submit orders unless the orders had been received prior to the market close. (Tr. pp. 581-582).

4. Respondent Conway Directed Respondent Ng to Process Customer Orders Received After 4:00 p.m., Eastern Time

The 145 trades, identified as late trades in the Amended Complaint, were set forth in 15 email indications of interests submitted by AB's hedge fund customers after 4:00 p.m., Eastern Time.[12] (JX-1; CX-351 through CX-365).

Neither Respondent Conway nor Respondent Ng had a credible explanation for how they could enter a customer order for specific shares of mutual funds, as received

[11] Mutual Fund/Settlement Entry Registration Verification Product ("Fund/Serv"), a subsidiary of the National Security Clearing Corporation ("NSCC"), acts as the clearing system for mutual fund shares permitting investors to submit web-based applications for subscription and redemption to the mutual fund. Fund/Serv is the order entry platform that the NSCC has, which is a direct link between banks and brokers and the mutual fund companies for the processing and execution of mutual fund orders. (Tr. p. 763).

[12] The internet headers on the emails confirmed that the time-stamp reflected on the face of each indication of interest email was the time recorded by the sender (the hedge fund customers), and the time-stamp was unaffected by any admitted inaccuracies in AB's computer clocks. (CX-351-1 through CX-365-1; Tr. pp. 812-813).

prior to the market close, when they did not receive the specifics of the trade (*i.e.*, the name of the security, the amount of the security, and whether the trade was a buy, sell, or exchange) from the customer until after 4:00 p.m., Eastern Time. Respondent Ng speculated that if there was a technical problem, he may have received the email with the specific trades after he received the telephone call from the customer telling him to execute the trades. (Tr. pp. 1240-1241). In any event, Respondent Ng testified that he simply followed Respondent Conway's orders.[13]

Even if the Hearing Panel believed the "technical problem" explanation, a verbal order to execute specific trades set forth in a forthcoming email is not a customer order until the actual email describing the trades is delivered. Accordingly, the Hearing Panel finds that the 145 trades were late, and that Respondent Ng nevertheless entered the trades into the system as directed by Respondent Conway.[14]

Respondent Conway argued that his primary goal was to input his customers' trades as quickly as possible, and therefore any late trading was unintentional. (Tr. p. 1107). But, the forward pricing rule establishes a bright line test: orders must be received before market close, *i.e.*, 4:00 p.m., Eastern Time. Since none of the 145 orders was transmitted to AB before 4:00 p.m., Respondents Conway and Ng must have known that the trades were late, so their actions in executing the trades could not have been unintentional.

[13] While Respondent Conway was the registered representative for the four hedge fund customers, Respondent Ng primarily interacted with the customers. (Tr. pp. 72, 74, 112, 313).

[14] Despite the need to input a large volume of trades into the system, Respondent Conway testified that he regularly left the office at 3:30 or 3:35 p.m., Eastern Time, to catch the train. (Tr. p. 1208). Respondent Conway admitted that Respondent Ng routinely spoke with him via telephone while he was on the train regarding business matters. (Tr. pp. 1208-1209).

Moreover, the Hearing Panel noted that 132 of the 145 late trades were executed on behalf of the Chronos hedge fund. (JX-1). Mr. Apoian, a former trader for Chronos, credibly testified that beginning in February 2003, Chronos implemented a new investment strategy known as "Large Cap Arb," in which each day's trading decision was based on activity in the futures market that occurred between 4:00 p.m., and 4:15 p.m., Eastern Time. (Tr. pp. 95, 997-998, 1001). Mr. Apoian stated that he developed the trading strategy based, in part, on his past experience that his orders would be executed by AB even if he provided oral confirmations after 4:00 p.m. (Tr. pp. 997-998, 1001, 1009). While Mr. Apoian did not testify that he told Respondents Conway or Ng about his strategy, the Hearing Panel finds, given the number and pattern of late trades by Chronos, that the Respondents should have recognized that late trading was a strategy of the customer, and not inadvertent.

NASD Conduct Rule 2110 states, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." A violation of NASD Conduct Rule 2110 may occur in either of two ways. First, Rule 2110 is violated whenever a member violates the federal securities laws, regulations, or NASD rules, "because members are expected and required to abide by the applicable rules and regulations."[15] Second, because Conduct Rule 2110 "is not limited to rules of legal conduct but rather . . . it states a broad ethical principle,"[16] it may also be

[15] *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, *12-13 (NAC June 2, 2000). *See also Stephen J. Gluckman*, Exch. Act Rel. No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999) (finding that a violation of any SEC or NASD rule constitutes a violation of 2110).

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

violated by unethical conduct, independent of a violation of any other law, regulation, or rule.

Here, the Respondents submitted trades for execution in violation of the forward pricing rule, which conduct violated both a legal rule and an ethical standard applicable to registered representatives.

Accordingly, the Hearing Panel finds that Respondents Conway and Ng's conduct violated NASD Conduct Rule 2110 because they intentionally or recklessly accepted orders after market close, but processed the orders as if they had been received prior to the market close, in violation of the SEC forward pricing rule.

D. Count Three: Deceptive Market Timing

Count three of the Amended Complaint alleges that Respondents Conway and Ng violated NASD Conduct Rule 2110 by assisting customers to market time mutual funds in a deceitful manner and contrary to explicit prohibitions on such trades imposed by the mutual fund companies, in at least 210 transactions, from September 2002 through September 2003.[17]

Market timing refers to the practice of rapid trading of mutual fund shares in order to exploit inefficiencies in the pricing of mutual funds. While not illegal per se, market timing raises transaction costs for fund companies, which diminishes investor returns. Rapid and repeated redemptions also can force fund managers to sell winning

[17] The Amended Complaint specifically alleged that Respondents Conway and Ng assisted: (A) customer Nettcorp in purchasing shares in (i) Harbor Funds, (ii) PIMCO Funds, (iii) ING Funds, (iv) Ark Funds, (v) GE Funds, (vi) TRP Funds, and (vii) Goldman Funds; (B) customer Parametric in purchasing shares in (i) Federated Funds, (ii) Franklin Templeton Funds, (iii) Liberty Funds, (iv) Bank One Group Funds, (v) Pioneer Funds, (vi) Credit Suisse Funds, (vii) Fidelity Funds, (viii) Northern Funds, (ix) Wells Fargo Funds, (x) American Century Funds, (xi) IDEX Funds, (xii) PBHG Funds, (xiii) Van Kampen Funds, (xiv) TRP Funds, and (xv) American Funds; and (C) customer Chronos in purchasing shares in (i) PIMCO Funds, (ii) Alger Fund Pioneer Funds, and (iii) Seligman Funds. Enforcement did not include in the 210 trades alleged to be market timing trades any trades that occurred after the Respondents received a warning letter, but before they received a stop letter, from the mutual fund company. (Tr. p. 959).

investments, and/or cause managers, anticipating frequent redemptions, to hold larger cash reserves than necessary or desirable.

Consequently, many mutual fund prospectuses describe the above potential harmful effects of market timing on the funds and fund investors, and reserve the right to limit frequent trading in their funds. (CX-46, p. 6; CX-57, p. 13; CX-63, p. 8; CX-81, p. 9; CX-97, p. 17; CX-152, p. 10). Some prospectuses specifically stated that market timing limitations applied to all accounts under the "common ownership or control" of a customer or group of customers. (CX-57, p. 13; CX-81, p. 9; CX-97, p. 17).

After the four hedge fund customers began market timing certain funds through Respondents Conway and Ng, many of the mutual fund companies attempted to enforce their restrictions on market timing, by sending letters, faxes, and emails to Penson. (CX-174 through CX-350). Penson forwarded this correspondence, known as "stop letters," to Respondents Conway and Ng. (Tr. pp. 138, 362, 738, 1135). The Respondents received in excess of 150 such letters, faxes, and emails.[18] (CX-174 through CX-350). The correspondence restricted and/or prohibited future trading by the AB hedge fund customers' account numbers and/or the rep and branch numbers of Respondents Conway and Ng. (*Id.*).

Respondent Ng also maintained a schedule of the stop letters that AB received. (Tr. pp. 359, 392). Respondents Conway and Ng routinely advised their clients of the stop letters.[19] (Tr. pp. 178, 359, 1106). Neither suggested to the Hearing Panel that the

[18] AB's chief compliance director did not know that the Respondents were receiving stop letters from the mutual fund companies via Penson. (Tr. pp. 617, 631, 663).

[19] Penson also created lists of mutual funds that had restricted further trading by Respondent Conway's customers, and regularly forwarded those lists to Respondents Conway and Ng. (CX-442; Tr. pp. 358-359). The lists named the fund companies that had restricted trading not only by particular account numbers, but also by representative number and/or branch codes. (CX-303).

mutual fund companies' imposition of restrictions on market timing was improper or illegal.[20]

Despite their receipt of multiple notices from the mutual fund companies demanding that their hedge fund clients stop market timing their funds, the Respondents continued placing market timing trades for their clients and helped them evade the mutual funds' restrictions. After an account was restricted by a fund company for market timing, Respondents Conway and Ng (i) allowed the hedge fund client to shift the trading in the funds or the fund families to another one of the customer's multiple accounts, (ii) changed the branch/rep number associated with the account number, and/or (iii) switched to an account with a different broker, to make it more difficult for the mutual fund company to detect a prohibited market timing trade.

For example, on December 17, 2002, the Harbor Funds sent a stop letter regarding trading to Nettcorp's Nettfund (Portfolio 7) account. (CX-248). Subsequently, in January 2003, the Respondents caused market timing trades to be executed in Harbor Funds on behalf of Nettcorp's Boston Pipes account.[21] (CX-513A). On January 29, 2003, ARK Funds sent a stop letter restricting trading in Nettcorp's Boston Pipes account; subsequently, in February 2003, the Respondents caused market timing trades to be executed in the ARK Funds on behalf of Nettcorp's NettFund (Portfolio 7) account. (CX-

[20] *See Windsor Securities, Inc. v. Hartford Life Ins. Co.*, 986, 666 F.2d. 655 (3d Cir. 1993) (finding that a company's imposition of market timing restrictions was not improper, but rather was understandable and motivated by a desire to protect a legitimate business interest).

[21] Although Chronos, Nettcorp, and Parametric each held accounts under several names, Respondents Conway and Ng dealt with the same people for all the accounts controlled by each client and received a single indication of interest email listing all of the trades for all of the accounts controlled by that client. (CX-351 through CX-365; Tr. pp. 95-96, 317-323).

277; CX-507; JX-2, p. 1). Similar conduct occurred with respect to the other hedge fund customers, Parametric[22] and Chronos.[23]

Respondent Conway opened multiple accounts for his hedge fund customers, but denied knowing that the hedge funds did this in order to execute market timing transactions. Respondent Conway also testified that he never read the prospectuses of the mutual funds traded by his clients and therefore was not aware that market timing restrictions applied to accounts under common ownership.[24] (Tr. p. 90). Based on his many years of prior experience with hedge fund customers, the Hearing Panel did not find his denials credible.[25]

During the relevant period, multiple branch/rep numbers were also used to disguise the market timing activities of Respondent Conway's hedge fund customers.[26] Respondent Conway testified that he allowed AB's back office to determine which branch code should be assigned to which customer. (Tr. pp. 85-86). But in April 2003, Respondent Ng, as directed by Respondent Conway, requested a change of the branch/rep code for Parametric's Bluecrab account from WD50 to WZ50 after receiving stop letters and restriction notices from various mutual fund companies concerning Parametric

[22] In December 2002, AB received a stop letter from Credit Suisse for Parametric's Troybilt account. (CX-246). In February, March, April and May 2003, Respondents Conway and Ng executed trades in the Credit Suisse funds for Parametric's Green Brook account. (CX-517A). In May 2003, Credit Suisse sent a stop letter to AB for Parametric's Green Brook account. (CX-318). In May and June 2003, Respondents Conway and Ng executed trades in the Credit Suisse funds for Parametric's Doublecut account. (CX-517A).

[23] In March 2003, the Alger Fund sent a stop letter regarding trading in Chronos' Standard Atlantic, Ltd. 690287851 account at ABW Inc. (CX-301). In March 2003, Chronos' Hutchkins, LLC 65000101 account at ABW Direct executed trades in the Alger Fund. (CX-508A).

[24] In a stop letter dated February 21, 2003, ARK Funds noted that the "Rep has continued to market time by opening new accounts under new account numbers." (CX-299).

[25] Respondents Conway and Ng had received stop letters from mutual fund companies prior to joining AB. (Tr. pp. 134-136, 355).

[26] The branch office codes for ABW Inc. ranged from "WA-WZ," and the office codes of ABW Direct were "IQ" and "AB." (CX-385, p. 5).

accounts in branch/rep code WD50.[27] (CX-282; CX-303; CX-304; CX-312; CX-417; CX-418).

Accordingly, the Hearing Panel finds that, although the branch/rep code may have been initially chosen by AB's back office when the account was opened, Respondent Conway determined when and if branch codes for his clients were to be changed.

Finally, at least one client, Chronos, executed market timing trades through the use of accounts at both ABW Inc. and ABW Direct. Respondent Conway explained that Chronos had accounts at the two broker dealers because initially ABW Inc. was unable to distinguish fees generated from his customers' accounts from the fees generated by other customers of the firm. (Tr. pp. 75-76, 141-142). Therefore, he opened accounts for Chronos at ABW Direct beginning in October 2002. (*Id.*). Based on the timing of transfers of funds between the Chronos accounts at ABW Inc. and the Chronos accounts at ABW Direct, the Hearing Panel did not find Respondent Conway's explanation credible.[28]

There is no credible dispute that in at least 210 instances, despite having received stop letters from mutual fund companies, Respondents Ng and Conway processed trades in restricted mutual fund companies.

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[27] When Parametric's Bluecrab account was funded in June 2003, it began trading using the new code WZ50. (CX-32, p. 1). Previously, in October 2002, the branch codes for Parametric's (i) Allencord, (ii) Doublecut, (iii) Green Brook, (iv) Pine Brook, and (v) Troybilt accounts were changed from WD50 to WB50. (CX-31, p. 9; CX-33, p. 35; CX-34, p. 13; CX-35, p. 31; CX-36, p. 37). In September 2003, the branch codes for Parametric's (i) Allencord, (ii) Green Brook, and (iii) Pine Brook accounts were changed from WB50 to WB99. (CX-31, p. 125; CX-34, p. 133; CX-35, p. 137).

[28] Chronos transferred $3,790,000 from the Standard Atlantic, Ltd. 6902875 account at ABW Inc. to the Standard Atlantic, Ltd. 6500036 account at ABW Direct on June 9, 2003 more than six months after Respondent Conway discovered that there was a compensation problem with ABW Inc. (CX-25, p. 1). In addition, on June 12, 2003, Chronos transferred $3,950,000 from the Hutchkins, LLC 65000101 account at ABW Direct, the company which was to be used to solve the compensation problem, to a new Hutchkins, LLC 69030278 account at ABW Inc. (CX-23, p. 151). On July 21, 2003, Chronos requested that Respondent Ng transfer $550,000 from ABW Direct's Hutchkins, LLC 65000101 account to ABW Inc.'s Hutchkins, LLC 69030278 account. (CX-7, p. 10).

Conduct Rule 2110 may be violated when a registered representative engages in unethical behavior, independent of a violation of any other law, regulation, or rule.[29] Consequently, conduct that is not expressly prohibited, such as failures to honor obligations imposed by private contracts, are viewed as violations of Conduct Rule 2110 if the surrounding facts and circumstances indicate that the conduct was unethical.[30] With respect to contravening high standards of commercial honor, the test is whether the representative's misconduct "reflects directly on [his] ability to comply with regulatory requirements fundamental to the securities business."[31]

The Hearing Panel finds that Respondent Conway and Ng's actions in ignoring stop letters and continuing to place trades, as well as their efforts to assist their customers to evade the mutual funds' restrictions, via deceit, *i.e.*, changing accounts, changing branch/rep numbers, and changing brokers, constituted unethical behavior.[32]

Respondents Conway and Ng argued that they had a high volume of trades, and they simply missed the restricted trades. (Tr. p. 1140). The Hearing Panel did not find their denials credible. Based on their prior securities experience and their familiarity with their four clients, Respondents Conway and Ng knew or should have known that their clients were ignoring stop letters and continuing to request trades with restricted funds. Accordingly, the Hearing Panel finds that Respondents Conway and Ng's efforts to evade the market timing restrictions were not simple negligence. (Tr. pp. 1111, 1152-1153, 1162-1164).

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[29] *Burkes* at 357.

[30] *Id.*

[31] *James A. Goetz*, Exch. Act Rel. No. 39796 (Mar. 25, 1998).

[32] *See Bear Stearns & Co., Inc*., Exch. Act Rel. No. 53,490, 2006 SEC LEXIS 623, at *66-*68 (Mar. 16, 2007) (multiple accounts are a classic deceptive market timing technique).

In addition, Respondent Conway argued that market timing was a normal course of business, *i.e.*, an industry practice. The SEC has held that "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner."[33] Respondent Ng argued he was simply an assistant and only acted at the direction of Respondent Conway. Although finding that Respondent Ng acted at the direction of Respondent Conway, the Hearing Panel finds that following directions is not an excuse for engaging in unethical practices.

Finally, both Respondents Conway and Ng argued that FINRA failed to give them prior guidance that failure to comply with the market timing restrictions imposed by the mutual fund companies was sufficient to violate Conduct Rule 2110, arguing that FINRA first announced that market timing may violate Conduct Rule 2110 in September 2003, when FINRA released Notice to Members ("NTM") 03-50.[34] (Tr. pp. 666, 1164). The Hearing Panel rejects this argument, finding that the Respondents knew or should have known that their deceptive conduct was unethical, even without being advised by FINRA.

The Hearing Panel finds that, in at least 210 instances, Respondents Conway and Ng violated NASD Conduct Rule 2110, because they engaged in deceptive activity to facilitate their clients' continued market timing after the mutual funds companies instructed the clients to stop trading.

III. SANCTIONS

There are no specific FINRA Sanction Guidelines for late trading and deceptive market timing. The most closely analogous Guideline is that for Misrepresentations and

[33] *Patricia H. Smith*, 52 S.E.C. 346, 348 (1995).

[34] *NASD Special Notice to Members* 03-50, NASD Reminds Member Firms of Their Obligations Regarding Mutual Fund Transactions and Directs Review of Polices and Procedures (Sept. 2003).

Material Omissions of Fact, which provide for fines of $10,000 to $100,000 for intentional or reckless misconduct, and suspensions of individuals from 10 days to two years, or a bar in egregious cases.[35] The fine may be increased by the amount of the respondent's financial benefit.[36]

For the late trading and the market timing as alleged in counts one and three of the Amended Complaint, Enforcement recommended that Respondent Conway be suspended for 18 months and fined $100,000 ($50,000 for each of the two violations alleged). Additionally, arguing that Respondent Conway's entire business was deceptive, Enforcement recommended that Respondent Conway disgorge $175,000, which approximates 20% of the fees that Respondent Conway earned from his business.

For the late trading and market timing, Enforcement recommended that Respondent Ng be suspended for 18 months and fined $20,000.[37]

The Hearing Panel agrees that the misconduct was egregious and warrants a significant sanction. First, Respondent Conway and Respondent Ng recklessly, if not intentionally, engaged in the misconduct in an effort to accommodate the wishes of their clients. Second, their misconduct continued for a significant period of time, *i.e.*, for at least 13 months. Third, neither acknowledged their misconduct; instead they blamed their clients, Penson, the mutual funds companies, their supervisors, and FINRA.

With respect to the market timing violation, Respondents Conway and Ng took a number of affirmative steps to hide their activities from the mutual fund companies.

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[35] *FINRA Sanction Guidelines*, p. 93 (2007).

[36] *Id.*

[37] Enforcement did not recommend a disgorgement-based fine against Respondent Ng because he was a salaried employee who earned far less than Respondent Conway.

With respect to late trading, Respondents Conway and Ng made little, if any, effort to enforce the forward pricing rule.

Accordingly, the Hearing Panel adopts the sanctions recommended by Enforcement as to Respondent Conway, except as to Respondent Conway's additional fine based on his monetary gain.

In reviewing AB's blotter, the Hearing Panel noted that there were approximately 12,000 trades, and that Enforcement provided evidence as to 330 trades (120 late trades and 210 market timing trades). Accordingly, the Hearing Panel is unwilling to rule that Respondent Conway's entire business model was built on unethical conduct, and is therefore unwilling to require disgorgement of $175,000, *i.e.*, 20% of his income. However, noting that the $8 million that Chronos deposited with AB to implement its Large Cap Arb strategy was based on Respondent Conway's willingness to late trade, the Hearing Panel finds that $78,720 should be disgorged as an additional fine.[38]

For late trading, Respondent Conway is fined $128,720 ($50,000 fine plus $78,720 disgorgement) and suspended for six months. For market timing, he is fined an additional $50,000 and suspended for an additional one year.[39]

Noting that Respondent Ng did not directly benefit financially from his wrongdoing, and that Respondent Conway as the registered representative opened the multiple accounts and directed use of the multiple branch/office rep numbers, the Hearing Panel adopts Enforcement's recommended fine for Respondent Ng. However, the

[38] Respondent Conway's portion of the fees charged on the $8 million deposited to implement the Large Cap Arb strategy was $78,720 (82% of 1.2% of $8 million).

[39] The Hearing Panel finds that consecutive, rather than concurrent, suspensions are appropriate under the circumstances presented in this case. *See Dep't of Enforcement v. Siegel*, Complaint No. C05020055, 2007 NASD Discip. LEXIS 20, at *53-56 (NAC May 11, 2007).

Hearing Panel suspends Respondent Ng for nine months in total, rather than 18 months as recommended by Enforcement.

For late trading, Respondent Ng is fined $10,000 and suspended three months; for market timing, he is fined an additional $10,000 and suspended an additional six months.

IV. CONCLUSION

The Hearing Panel fines Respondent Robert Conway $178,720 ($100,000 fine and $78,720 disgorgement) and suspends him for 18 months from associating with any FINRA member in any capacity for violating NASD Conduct Rule 2110 by (i) late trading in violation of the forward pricing rule, and (ii) deceptively evading market timing restrictions.

The Hearing Panel fines Respondent Ng $20,000 and suspends him for nine months from associating with any FINRA member in any capacity for violating NASD Conduct Rule 2110 by (i) late trading in violation of the forward pricing rule, and (ii) deceptively evading market timing restrictions.

The Hearing Panel also orders that Respondents Conway and Ng jointly and severally pay the $11,519.81 costs of the Hearing, which include an administrative fee of $750 and hearing transcript costs of $10,769.81. The costs and fines shall be due and payable when, and if, either Respondent Conway or Respondent Ng seeks to return to the securities industry. If this Decision becomes the final disciplinary action of FINRA, Respondent Conway's suspension shall commence at the opening of business on June 16, 2008, and conclude at the close of business on December 15, 2009, and Respondent Ng's

suspension shall commence at the opening of business on June 16, 2008, and conclude on March 15, 2009.[40]

HEARING PANEL.

By:_____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
April 23, 2008

Copies to:
Kakit Ng (via FedEx and first-class mail)
Robert Conway (via FedEx and first-class mail)
Robert Bertsch, Esq. (via facsimile and first-class mail)
Frank M. Weber, Esq. (via electronic and first-class mail)
Elissa M. Meth, Esq. (via electronic and first-class mail)
Philip J. Berkowitz, Esq. (via electronic and first-class mail)
David M. Jaffe, Esq. (via electronic and first-class mail)
David R. Sonnenberg, Esq. (via electronic and first-class mail)

[40] 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.