

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

HOWARD BRAFF
(CRD No. 1161062),

Respondent.

Disciplinary Proceeding
No. 2007011937001

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

May 19, 2010

Respondent is fined \$15,000 and suspended in all capacities for one year for: (i) failing to notify his employer firms, in writing, that he had securities accounts at two other firms and failing to notify those firms that he was associated with a FINRA member, in violation of NASD Conduct Rules 3050(c) and 2110; and (ii) falsely representing to two employer firms that he did not have any outside brokerage accounts, in violation of Rule 2110. Respondent is also ordered to pay costs.

Appearances

For Complainant: Samuel Barkin, Jon Batterman, and Kathleen Lynch,
FINRA, DEPARTMENT OF ENFORCEMENT, New York, New York.

For Respondent: Howard Braff, pro se.

DECISION

I. INTRODUCTION

The Department of Enforcement (“Enforcement”) filed an Amended Complaint¹ on August 21, 2009, alleging that Respondent Howard Braff (“Braff”) violated NASD Conduct Rules 3050(c) and 2110 by failing to disclose to several of his employer firms that he had open securities accounts at two other firms, and by failing to disclose to those

¹ Enforcement filed the original Complaint on July 27, 2009.

firms that he was associated with a FINRA member firm. In addition, the Amended Complaint alleges that he violated NASD Conduct Rule 2110 by falsely representing to two of his employer firms that he had no outside securities accounts.

Braff filed an Answer and Combined Offer of Settlement on August 26, 2009, in which he admitted one violation. As to the remaining charges, he incorporated his Answer to the original Complaint in which he denied the charges and requested a hearing.

The Hearing Panel rejected Braff's contested offer of settlement and conducted a hearing at FINRA's office in Jericho, New York, on March 16, 2010. The Hearing Panel was comprised of the Hearing Officer and two current members of FINRA's District 10 Committee.

Before the hearing, the parties submitted a Stipulation dated January 29, 2010.² At the hearing, Enforcement called four witnesses—Michael Gerena ("Gerena"), the FINRA examiner who investigated Braff's outside securities accounts; the compliance officers from two of Braff's former firms; and Braff, who also testified on his own behalf. In addition, Enforcement submitted 11 exhibits (CX-1 through CX-10, and RX-4A), and Braff submitted four exhibits (RX-1 through RX-4). All of the exhibits were admitted into evidence.

For the reasons discussed below, the Hearing Panel found that Braff committed the violations alleged in the Amended Complaint.

II. BACKGROUND

A. Howard Braff

Braff entered the securities industry in 1983 as a General Securities Representative. In 1993, he became registered as a General Securities Principal. Between

² The Stipulation ("Stip.") was admitted into evidence as a joint exhibit, marked JX-1.

1993 and the present, Braff was employed and registered with a number of member firms, including Milestone Group Management LLC (“Milestone”), PGP Financial, Inc. (“PGP Financial”), and Pointe Capital, Inc. (“Pointe Capital”).³ He is currently registered as a General Securities Representative and a General Securities Principal through FINRA member firm PHD Capital. He owns the PHD Capital branch office where he works and serves as the compliance manager for the branch.⁴ Braff also had been associated with PHD Capital between October 16, 2006, and January 17, 2007.⁵

B. Origin of the Underlying Investigation

FINRA opened an investigation into Braff’s personal trading as a result of information it uncovered in the course of an investigation of trading activity related to Document Security Systems (“DMC”).⁶ Peter Dunne (“Dunne”), a broker Braff supervised at Pointe Capital, had been permitted to resign for failing to follow the firm’s procedures regarding the posting of electronic communications. When Gerena investigated, he found that Dunne and Braff were both trading DMC stock in their outside brokerage accounts.⁷ Upon further investigation, Gerena learned that Braff had not notified three of his employer firms (PGP Financial, PHD Capital, and Pointe Capital) that he maintained brokerage accounts with Scottrade, Inc. (“Scottrade”) and TD Ameritrade (formerly known as TD Waterhouse) (referred to herein as “Ameritrade”).⁸ Gerena further discovered that he had falsely represented to PGP Financial and PHD Capital that he had no outside brokerage accounts.

³ Stip. ¶¶ 3-6.

⁴ Tr. 75.

⁵ Stip. ¶ 5.

⁶ Tr. 27-28.

⁷ Tr. 28.

⁸ The Complaint also alleged that Braff failed to disclose his outside brokerage accounts to New Castle Financial Services LLC and Aura Financial Services, Inc. while he was employed by those member firms. However, Enforcement dropped those charges at the hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Braff was a broker with Scottrade from September 1993 until June 12, 2000. Upon leaving, he opened a personal brokerage account with Scottrade, which account he maintained until at least July 1, 2007.⁹

Braff worked at several member firms between June 2000 and August 2003, at which time he joined Milestone as a broker.¹⁰ He was employed at Milestone until March 30, 2004. On January 28, 2004, while he was a registered representative at Milestone, he opened a second brokerage account at Ameritrade, which he also maintained until at least July 1, 2007.¹¹ Braff did not disclose on the Ameritrade new account form that he was employed by Milestone. Instead, he indicated on the application that he was a self-employed solar engineer and checked the box on the application affirmatively representing that he was not employed by a broker-dealer.¹² Both representations were false.¹³

Braff next worked at PGP Financial from November 7, 2005, until October 5, 2006.¹⁴ Braff joined PGP Financial as a broker, but in January 2006, he entered into an agreement to purchase the firm and he assumed the firm's compliance responsibilities.¹⁵ Braff did not notify Scottrade or Ameritrade that he was associated with PGP Financial.¹⁶ Braff also failed to notify PGP Financial that he had outside brokerage accounts at Scottrade and Ameritrade. In fact, to the contrary, he affirmatively indicated on his

⁹ Stip. ¶ 10; CX-2 (account application).

¹⁰ Stip. ¶ 3.

¹¹ *Id.* ¶ 11.

¹² CX-3, at 1 (account application); Tr. 81-82.

¹³ The Complaint did not charge Braff with these misrepresentations.

¹⁴ Stip. ¶ 4.

¹⁵ Tr. 66; CX-10.

¹⁶ Stip. ¶ 12. Gerena testified that he sent Scottrade and Ameritrade a request for records of any notices provided by Braff that he was employed by a broker-dealer and that the firms responded that they had no record of ever having received such a notice. Tr. 34.

employment questionnaire that he had no outside brokerage accounts.¹⁷ Braff also submitted an outside brokerage disclosure form to PGP Financial that indicated he had no outside brokerage accounts.¹⁸ These representations were false.

After Braff left PGP Financial, he joined PHD Capital for the first time on October 10, 2006.¹⁹ Braff did not notify Scottrade or Ameritrade that he was associated with PHD Capital.²⁰ And he failed to notify PHD Capital that he had outside brokerage accounts with Scottrade and Ameritrade.²¹

Braff left PHD Capital in January 2007 and joined Pointe Capital on March 21, 2007.²² Braff was hired as an independent contractor to manage one of its branch offices.²³ Paul Chuzi (“Chuzi”), Pointe Capital’s Chief Compliance Officer at the time, testified that Braff never notified the firm that he had outside brokerage accounts, and he did not seek written permission to maintain such accounts.²⁴ Chuzi further testified that the personal data sheet Braff submitted did not list his accounts with Scottrade and Ameritrade.²⁵

Braff resigned from Pointe Capital effective April 2, 2007.²⁶ Following his tenure at Pointe Capital, Braff was associated with two other member firms before joining PHD

¹⁷ CX-4, at 9.

¹⁸ CX-5.

¹⁹ Stip. ¶ 5.

²⁰ *Id.* ¶ 12.

²¹ *Id.* ¶ 13.

²² *Id.* ¶ 6. At the time, Pointe Capital was known as JHS Capital Advisors, Inc.

²³ Tr. 41.

²⁴ Tr. 42-43, 47.

²⁵ Tr. 47-48; CX-9.

²⁶ Stip. ¶ 6; Tr. 42.

Capital for the second time on June 4, 2007.²⁷ Once again, Braff did not notify PHD Capital that he had outside brokerage accounts with Scottrade and Ameritrade.²⁸

Braff prepared an exhibit that detailed his trading activity at Scottrade and Ameritrade between November 7, 2005, and June 1, 2007.²⁹ The exhibit shows that he made 493 trades in the two accounts with a total cost basis of \$3,744,406.97.³⁰ Nonetheless, Braff did not consider his repeated failures to notify his employer firms of his outside accounts to be significant. Braff downplayed the importance of the total cost of the trades as “a little misleading, because if you do thousands of trades, you know, it’s going to look like a lot of money. Look at each individual trade, \$500, \$600, \$300, \$1,000. They’re small trades actually. They’re all small trades.”³¹

The Hearing Panel finds that Braff violated NASD Conduct Rule 3050(c) by failing to provide notice to Scottrade and Ameritrade that he was a broker associated with other member firms, and by failing to disclose the existence of the Scottrade and Ameritrade accounts to his employer firms, as described above.³² He also thereby violated NASD Conduct Rule 2110.³³

²⁷ Stip. ¶¶ 7-9.

²⁸ *Id.* ¶ 16.

²⁹ RX-4; RX-4A.

³⁰ Tr. 90; RX-4.

³¹ Tr. 91.

³² NASD Conduct Rule 3050(c) provides,

A person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member; provided, however, that if the account was established prior to the association of the person with the employer member, the associated person shall notify both members in writing promptly after becoming so associated.

³³ *Department of Enforcement v. Claggett*, No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *25 (Sept. 28, 2007). Conduct Rule 2110 requires that FINRA members shall, in conducting their business, “observe high standards of commercial honor and just and equitable principles of trade.” NASD Rule 0115 makes all FINRA rules, including NASD Rule 2110, applicable to both FINRA members and all persons associated with FINRA members. Conduct that violates other SEC or FINRA rules is inconsistent with the high standards of commercial honor and just and equitable principles of trade and therefore also violates

The Hearing Panel further finds that Braff violated NASD Conduct Rule 2110 by filing false and misleading documents with PGP Financial and PHD Capital, representing that he did not have any outside brokerage accounts.

IV. SANCTIONS

The FINRA Sanction Guidelines (“Guidelines”) for failure to comply with NASD Conduct Rule 3050 recommend a fine ranging from \$1,000 to \$25,000 and, in egregious cases, a suspension for up to two years or a bar against an individual respondent.³⁴ The Guidelines do not contain specific guidance for individuals misrepresenting to their firm that they do not maintain outside brokerage accounts. The Hearing Panel therefore considered the Guidelines for Forgery and/or Falsification of Records as the most analogous.³⁵ These Guidelines recommend a fine ranging from \$5,000 to \$100,000 and a suspension in any or all capacities for up to two years where mitigation exists. In egregious cases, the Guidelines recommend consideration of a bar.³⁶

For purposes of determining a sanction for Braff’s misrepresentations to PGP Financial and PHD Capital regarding his outside brokerage accounts in violation of NASD Conduct Rule 2110, the Hearing Panel finds that it is appropriate to aggregate this violation with the separate violation of NASD Conduct Rule 3050(c). The Guidelines, authorize the aggregation of individual violations for purposes of determining sanctions if, among other things, the violations were the result of a single, underlying problem.³⁷ Here, both violations arose from Braff’s desire to hide his personal trading from the

NASD Rule 2110. *Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006), *aff’d*, 209 F. App’x 6 (2d Cir. 2006).

³⁴ FINRA Sanction Guidelines 17 (2007), available at www.finra.org/oho (then follow “Enforcement” hyperlink to “Sanction Guidelines”).

³⁵ See *Department of Enforcement v. Duma*, No. C8A030099, 2005 NASD Discip. LEXIS 46, at *27 n.15 (N.A.C. Oct. 27, 2005) (applying Guidelines for Forgery and/or Falsification of Records as “most analogous”).

³⁶ FINRA Sanction Guidelines 39.

³⁷ See *Guidelines* at 4 (General Principles Applicable To All Sanction Determinations, No. 4).

broker-dealers with which he was employed.³⁸ Therefore, as discussed below, the Hearing Panel imposes a single sanction for these violations.

Upon consideration of the record in this case, the relevant Guidelines, the Principal Considerations in Determining Sanctions, and the General Principles applicable to all sanction determinations,³⁹ the Hearing Panel concludes that Braff's misconduct was egregious. Braff's lack of written notice to PGP Financial and PHD Capital that he had personal brokerage accounts with Scottrade and Ameritrade permitted him to evade oversight of his active trading in those accounts. The significance of this gap in supervision is underscored by the fact that Braff traded certain securities in his personal accounts while he, as well as brokers he supervised, simultaneously recommended those securities to their customers.⁴⁰ Such simultaneous trading is an aggravating factor because it presents the possibility of conflicts between the brokers' and their customers' interests. Therefore, such activity should be monitored by the brokers' firms to maintain brokers' integrity in their dealings with the public, which is an underlying objective of Conduct Rule 3050.

The Hearing Panel also considers aggravating the fact that Braff was well aware of the requirement to disclose outside accounts. Braff's responsibilities at PGP Financial and PHD Capital included assuring that the brokers in his branch office disclosed their outside accounts, and he supervised brokers with disclosed outside accounts. Nonetheless, he intentionally failed to disclose his outside accounts, as required by NASD Conduct Rule 3050(c). As FINRA noted in similar circumstances, "This blatant disregard of compliance responsibilities is inexcusable."⁴¹ Braff's demonstrated

³⁸ Braff testified that he would "never open a personal account at the same brokerage firm that I work at. ... It's a terrible idea to do that. It's all your eggs in one basket. It's - - your account can be frozen. I wouldn't put my family at that risk of that happening." Tr. 99.

³⁹ *Guidelines* at 2-7.

⁴⁰ Tr. 30, 33, 97-98.

⁴¹ *Department of Enforcement v. Duma*, 2005 NASD Discip. LEXIS 46, at *29.

indifference to complying with the rule coupled with his affirmative misstatements to PGP Financial and PHD Capital is a highly aggravating factor that constitutes egregious misconduct.⁴² Accordingly, correspondingly serious sanctions are needed to protect the investing public.

Further, the Hearing Panel finds aggravating Braff's refusal to acknowledge all of his misconduct. Braff argued that it is not standard industry practice for brokers to provide written notice that they are associated with another member firm when opening a new account, despite the unambiguous language of NASD Conduct Rule 3050(c).⁴³ Braff contended that the industry standard is for brokers to rely on their employer firms to send such notices. Accordingly, Braff did not believe he violated Rule 3050(c) by failing to notify Scottrade and Ameritrade that he was a broker at other firms. Braff did not address the obvious flaw in his argument, which is that his employer firms could not have notified Scottrade and Ameritrade because Braff had not disclosed those accounts.

For the foregoing reasons, the Hearing Panel finds that Braff should be fined \$15,000 and suspended from associating with any member firm in any capacity for one year for his violations of NASD Conduct Rules 3050(c) and 2110.

V. ORDER

Respondent Howard Braff is fined \$15,000 and suspended for one year from associating with any FINRA member in any capacity for: (i) failing to notify his employer firms, in writing, that he had securities accounts at Scottrade and Ameritrade and failing to notify Scottrade and Ameritrade that he was associated with a FINRA member, in violation of NASD Conduct Rules 3050(c) and 2110; and (ii) falsely representing to PGP Financial and PHD Capital that he did not have any outside brokerage accounts, in violation of Rule 2110.

⁴² *Id.*

⁴³ Tr. 110-11.

In addition, Braff is ordered to pay costs in the amount of \$1,856.80, which includes an administrative fee of \$750 and hearing transcript costs of \$1,106.80. These costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

If this decision becomes FINRA's final disciplinary action, the suspension shall commence on July 19, 2010, and end at the close of business on July 18, 2011.⁴⁴

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Howard Braff (*via electronic and first-class mail*)
Samuel L. Barkin, Esq. (*via electronic and first-class mail*)
Jon Batterman, Esq. (*via electronic and first-class mail*)
Kathleen Lynch, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

⁴⁴ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.