

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

WESTROCK ADVISORS, INC.
(CRD No. 114338),

Respondent.

Disciplinary Proceeding
No. 2006005696601

Hearing Officer – RSH

HEARING PANEL DECISION

May 6, 2009

Summary

Respondent violated NASD IM-10100 and Rule 2110 by failing to produce documents as ordered by an NASD arbitration panel. For this violation, Respondent is censured and fined \$35,000.

Appearances

Gary M. Lisker and Robin Sardegna, for FINRA Department of Enforcement,
Washington, D.C.

Robert Giacovas, New York, N.Y., for Westrock Advisors, Inc.

DECISION

I. Procedural History

On June 5, 2008, the Department of Enforcement (“Enforcement”) filed a Complaint charging that Respondent, Westrock Advisors, Inc. (“Westrock”), violated NASD Membership and Registration Rule Interpretive Material (“IM”)-10100 of the Code of Arbitration Procedure and Conduct Rule 2110 by failing to produce documents within its possession and control in response to the claimant’s discovery request and an order of the arbitration panel in a customer

arbitration proceeding. On July 17, 2008, Westrock filed an Answer contesting the charge and requesting a hearing, which was scheduled for December 9-10, 2008.¹

On November 24, 2008, the parties filed a joint motion to cancel the hearing and proposed a revised schedule and procedure for resolving this proceeding. Specifically, the parties agreed to stipulate to certain facts and evidence on the issue of liability and to limit this proceeding to a determination of appropriate sanctions, based on written submissions of the parties, in lieu of the scheduled hearing. The Hearing Officer granted the motion, and the parties filed Joint Stipulations² and Joint Exhibits³ on December 2, 2008, and briefs on December 16, 2008, January 9, 2009 and January 14, 2009.

Based upon a review of the entire record, the Hearing Panel, comprised of the Hearing Officer and two current members of the District 11 Committee, makes the following findings of fact and conclusions of law.

II. Findings of Fact

Westrock is a registered broker-dealer with its primary office in New York, N.Y. It has been a FINRA member since 2002. FINRA has jurisdiction over Westrock and the conduct that is the subject of this proceeding.⁴

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. Initially, FINRA adopted NASD's rules and certain NYSE rules, but it is in the process of establishing a consolidated FINRA rulebook. To that end, on December 15, 2008, certain consolidated FINRA rules became effective, replacing parallel NASD and/or NYSE rules, and in some cases the prior rules were re-numbered and/or revised. See Regulatory Notice No. 08-57, FINRA Notices to Members, 2008 FINRA LEXIS 50 (Oct. 2008). This Decision refers to and relies on the NASD rules that were in effect at the time of the Respondent's alleged misconduct and cited in the Complaint as the basis for the charges against it.

² Stip. 1-23.

³ Enforcement's Exhibits (CX 1-27) and Respondent's Exhibits (RX 1-2).

⁴ Stip. 1,2.

A. Westrock Failed to Provide Documents Requested in a Customer Arbitration as Ordered by an NASD Arbitration Panel

1. The Documents Requested for the MS Arbitration

In June 2005, MS, a former customer of Westrock, filed an arbitration claim against Westrock and its Chief Executive Officer (“CEO”) with NASD’s Office of Dispute Resolution.⁵ The statement of claim in the arbitration alleged, among other things, that a former Westrock registered representative effected unauthorized trades in MS’s Westrock account between January 2002 and September 2004.⁶ In its answer, dated September 2, 2005, Westrock denied that the trades were unauthorized.⁷

On or about September 20, 2005, MS’s counsel served its First Request to Respondents for Production of Documents (“Discovery Request”). The Discovery Request sought copies of “[a]ll the time-stamped order tickets entered for the Claimant” and “[t]he daily blotters for the days of trades in the Claimant’s account” for the period November 2001 through December 2004.⁸

On or about February 15, 2006, almost five months after the Discovery Request was made, Westrock filed its response. In response to the request for order tickets, Westrock stated that “[o]rders were electronic; thus, no such documents exist.” In response to the request for daily blotters, Westrock stated that “[d]ocuments responsive to this request, to the extent they exist, will be produced.”⁹

By March 16, 2006, Westrock had not produced any order tickets or daily blotters in response to the Discovery Request. On that date, MS’s counsel filed a Motion to Compel

⁵ Stip. 3; CX-1.

⁶ Stip. 4; CX-1.

⁷ Stip. 5; RX-1.

⁸ Stip. 6-8; CX-2.

⁹ Stip. 9; CX-3;

Production of Documents and Information (“Motion to Compel”) with the arbitration panel.¹⁰

In the Motion to Compel, he complained that Westrock had only produced eight pages of documents to MS, while MS had produced between 850-900 pages of documents in response to Westrock’s discovery request.¹¹ On March 30, 2006, the arbitration panel ordered Westrock to produce the daily blotters by April 7, 2006, and the order tickets by April 14, 2006. The arbitration panel’s order further provided that “[i]n the event that either party is unable to comply with a specific request, on the grounds that the document in question does not exist, that party shall provide a written affirmation.”¹²

On or about April 7, 2006, Westrock’s president/CEO executed a sworn declaration stating: “To the extent that any responsive documents or information have not been produced, they either do not exist or were unobtainable from a third party.”¹³ The declaration was sent to MS with a production of documents which did not include any order tickets or daily blotters. Westrock never produced any documents to MS that were responsive to the requests for order tickets or daily blotters in the Discovery Request.¹⁴

Between the time MS made his Discovery Request and the date of the arbitration hearing, MS’s counsel made repeated requests for the order tickets and daily blotters.¹⁵ In responding to MS’s requests for order tickets, Westrock consistently stated that “orders are electronic; thus no such documents exist.”¹⁶ In response to the requests for trade blotters, Westrock consistently said that it would produce them.¹⁷ After the hearing panel ordered Westrock to produce both the order tickets and daily trade blotters, Westrock altered its responses. It stated that it could not

¹⁰ Stip. 10; CX-4.

¹¹ CX-4 at 1.

¹² Stip. 11-12; CX-6.

¹³ CX-7.

¹⁴ Stip. 13, 15.

¹⁵ CX-4, 5, 6, 8, 9, 11.

¹⁶ CX-3 at p. 3.

¹⁷ CX-3 at p. 8.

produce the order tickets because: “(i) there is no order ‘ticket’ per se or (ii) records that have been retained by UBS have been impossible to retrieve during the very limited time frame in which the Respondents were ordered to produce such information.”¹⁸ And, after continuously stating that it would produce the daily trade blotters, on April 26, 2006, Westrock simply wrote, without further explanation: “Respondents do not possess such documents.”¹⁹

The MS arbitration hearing was held on May 1-4, 2006. The arbitration panel denied MS’s claims in a decision dated May 15, 2006.²⁰

2. Westrock’s Search for the Arbitration Documents

Westrock claims that it “diligently search[ed] for responsive documents” in response to both MS’s document request and the arbitration panel’s order.²¹ Yet, the record is devoid of any evidence that anyone at Westrock actually looked for the order tickets and daily blotters. The Westrock employees who would have been responsible for locating the documents--Westrock’s compliance director and operations manager--could not recall searching for or producing them for the arbitration.

Westrock’s compliance director, A. Shapiro (“Shapiro”), testified during two on-the-record (“OTR”) interviews that it was his responsibility to respond to NASD arbitration requests, yet he could not recall seeing MS’s document request or being involved in searching for or producing the documents requested. He testified that he would have sent the document request to Westrock’s operation manager, C. Slader (“Slader”), who was in charge of locating “the so-called memorabilia, the order tickets, confirmations...blotters.”²² Shapiro noted that although there is no physical order ticket when a broker enters a trade electronically, there is an electronic record of the ticket. The electronic record can be printed and the printout contains much of the

¹⁸ CX-10, 12.

¹⁹ CX-12.

²⁰ Stip. 14.

²¹ Westrock Brief to the Hearing Panel at p. 3.

²² CX-25 at 17.

same information contained on a traditional order ticket, including the exact commission charged and an execution time-stamp.²³ Similarly, although neither Westrock nor its clearing agent maintains daily trade blotters, the clearing agent can re-create the information typically contained on a trade blotter. Westrock refers to these re-created order tickets and blotters as “playbacks.”²⁴ Shapiro typically directed Slader to give him any documents she located; however, he could not recall what he did for the MS arbitration, whether Slader ever located any documents or whether any documents were actually produced for the MS arbitration.²⁵

Shapiro testified that while he was familiar with NASD Notices to Members (“NTM”) “generally,” as of his OTR interview on March 27, 2007, he had never seen NTM 99-90, which describes the discovery guide to be used in arbitration proceedings.²⁶

Slader had the unofficial title of “operations manager;” however, she held no securities licenses²⁷ and testified in her OTR interview that her duties were basically administrative—assist[ing] brokers...writing, taking letters...[and] gathering documents. At some point in her six-year tenure at Westrock, her superiors began calling her “operations manager.” As far as she could tell, the title simply meant that she “got a lot more work.”²⁸ According to Slader’s attorney, who made a statement at her OTR interview, Slader was unaware of exactly when the search for MS arbitration documents took place.”²⁹

²³ CX-25 at 42-43.

²⁴ CX-25 at pp. 25, 41; CX-26 at pp. 20-21.

²⁵ CX-25 at pp. 30-32; CX-27 at pp. 12, 15-17.

²⁶ CX-25 at pp. 20-22.

²⁷ CX-24 at p. 3.

²⁸ CX-26 at pp. 11-16.

²⁹ CX-26 at p. 38.

B. Westrock Provides Enforcement Staff With All of the Order Tickets and Daily Blotters that Had Been Requested in the MS Arbitration

1. Enforcement's Request for Documents

In a letter dated August 29, 2006 ("First Request"), Enforcement requested, pursuant to Rule 8210, that Westrock produce order tickets for six trades in MS's account, and daily blotters for six trade dates identified in MS's statement of claim in the arbitration. The requested order tickets and trade blotters were among the documents requested in MS's Discovery Request in the arbitration.³⁰ On September 14, 2006, Westrock produced four of the six requested order tickets and four of the six requested blotters.³¹ Westrock produced the last two requested blotters to Enforcement on or about December 19, 2006,³² and the last two order tickets on or about January 5, 2007.³³

In a letter dated April 23, 2008 ("Second Request"), Enforcement expanded its earlier document request and asked that Westrock produce order tickets and daily trade blotters for all trades identified in MS's Statement of Claim, to the extent not previously produced.³⁴ On or about May 20, 2008, Westrock produced to Enforcement a CD-ROM disc containing the order tickets and daily trade blotters requested in Enforcement's First Request.³⁵

2. Westrock's Search for the Documents Requested by Enforcement

In contrast to their inability to recall whether they had collected documents for the MS arbitration, Shapiro and Slader testified in great detail about their search for the very same documents when they were requested by Enforcement.

³⁰ Stip. 16; CX-13.

³¹ Stip. 17; CX-14.

³² Stip. 18; CX-19.

³³ Stip. 19; CX-20.

³⁴ Stip. 20; CX-23.

³⁵ Stip. 21; CX-24.

When he was shown a copy of Enforcement's First Request, Shapiro testified that he recalled receiving it and specifically recalled bringing the letter to C. Slader and giving her "a verbal heads up with respect to the importance of it and asked her to get the documents."³⁶ Although his memory failed him when he tried to recollect the arbitration document request, his memory was very specific about the documents requested by Enforcement. Shapiro testified, for example: "I believe she retrieved all documents but two of the blotter requests and two of the order tickets. I remember that she had difficulty in locating the level 3 communication, which is 2-D, I believe it was the 2-F, the Horizons. I can't remember which of the two blotters, or playbacks, whatever they are referring to, she couldn't locate."³⁷ Shapiro testified that when Slader wasn't able to locate a daily blotter playback, Shapiro personally called Westrock's clearing agent, UBS, to obtain reconstructions. Shapiro testified that Westrock received the reconstructed blotters within weeks and forwarded them to Enforcement.³⁸

Similarly, Slader's recollection of her search for the documents requested by Enforcement was much clearer than it was of her search for the documents requested in the arbitration. Slader testified in her OTR interview that Shapiro gave her the task of locating the order tickets and trade blotters requested by Enforcement.³⁹ She testified that she retrieved from storage and searched over 50 boxes of documents to locate the order tickets and playbacks.⁴⁰ When she was able to locate only some of the documents Enforcement had requested, Shapiro told her to keep searching, and she requested more boxes to search.⁴¹ Westrock produced 8 of

³⁶ CX-25 at 34.

³⁷ CX-25 at 35.

³⁸ CX-25 at pp. 40-41.

³⁹ CX-26 at pp. 25-26, 41.

⁴⁰ CX-26 at pp. 27-28.

⁴¹ CX-26 at p. 32.

the 12 documents Enforcement requested in its first letter within about two weeks.⁴² The remaining documents were produced within a few months.⁴³

Slader left Westrock in October 2006.⁴⁴ By the time Enforcement sent its Second Request, Westrock had hired K. Sheth (“Sheth”) as an assistant compliance officer. Sheth, who held three securities licenses—Series 7, 63 and 24—had primary responsibility for responding to Enforcement’s Second Request. In a letter she sent to Enforcement responding to its Second Request, she stated that it had taken her, with the assistance of Shapiro and another assistant, a little over 100 hours to locate all of the documents Enforcement had requested. With Sheth’s efforts, Westrock produced, in less than one month, a CD-ROM containing all of the documents requested in Enforcement’s Second Request.⁴⁵

III. Conclusions of Law

IM-10100 of the NASD Code of Arbitration Procedure provided:

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to: (c) fail to...produce any document in his possession or control as directed pursuant to provisions of the NASD Code of Arbitration Procedure.

The stipulations and exhibits that the parties have jointly filed in this matter establish that Westrock failed to produce documents in its “possession or control as directed pursuant to the provisions of the NASD Code of Arbitration Procedure,” and the Hearing Panel finds that Westrock thus violated IM-10100 and Conduct Rule 2110, as alleged in Enforcement’s Complaint.

⁴² CX-14; Stip. 17.

⁴³ CX-19, 20; Stips. 18, 19.

⁴⁴ CX-26 at p. 10.

⁴⁵ CX-23, 24; Stips. 20, 21.

IV. Sanctions

The FINRA Sanction Guidelines (“Guidelines”) do not specifically address the alleged violation; however, General Principles Applicable to All Sanction Determinations provide guidance. General Principal 1 states:

The overall purposes of FINRA’s disciplinary process and FINRA’s responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public. Toward this end, Adjudicators should design sanctions that are significant enough to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices. Depending on the seriousness of the violations, Adjudicators should impose sanctions that are significant enough to ensure effective deterrence.⁴⁶

For violating IM-10100 and Conduct Rule 2110, Enforcement recommends that Westrock be censured and fined \$35,000. Westrock does not dispute that it failed to comply with the arbitration panel’s order; however, it contends that “the circumstances surrounding Westrock’s inability to produce the documents are mitigating circumstances such that imposing any monetary sanction is unwarranted.”⁴⁷

Westrock’s claim that it “made every effort to comply with the order and engaged in extensive and diligent searches to locate the responsive documents”⁴⁸ is belied by the record. Westrock argues that “in the week allotted between the [arbitration] Panel’s order and the deadline to produce the documents, the documents were inaccessible and Westrock was unable to comply with the order.”⁴⁹ This argument ignores the fact that MS had first requested the documents seven months earlier and had made numerous subsequent requests for them. Neither Westrock’s compliance director nor its operations director could recall when they began

⁴⁶ FINRA Sanction Guidelines (2007 ed.), General Principles Applicable to All Sanction Determinations, at 2. The applicable General Principles in the current FINRA Guidelines are the same as those in effect when the violations in this case occurred.

⁴⁷ Westrock Brief at p. 2.

⁴⁸ Westrock Brief at p. 2.

⁴⁹ Westrock Brief at p. 2.

searching for the documents, and there is no evidence that anyone at Westrock began looking until they were ordered to do so by the arbitration panel, if then.

Ultimately, Westrock failed to produce a single order ticket or trade blotter for the arbitration. Westrock's CEO signed an affirmation stating that the requested documents "either [did] not exist or were unobtainable from a third party." Yet, when Enforcement staff requested some of the very same documents a few months later, Westrock was able to produce most of those documents within two weeks. And when Enforcement requested *all* of the trade tickets and blotters that MS had requested, Westrock produced them on a CD in less than one month. Clearly, Westrock could have produced the documents to MS if it had chosen to make the same effort it made in response to Enforcement's request.

Westrock's violation is aggravated because the documents it claimed it did not possess or did not exist are records that the federal securities laws and FINRA rules require it to make and keep. Securities and Exchange Commission ("SEC") rules require brokerage firms to keep trade blotters for six years⁵⁰ and order tickets for three years.⁵¹ FINRA Rule 3110(a) requires member firms to comply with the recordkeeping and retention requirements of those rules. MS's Statement of Claim alleged unauthorized trading in his Westrock account between January 2002 and September 2004.⁵² Therefore, when MS served his Discovery Request on September 20, 2005, all of the requested trade blotters and the majority of the order tickets were still within the retention periods mandated by SEC and FINRA rules. Nevertheless, Westrock claimed it did not possess those records or they did not exist.

In addition to being required records, the order tickets were presumptively discoverable under the rules pertaining to arbitration proceedings. NASD NTM 99-90, which was issued in November 1999, announced a new "Discovery Guide" that the SEC had approved for use in

⁵⁰ Securities Exchange Act of 1934 ("Exchange Act"), Rules 17a-3(a)(1) and 17a-4(a).

⁵¹ Exchange Act, Rules 17a-3(a)(6) and 17a-4(b)(1).

⁵² CX-1.

NASD arbitrations. Among other things, NTM 99-90 included several “Discovery Lists” that made order tickets presumptively discoverable in customer arbitrations alleging unauthorized trading. NTM 99-90 states that the Discovery Guide “provides guidance to parties on which documents they should exchange without arbitrator or staff intervention,” and specified that the documents should be provided to the customer within 30 days of the date the answer is due or filed.⁵³ Thus, Westrock should have known when it answered MS’s Statement of Claim that it would be producing order tickets. Westrock’s compliance director testified that he was “the individual who would be responsible for seeing documents like [NASD Notices to Members] and reading them.” Nevertheless, he admitted that he had never seen NTM 99-90 before his testimony on March 21, 2007.⁵⁴

Because customers who sign predispute arbitration agreements with FINRA member firms are compelled to use FINRA’s arbitration process to resolve disputes with those firms,⁵⁵ the integrity of the process is of paramount importance. It is equally important that the investing public view the process as fair, and FINRA has stressed the importance of full cooperation by its members during discovery in arbitration proceedings. In NTM 03-70, issued in November 2003, NASD, in reminding its members of their duty to cooperate in the arbitration discovery process, stated, “...some parties believe that noncompliance with their duty to cooperate in the discovery process—to voluntarily turn over documents listed in the applicable Discovery Production Lists, or requested by other parties under Rule 10321—is a routine and acceptable part of arbitration strategy....This is a trend that NASD will not tolerate. Discovery abuse hinders the efficient and cost-effective resolution of disputes in this forum, and undermines the integrity and fairness of the NASD forum.” Despite the foregoing guidance, it is apparent from the record that Westrock

⁵³ NASD NTM 99-90 at pp. 687, 689, 696.

⁵⁴ CX-25 at pp. 21-22.

⁵⁵ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

took its responsibility to provide documents to an arbitration claimant much less seriously than its duty to provide documents to Enforcement staff.

In the one litigated case involving a firm that failed to provide discovery ordered by an NASD arbitration panel, the disciplinary hearing panel held, and the National Adjudicatory Council (“NAC”) affirmed, that the respondent, Josephthal & Co., had violated IM-10100 and Conduct Rule 2110.⁵⁶ In that case, Josephthal, relying on attorney-client privilege, refused to produce a memorandum to an arbitration panel for *in camera* inspection. In holding that Josephthal had violated IM-10100 and Rule 2110, the NAC “reject[ed] as incorrect the contention that we must find that Josephthal acted in bad faith as an additional element of such violation.”⁵⁷ The NAC upheld the hearing panel’s sanction of a censure and \$10,000 fine.

Westrock argues that its conduct is less serious than Josephthal’s because unlike Josephthal, it “never knowingly withheld documents in its possession or control.”⁵⁸ We disagree; Westrock’s conduct was more serious than Josephthal’s. Westrock withheld not just one document that was arguably privileged, but many documents that were records Westrock was obligated to keep under SEC and NASD rules. Westrock’s compliance director admitted that although the firm did not have order tickets and trade blotters “per se,” Westrock’s clearing agent could, and later did, print out electronic records or “playbacks” containing the same information.

The record in this case demonstrates not only Westrock’s failure to comply with an arbitration panel’s order, but its complete disregard for its discovery obligations in a customer arbitration. We find no mitigating factors. The Hearing Panel finds that a meaningful sanction is necessary to impress upon Westrock the seriousness of its violation as well as to deter it from

⁵⁶ *Department of Enforcement v. Josephthal & Co, Inc.*, 2002 NASD Discip. LEXIS 8 (N.A.C. May 6, 2002).

⁵⁷ *Id.* At *14.

⁵⁸ Westrock Brief at p. 9.

future discovery abuses in arbitrations. Therefore, for violating IM-10100 and Conduct Rule 2110, the Hearing Panel finds that Westrock should be censured and fined \$35,000.

V. Order

Based on careful consideration of all the evidence, the Hearing Panel imposes the following sanction.⁵⁹ For violating IM-10100 and Conduct Rule 2110, Westrock is censured and fined \$35,000. The sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this Decision becomes FINRA's final disciplinary action.

SO ORDERED.

Rochelle S. Hall
Hearing Officer
for the Hearing Panel

Copies to: Westrock Advisors, Inc. (*via overnight mail and first-class mail*)
Robert A. Giacovas, Esq. (*via facsimile and first-class mail*)
Amanda B. Regnier, Esq. (*via facsimile and first-class mail*)
Ronald Singh, Esq. (*via facsimile and first-class mail*)
Gary M. Lisker, Esq. (*via electronic and first-class mail*)
Robin Sardegna, Esq. (*via electronic and first-class mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

⁵⁹ The Hearing Panel considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views expressed herein.