BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee for District No. 7, Complainant, vs. Adam S. Levy Aventrua, FL, and 3300 N.E. 191st, Street Aventura, Florida, Respondent.	DECISION Complaint No. C07960085 District No. 7 Dated: March 6, 1998

Adam S. Levy ("Levy") has appealed a July 24, 1997 decision of the District Business Conduct Committee for District No. 7 ("DBCC") pursuant to Procedural Rule 9310 of the NASD's Code of Procedure (now superseded).[1] For the reasons discussed below, we find that Levy effected 16 unauthorized transactions in one customer account in violation of Conduct Rule 2110. We affirm the DBCC's imposition of a censure, fine of $50,000, and a bar from associating with any member in any capacity.

Background

Levy first entered the securities business in October 1993 as a general securities representative of Gruntal & Co., Inc. ("Gruntal & Co."), an NASD member. Levy left Gruntal & Co. in October 1995, and is currently not associated with an NASD member.

[1] We cite here the Procedural Rules that were in effect at the time Levy appealed. We will apply the NASD's new procedural rules governing disciplinary proceedings to cases served on a respondent on or after August 7, 1997 and appealed or called for review. See Special Notice to Members 97-55 (August 1997).

Facts

The one-cause complaint alleged that from June 12 through July 25, 1995, Levy effected 18 unauthorized trades in the account of customer R.H. ("R.H.") as detailed in Exhibit A attached to the complaint,[2] in violation of Conduct Rule 2110. At the outset of the DBCC hearing, regional counsel withdrew the allegations as to the June 7, 1995 trade, bringing the total number of allegedly unauthorized trades to 17.[3] Levy filed a one-page notice of answer, which only requested a hearing.

Levy first contacted R.H. by telephone in January 1995 to solicit an investment in Coca Cola stock. R.H. agreed to purchase the shares of Coca Cola, opened a new cash account with Gruntal & Co., and allegedly informed Levy that he "was getting [his] feet wet and [that he] would like to stick with New York Stock Exchange ["NYSE"] stocks."[4] The account was not opened as a discretionary account.

On January 18, 1995, R.H. sent Gruntal & Co. a check for the shares of Coca Cola stock. In March, R.H. purchased shares of Ivax Corp. ("Ivax") and of McDonald's Corp. based on Levy's recommendations and sent Gruntal & Co. checks covering the purchases. On April 3 and April 24, R.H. purchased two other stocks and transmitted payment to Gruntal & Co. for those shares on April 10 and April 25. On about April 24, 1995, R.H. noticed that Ivax was not listed on the NYSE and (according to R.H.) promptly contacted Levy and instructed him to sell the Ivax stock as "a matter of principle" even though it had already climbed three points. In May, R.H. purchased two additional stocks solicited by Levy, only later apparently realizing that the stocks were not NYSE listings.

On June 9, 1995, R.H. informed Levy that he would be going on vacation, that he would be "incommunicado," and that he would call Levy upon his return. On that day, R.H. also authorized Levy to purchase two additional stocks. On June 29, 1995, upon returning from vacation, R.H. contacted Levy, who informed him that his account had done well while he was on vacation. On July 17, 1995, R.H. purchased shares of Aepurtes Technologies, Inc. ("Aepurtes") through Levy.

On July 23, 1995, R.H. received his June account statement, which reflected what R.H. believed were about 10 trades that he did not authorize. R.H. testified that he called Levy the next morning, complained about the trades that were "against [his] express wishes and without [his] knowledge," and instructed Levy to close the account and send him a check. According to R.H., Levy responded that he had been "trying to make money for [R.H.] while [he was] on vacation." R.H. claimed that Levy promised to "in one way or another make [R.H.] whole," and that Levy urged R.H. not to complain to Levy's superiors because Levy would lose his job. R.H. attempted to contact Levy by telephone and by

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[2] Exhibit A is attached to this decision.

[3] We affirm the DBCC's dismissal as to this trade.

[4] R.H. is an 83 year-old man who testified that he previously held an account at another brokerage firm for 19 years, but had not traded since the death of his wife a couple of years ago. R.H. also testified that he had never before filed a complaint against a broker. NASD Regulation's staff conducted the investigation of Levy in response to an amended Uniform Notice of Termination ("Form U-5") filed by Gruntal & Co. that reported R.H.'s complaint of unauthorized trading.

facsimile throughout the month of August, and when Levy finally telephoned R.H., they agreed to meet at a restaurant on September 5, 1995 to discuss the matter.[5] At the restaurant, according to R.H., Levy stated that he would pay for the losses to the account if he could have "a few more days." By faxes dated September 12 and 20, 1995, R.H. requested that Levy contact him. R.H. contended that after Levy failed to respond, he contacted and met with Phil Semenick ("Semenick"), Gruntal & Co. Branch Manager, on October 12, 1995. R.H. also summarized his complaint in a letter to Semenick dated November 5, 1995. By letter dated November 10, 1995, Linda Chudnoff ("Chudnoff"), Assistant Vice President of Compliance at Gruntal & Co., advised R.H. that Levy had informed her that he had been given permission to trade in the account before R.H. left for vacation. She also stated that she could perceive no liability warranting further action.

Levy testified that R.H. gave him "complete control over [the] account" before leaving on vacation. Levy also testified that R.H. called him four times while on vacation and authorized the trades. Levy contended that when R.H. closed the account at Gruntal & Co., R.H. told him that the "market was too high" and that he (R.H.) would do business with Levy again sometime in the future.

Discussion

The DBCC found R.H. more credible than Levy. We agree and give "considerable weight" to the credibility determinations of the DBCC as the initial decision maker who actually heard the witnesses' testimony. See In re Robert Lester Gardner, Exchange Act Rel. No. 35899 (June 30, 1995); In re Frank J. Custable, 51 S.E.C. 643 (1993). The credibility determinations of an initial fact finder can only be rejected when the record contains "substantial evidence" opposing that determination. In re Joseph H. O'Brien II, 51 S.E.C. 1112 (1994).

We find that the DBCC's credibility determination is well supported by the evidence for the following reasons: First, R.H.'s active involvement in his account supports the finding that he did not relinquish "complete control" over his account as Levy asserts.[6] Second, Levy's contention that R.H. authorized the trades during four phone calls while he was on vacation is contrary to the evidence. An Associate Examiner for District No. 7, Joan O'Connell ("O'Connell"), testified that she compared the dates and locations of R.H.'s vacation to Gruntal & Co.'s telephone records and did not locate any instances of calls received by Gruntal & Co. that matched R.H.'s locations. She also reviewed R.H.'s

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[5] The record contains a total of five faxes from R.H. to Levy dated August 9, 14, 28, and September 12, and 20, 1995. Levy contends that he received only one of the faxes. Levy also points out that when NASD Regulation staff requested that Gruntal & Co. provide information relating to this case, the firm could not locate copies of any faxes. In the record, however, is a memorandum of an interview of Phil Semenick ("Semenick"), Levy's manager, conducted by NASD Regulation staff, in which Semenick stated that he had received and handed to Levy two of R.H.'s faxes and that he (Semenick) had urged Levy to telephone R.H.

[6] We note that the volume of activity in R.H.'s account during the two weeks that he was on vacation was inconsistent with the previous level of activity of approximately two or three trades per month.

telephone records and determined that he made no calls to Gruntal & Co. during his vacation.[7] Moreover, Levy's assertion that R.H. authorized the trades during four phone calls is inconsistent with his earlier contention that R.H. had granted him complete control over the account. Third, when Levy prepared a statement responding to R.H.'s complaint to Chudnoff, Levy failed to mention the fact that R.H. had purportedly authorized trades during the four phone calls. This crucial omission certainly casts doubt on Levy's version of events. Finally, a customer account form that was updated on June 28, 1995, before R.H. contacted Levy upon returning from vacation, indicates that R.H.'s account was not designated as a discretionary account.[8] There is therefore nothing in writing that evidences R.H.'s or Gruntal & Co.'s authorization for a discretionary account as required by Rule 2510(b).[9] We find these facts corroborate R.H.'s assertion that he did not authorize the trades.

We have also considered Levy's argument that R.H. complained of unauthorized trading merely because he did not want to absorb any losses to his account. Levy argues that R.H. received confirmations for each of the 17 trades, but did not object to them until several weeks later.[10]

We find no support in the record for Levy's assertion that R.H. fabricated the unauthorized trading complaint in order to obtain reimbursement for the losses in his account. We note that R.H. acknowledged having authorized the July 20, 1995 purchase of Aepurtes, a stock on which he lost money,[11] and that if he truly had fabricated the unauthorized trading complaint, he would have also claimed that the Aepurtes purchase was unauthorized. We also note that when R.H. became aware of the unauthorized trades after receiving his June account statement, he promptly instructed Levy to close the

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[7] O'Connell testified that she located one individual who called Gruntal & Co. from a location to which R.H. traveled on vacation. O'Connell further testified that she contacted this individual and determined that it was not R.H. who had placed the call. Additionally, the record contains R.H.'s frequent flyer statements as evidence of R.H.'s vacation travel.

[8] Levy contends that the June 28, 1995 account form was prepared by his assistant at the behest of Semenick. Semenick stated in an interview conducted by NASD Regulation staff that he had noticed that the trading pattern had changed in R.H.'s account, and that after Levy had represented to him that the customer's objectives had changed, Semenick ordered that the form be updated by Levy's assistant. We note that Levy signed this form after he purportedly was given complete control over R.H.'s account.

[9] Conduct Rule 2510(b) states that "[n]o member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the member, as evidenced in writing by the member."

[10] R.H. testified that he always waited to open confirmations until he received his account statements so that he could match the confirmations to the account statement, and that therefore he did not open the 17 confirmations until he received his June account statement from Gruntal & Co. on July 23, 1995. He contends that the June account statement was delayed in the mail due to Hurricane Erin.

[11] R.H. testified that he authorized the purchase of the Aepurtes stock before he received the June account statement that revealed the allegedly unauthorized trading.

account; he repeatedly attempted to have Levy rectify the situation; and he finally complained to Levy's superiors at Gruntal & Co.

We find, however, that the last unauthorized transaction alleged on Exhibit A -- the sale of Wandel & Golterman shares on July 25, 1995 -- might have occurred in response to R.H.'s instructions on July 24, 1995 to liquidate his account. We therefore reverse the DBCC's determination that the final transaction listed on Exhibit A was unauthorized.

The Securities and Exchange Commission has unequivocally held that unauthorized trading in a customer's account is a violation of the requirement to observe just and equitable principles of trade. In re Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992); see In re Keith L. De Santo, Exchange Act Rel No. 35860 (June 19, 1995), aff'd, 101 F.3d 108 (2d Cir. 1996) (table); In re Robert Lester Gardner, Exchange Act Rel. No. 35899 (June 27, 1995). Accordingly, we hold that Levy violated Conduct Rule 2110 by effecting 16 unauthorized transactions in one customer account.

Sanctions

The DBCC ordered that respondent be barred in all capacities, fined $50,000, and required to pay $13,770 in restitution. In assessing the sanctions, the DBCC considered that Levy was still employed in the securities business, that R.H. suffered losses totaling $13,770, and that Levy earned approximately 50 percent of the $11,781.85 that Gruntal & Co. earned on the unauthorized trades. The DBCC found respondent's conduct "inexcusable" and noted the following aggravating factors: that respondent took advantage of his customer's absence to effect the trades, and that he executed even more trades when the customer returned from vacation and failed to notice the unauthorized transactions.

We reverse the DBCC's order that Levy pay R.H. $13,770 in restitution. We note that at the appeal hearing, in response to questions asked by the Subcommittee, regional counsel stated that since the DBCC hearing, Gruntal & Co. has reimbursed R.H. for his losses. Restitution is therefore not appropriate because the customer has already been made whole for his losses.

We recognize that respondent has no prior disciplinary history, but like the DBCC, we find respondent's conduct inexcusable. We find it particularly egregious that the customer repeatedly complained to Levy, that Levy persuaded the customer not to complain to the firm, and that Levy then attempted to avoid any further contact with his customer. Levy's conduct represents a betrayal of his customer's trust. Levy also continues to fail to acknowledge any wrongdoing. We find that Levy's conduct indicates that if he were permitted to remain in the industry, he would pose a threat to the investing public. We therefore affirm the DBCC's imposition of a $50,000 fine and a bar from associating with any NASD member in any capacity. Taking into account our dismissal as to the July 25, 1995 transaction, we nonetheless find that these sanctions are commensurate with the totality of violations.[12]

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[12] We find that these sanctions are consistent with the applicable Guideline which recommends imposition of a bar in certain cases. See Guidelines (1996 ed.) at 56 (Unauthorized Transactions).

Conclusion

Accordingly, we impose sanctions of a censure, a $50,000 fine, a bar from associating in any capacity with any member, and DBCC hearing costs of $911.20.[13] The bar imposed is effective immediately upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

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Joan C. Conley, Corporate Secretary

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[13] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

NASDR Direct: (202) 728-6904
NASDR Fax: (202) 728-8264

March 6, 1998

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Adam S. Levy
Aventura, Florida

Adam S. Levy
Aventura, Florida

Re: Complaint No. C07960085: Adam Levy

Dear Mr. Levy:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW, Stop 6-9
Washington, DC 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: Alan Wolper, Esq.