

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DANTE J. DiFRANCESCO
(CRD No. 2482531),

Respondent.

Disciplinary Proceeding
No. 2007009848801

Hearing Officer – MC

HEARING PANEL DECISION

December 1, 2009

Respondent is suspended from association with any FINRA member firm in any capacity for 10 business days, and is fined \$10,000, for misusing confidential customer information in violation of Conduct Rule 2110.

Appearances

Robin W. Sardegna, Senior Litigation Counsel, Washington, DC, and Danielle I. Schanz, Senior Litigation Counsel, New York, NY, for the Department of Enforcement.

Dante J. DiFrancesco, Respondent, pro se.

DECISION

I. Background and Procedural History

In May 2007, Respondent Dante J. DiFrancesco (“DiFrancesco”) left FINRA member firm Banc of America Investment Services, Inc. (“BAIS”) to join another FINRA member firm. As he left BAIS, DiFrancesco downloaded onto a flash drive approximately 36,000 customer names and related information without authorization from BAIS, or from any of the customers, and sent the data electronically to his prospective employer member firm, National Securities Corporation (“NSC”).

After conducting an investigation, FINRA’s Department of Enforcement (“Enforcement”) filed the Complaint in this matter on January 7, 2009. In its single Cause of Action, the Complaint alleges that DiFrancesco violated Conduct Rule 2110¹ by taking and misusing confidential customer information when he downloaded and transmitted the customer names and information. On February 26, 2009, DiFrancesco filed an Answer to the Complaint in which he acknowledged downloading the information onto a flash drive. DiFrancesco claimed, however, that he intended to download only his own list of approximately 200 customers and was initially unaware that he had inadvertently taken information pertaining to other BAIS customers. DiFrancesco denied making wrongful use of the information, and denied that he violated Conduct Rule 2110.

After deliberations following a one-day hearing in New York, NY, a Hearing Panel² reached the following findings of fact and conclusions of law.³

II. Findings of Fact and Conclusions of Law

A. The Respondent

DiFrancesco first became registered as a General Securities Representative with FINRA in August 1994. From October 2004 to May 25, 2007, DiFrancesco was

¹ As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of DiFrancesco’s alleged misconduct. The applicable rules are available at www.finra.org/rules.

² The Hearing Panel was comprised of one current member of the District 10 Committee, one current member of the District 11 Committee, and the Hearing Officer.

³ References to the hearing testimony are designated as “Tr.” followed by a page number. References to Enforcement’s exhibits are designated as “CX-.” Respondent offered no exhibits.

employed by BAIS where he was registered as a General Securities Representative. He left BAIS in May 2007 and became employed by member firm NSC on June 11, 2007. According to the Uniform Termination Notice for Securities Industry Registration (Form U5) NSC filed on July 16, 2007, NSC discharged DiFrancesco on June 21, 2009, upon discovering that he may have possessed proprietary information relating to clients of BAIS.⁴ DiFrancesco is currently registered as a General Securities Representative with another FINRA member firm.

B. Factual Background

DiFrancesco associated with BAIS when that firm acquired his employer firm in 2004.⁵ When that occurred, DiFrancesco signed three agreements stating, among other things, that he would not “reproduce or appropriate for [his] own use or for the use of others any proprietary information,” including customer lists.⁶

DiFrancesco had between 180 and 200 clients prior to the purchase of his firm by BAIS.⁷ When he left BAIS in May 2007, DiFrancesco decided he would take with him his list of customers and information about them because he believed he was entitled to take his “book” to his new firm.⁸ Not having a physical “book” to take, DiFrancesco decided to download his customers’ essential information from the BAIS computer database.⁹ Initially, DiFrancesco attempted to send the list by e-mail from his office to

⁴ CX-1; CX-2, p. 1.

⁵ Tr., p. 59.

⁶ *Id.*, pp. 65-71.

⁷ *Id.*, pp. 19-20, 84, 96, 99.

⁸ *Id.*, pp. 75-76.

⁹ *Id.*, p. 78.

his home, but was unsuccessful.¹⁰ DiFrancesco believed BAIS blocked the e-mail with the attached list of customers,¹¹ and that BAIS would not allow him to take the list,¹² leading him to conclude it was necessary to download the data to a flash drive.¹³

To obtain his customer list and contact information, DiFrancesco entered his sales code into the BAIS database.¹⁴ He planned to use the information, including customer names, addresses, telephone numbers, and account numbers, to contact his clients and to fill out the forms required to transfer their accounts to his new firm.¹⁵ DiFrancesco testified that he intended to download only data related to his own customers.¹⁶

After taking the flash drive home, DiFrancesco created an Excel spreadsheet to organize the data.¹⁷ This is when he discovered he had unintentionally downloaded data relating to thousands of BAIS customers.¹⁸ On June 6, 2007, DiFrancesco attached the BAIS customer data to an e-mail he sent to Dan Kasht, manager of the NSC branch office to which he was transferring.¹⁹ The e-mail said:

“... as mentioned I am having trouble exporting the client files from this list. Here it is with 31k names. I will call you to review the items so we can get this stuff out pronto.”²⁰

¹⁰ Tr., pp. 85-86.

¹¹ *Id.*, p. 206.

¹² *Id.*, pp. 103-105.

¹³ *Id.*, pp. 85-86.

¹⁴ *Id.*, pp. 83-84, 258.

¹⁵ *Id.*, p. 96.

¹⁶ *Id.*, pp. 19-20, 73, 83-84.

¹⁷ *Id.*, p. 205.

¹⁸ *Id.*, pp. 20, 73-74.

¹⁹ *Id.*, p. 79; CX-5.

²⁰ *Id.*

DiFrancesco testified that the e-mail's reference to "client files" was to the files of his own 180 to 200 clients, and that he intended to ask Kasht for assistance in separating them out from the rest of the customers in the database.²¹ DiFrancesco testified that Kasht printed out the attachment²² to his e-mail and that the two of them reviewed it to identify and highlight DiFrancesco's customers in order to contact them.²³ DiFrancesco testified that he destroyed the flash drive after retrieving his client list from the database but that he did not know what Kasht did with the e-mail or the printout.²⁴ NSC sent a "welcome letter" on its letterhead, signed by both DiFrancesco and Kasht, dated June 11, 2007, to customers selected by DiFrancesco.²⁵

DiFrancesco testified that he believed his right to his client information outweighed BAIS's rights under the confidentiality agreement and other documents he signed.²⁶

C. Violations

Conduct Rule 2110 requires an associated person "in the conduct of his business," to "observe high standards of commercial honor and just and equitable principles of trade." Thus, misconduct that violates Conduct Rule 2110 must occur in the course of

²¹ Tr., p. 195.

²² *Id.*, pp. 90, 112. Kasht testified that he did not print out the e-mail attachment DiFrancesco sent to him. *Id.*, p. 154. He testified that he made no use of the information and that he deleted it. *Id.*, pp. 159-160. Kasht testified that he and DiFrancesco talked several times about the customers DiFrancesco wanted to bring with him from BAIS, and that DiFrancesco gave him lists of his customers to whom to send information about transferring their accounts. *Id.*, pp. 140-143.

²³ *Id.*, p. 90.

²⁴ *Id.*, p. 113.

²⁵ *Id.*, pp. 150-152; CX-11.

²⁶ *Id.*, pp. 110-111.

business and must violate high standards of commercial honor.²⁷ A violation of the Rule is based on the “ethical implications” of a representative’s conduct, and does not depend on whether or not the representative has committed a legally cognizable wrong.²⁸ “Scienter is not an element of [a Rule 2110] violation,”²⁹ nor is it necessary to ascertain a respondent’s motive in order to find that a violation has been committed.³⁰

The Hearing Panel finds that Enforcement established, by a preponderance of the evidence, that DiFrancesco misused property of his employer firm, and violated Conduct Rule 2110, when he downloaded customer information for approximately 36,000 customers from BAIS’s computer system onto a flash drive and attached the information to an e-mail he subsequently sent to Kasht.³¹ Furthermore, DiFrancesco’s actions violated the confidentiality requirements imposed by Regulation S-P, which sets strict limits on FINRA members’ disclosure of customers’ nonpublic information to non-affiliated third parties without notice to the customers.³²

When he transmitted the data to his new employer, DiFrancesco was acting in the course of his business.³³ Because the data he downloaded and transmitted included information whose confidentiality he and BAIS were required to maintain by Regulation

²⁷ *Dep’t of Enforcement v. David L. Foran*, No. C8A990017, 2000 NASD Discip. LEXIS 8, at *12-*14 (NAC Sept. 1, 2000).

²⁸ *Timothy L. Burkes*, 51 S.E.C. 356, 359-360 (1993).

²⁹ *Louis Feldman*, Exch. Act Rel. No. 34933, 1994 SEC LEXIS 3428, at *6 (Nov. 3, 1994).

³⁰ *Keith Springer*, Exch. Act. Rel. No. 45439, 2002 SEC LEXIS 364, at *26 (Feb. 13, 2002).

³¹ Because the Complaint charges DiFrancesco with misusing customer information of approximately 36,000 BAIS customers, and the evidence sustains the charge, the Hearing Panel found it unnecessary to reach the question of whether DiFrancesco would have violated Conduct Rule 2110 by taking only the information relating to the 180 to 200 customers he had acquired prior to associating with BAIS.

³² 17 C.F.R. §248.10.

³³ *Dep’t of Enforcement v. David L. Foran*, *supra* at *13 (holding that a registered person’s “business” includes his business relationship with his employer).

S-P,³⁴ DiFrancesco violated the high standards of commercial honor required of him by Conduct Rule 2110.

III. Sanctions

Enforcement argues that DiFrancesco should be suspended in all capacities for 30 days and fined \$10,000. Noting that the FINRA Sanction Guidelines do not contain specific recommendations for the misconduct found here, Enforcement contends that there are aggravating circumstances justifying imposition of these sanctions.

Enforcement argues that the following circumstances are aggravating: (i) DiFrancesco signed three agreements, including BAIS's Code of Ethics and Code of Conduct, that put him on notice that BAIS owned the information he downloaded and considered it proprietary and confidential; (ii) DiFrancesco's misconduct was premeditated; and (iii) DiFrancesco breached the confidentiality of approximately 36,000 BAIS customers whose private information he sent to a competitor firm.

Enforcement also argues that factors from four Principal Considerations in the Sanction Guidelines are present. They are:

1. Principal Consideration #10, concealment of misconduct, because DiFrancesco admittedly downloaded and removed the data from BAIS in a surreptitious manner;³⁵
2. Principal Consideration #13, intentional conduct, because DiFrancesco's misconduct was the result of intentional acts;
3. Principal Consideration #17, because DiFrancesco was motivated by the potential for financial gain when he took BAIS's customer information; and

³⁴ 17 C.F.R. §§248.3, 248.10.

³⁵ Tr., p. 97.

4. Principal Consideration #18, number and size of the transactions at issue, because of the enormous number of customers whose names and data were involved.

DiFrancesco admits having done “something foolish and stupid,” but argues in mitigation that all he intended to do was to try to maintain his clients when he moved to a new firm.³⁶

Based upon the testimony and evidence adduced at the hearing, and taking into consideration all of the circumstances, the Hearing Panel accepts DiFrancesco’s claim that he intended to download only the information relating to his clients so that he could maintain his relationship with them when he moved to NSC. Nonetheless, it is uncontroverted that after the download, DiFrancesco knowingly sent data concerning approximately 36,000 BAIS customers, who were not his clients, to Kasht and NSC. The Hearing Panel finds there is no evidence DiFrancesco used, intended to use, or expected his new firm to use, the data relating to the BAIS customers who were not his clients. The evidence is that the only customers DiFrancesco contacted during his brief employment by NSC were his former customers at BAIS, whom he wished to persuade to move their accounts to his new firm. The consequence was, however, that the privacy of confidential information pertaining to thousands of BAIS customers was compromised by DiFrancesco’s actions.

For these reasons, the Hearing Panel concludes that a suspension for 10 business days in any capacity and a fine of \$10,000 will serve the purposes of remediation and deterrence that the Sanction Guidelines call for.

³⁶ Tr., p. 251.

IV. Order

For misusing confidential customer information, in violation of Conduct Rule 2110, Respondent Dante J. DiFrancesco is suspended from associating with any FINRA member firm in any capacity for 10 business days and fined \$10,000.

In addition, DiFrancesco is ordered to pay the costs of the hearing in the amount of \$2,702.77, which includes an administrative fee of \$750 and the cost of the hearing transcript.

If this Decision becomes FINRA's final disciplinary action in this proceeding, the suspension shall become effective at the opening of business on Monday, February 1, 2010, and shall end at the close of business on Friday, February 12, 2010. The fines shall be due and payable upon DiFrancesco's return to the securities industry.³⁷

HEARING PANEL.

By: Matthew Campbell
Hearing Officer

Copies to:

Dante J. DiFrancesco (*via electronic and first-class mail*)
Robin W. Sardegna, Esq. (*via electronic and first-class mail*)
Danielle I. Schanz, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

³⁷ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.