

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement,

Complainant,

vs.

Michael A. Usher  
Greeley, Colorado,

Respondent.

DECISION

Complaint No. C3A980069

Dated: April 18, 2000

**President of member firm, who had his registration suspended for failure to pay an arbitration award, continued to conduct a securities business in violation of his suspension. Held: findings and sanctions affirmed.**

Michael A. Usher ("Usher") has appealed all aspects of a May 21, 1999 amended decision of a Hearing Panel. After a review of the entire record in this matter, we affirm the findings of the Hearing Panel that Usher conducted a securities business while his and his broker-dealer's registrations were suspended. We affirm the Hearing Panel's sanctions of a bar from acting as a general securities principal, a \$25,000 fine, an additional fine of \$3,914.70 plus interest, which represents disgorgement, and costs.

Background

Usher entered the securities industry in 1981. In 1983, he helped start Gilbert Marshall & Company ("Gilbert Marshall" or the "Firm"), where he was registered as a principal until June 1997, when the Firm closed.<sup>1</sup> Usher was the President of Gilbert Marshall from 1992 until June 1997. While

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<sup>1</sup> Gilbert Marshall withdrew its NASD membership by filing a Form BDW on June 4, 1997. It was not named as a respondent in the complaint, which was filed on November 20, 1998.

at Gilbert Marshall, Usher was registered as a general securities representative, a general securities principal, a financial and operations principal ("FINOP"), a compliance registered options principal, a registered options principal, and a senior registered options principal.

On March 3, 1997, an NASD arbitration panel entered an award against Usher and Gilbert Marshall for \$37,500 jointly and severally, in the matter of Richard Weisinger, et al. v. Gilbert Marshall & Company, et al., NASD Arbitration No. 95-01220. On March 4, 1997, the award was served on Usher's attorney.

A little more than one month after the arbitration panel's award, on April 8, 1997, the attorney for a prevailing claimant wrote to the NASD's Arbitration and Mediation Department ("Arbitration and Mediation Department") in Los Angeles that Usher and Gilbert Marshall had not paid any of the \$37,500 award. On April 9, 1997, a staff attorney with the Arbitration and Mediation Department wrote to Usher's attorney that if the award was not paid, the NASD would begin summary revocation proceedings against Usher. Usher's attorney received this letter on April 11, 1997.

On April 24, 1997, the claimant's attorney again wrote the Arbitration and Mediation Department and notified it that Usher and Gilbert Marshall had not paid the award. On April 30, 1997, the Arbitration and Mediation Department staff attorney wrote directly to Usher that the NASD was instituting cancellation proceedings and that it would cancel his registration on May 23, 1997 unless he paid the arbitration award in full, or documented other legally relevant events, before May 23, 1997.<sup>2</sup> Also on April 30, 1997, the Arbitration and Mediation Department staff attorney wrote to Gilbert Marshall that its registration would be canceled as of May 23, 1997. Usher and Gilbert Marshall, however, continued to conduct a securities business until May 30, 1997.

On May 30, 1997, Usher received a copy of a May 27, 1997 memorandum from the Arbitration and Mediation Department staff attorney to NASD's membership department that explained that the membership department should suspend Usher and Gilbert Marshall's registration and membership immediately. Usher testified that after he received the May 30, 1997 suspension memorandum, he stopped conducting a securities business. He further testified that on May 29, 1997, he received a letter from the claimant that requested payment in full. On May 30, 1997, Usher sent a check for \$37,500 to the claimant.

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<sup>2</sup> The letter explained that Usher had the option to document that:

- the claimant had agreed to installment payments or had otherwise settled the matter;
- Usher had filed a timely motion to vacate or modify the award, which had not been denied;
- Usher had filed a petition in bankruptcy pursuant to the Federal Bankruptcy Code and the bankruptcy proceeding was pending; or,
- Usher had requested a hearing regarding the pending suspension of his registration.

## Discussion

The Hearing Panel disposed of this case in two steps: On March 11, 1999, it granted the Department of Enforcement's ("Enforcement") motion for summary disposition on the issue of liability.<sup>3</sup> Enforcement's motion for summary disposition sought to establish that Usher and Gilbert Marshall had violated Conduct Rule 2110 when they conducted a securities business after the NASD had suspended them. The Hearing Panel reserved judgment on the issue of sanctions and held a hearing to address this issue on March 16, 1999.

We uphold the Hearing Panel's finding that Usher and Gilbert Marshall violated Conduct Rule 2110. Usher admits that he received the April 30, 1997 letter addressed to him from the Arbitration and Mediation Department that warned him that his registration with the NASD would be canceled as of May 23, 1997. The evidence established that Usher effected securities transactions on May 27, 29, and 30, 1997. Usher has not disputed these facts, which conclusively establish the violation in this case.

In defense of his actions, Usher argues that the Arbitration and Mediation Department's correspondence was a "form letter" and that he did not notice the May 23, 1997 suspension date, which appears in the third paragraph of the letter. We find that the April 30, 1997 letter clearly and specifically told Usher that the NASD would cancel his registration on May 23, 1997. The first paragraph of the letter states that "[o]n March 3, 1997, an award was issued" in the arbitration action against Usher, "which ordered you to pay the sum of \$37,500.00, jointly and severally .... The NASD has been advised that you have not complied with this order." The second paragraph explains that the NASD's By Laws permit the NASD "to institute cancellation proceedings against any member or associated person that fails to pay an arbitration award rendered by an NASD panel. Therefore, pursuant to Article VI, Section 2 of the NASD Code of Procedure, your registration with the Association will be canceled on the date described below." The next sentence warns that Usher's registration will be canceled on May 23, 1997.

Usher also argues that he had been "in contact" with the Arbitration and Mediation Department staff attorney, that he did not intentionally violate his suspension, and that he felt he was entitled to a verbal warning that his registration would be suspended. We reject Usher's arguments as untenable.

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<sup>3</sup> In reviewing a Hearing Panel ruling on a motion for summary disposition, we take our guidance from the text of Procedural Rule 9246 and from federal law that has elaborated on the concept of summary disposition of a case when there is no genuine issue with regard to any material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (the moving party bears the initial burden of showing "the absence of a genuine issue of material fact"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.")

Enforcement was not required to prove that Usher read his suspension letter and deliberately acted in violation of his suspension. Rather, Enforcement was required to prove, by a preponderance of the evidence, that Usher was suspended and was given notice of this fact. Without question, the suspension letter would plainly and clearly advise even a casual reader that "the cancellation of your registration with the NASD [would] become effective on May 23, 1997." Therefore, Enforcement proved its case. Accepting for the sake of argument Usher's claim that he did not notice the suspension date in the letter, we conclude that Usher completely ignored his responsibility to read and comply with the NASD's suspension letter.<sup>4</sup> Moreover, Usher's argument that he should have been given a verbal warning has no basis in the NASD's rules, which require written notice of suspensions. We conclude that Usher violated Conduct Rule 2110 when he conducted a securities business while his registration was suspended.

As to Gilbert Marshall, which was jointly and severally liable with Usher for the arbitration award, the evidence showed that the Firm was suspended and given notice of its suspension at the same time as Usher. On April 30, 1997, the Arbitration and Mediation Department staff attorney sent a letter to Usher that notified him that Gilbert Marshall's registration would be canceled unless the Firm documented that it had complied with an exception that legally excused it from immediately paying the arbitration award.<sup>5</sup> The evidence established that Gilbert Marshall remained open as a broker-dealer from May 27 through May 30, 1997, and conducted a securities business.

Usher now argues that he does not recall receiving the suspension letter discussing Gilbert Marshall's suspension. He contends that had he received and read such a letter, he would have paid the arbitration award. We do not credit Usher's position. Enforcement provided evidence in the record of signed certified mail return receipts for Gilbert Marshall's suspension letter. Usher admitted that the certified mail return receipts were signed by the Firm's receptionist. We therefore find that the Firm, through its President, received proper notice of its pending suspension. We conclude that Usher violated Conduct Rule 2110 when he allowed his Firm to conduct a securities business while its registration was suspended.

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<sup>4</sup> Usher also failed to read the relevant NASD arbitration rule. Arbitration Rule 10330(h) stated that "[a]ll monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction." See Carter v. SEC, 726 F.2d 472, 474 (9th Cir. 1983) (per curiam) (registered representative presumed as a matter of law to have knowledge of NASD rules).

<sup>5</sup> The Firm had the same five options, including demonstrating that the award had been paid in full, that Usher had. Supra, footnote 3.

## Sanctions

We begin our discussion of Usher's sanctions by reviewing his disciplinary history. Usher's disciplinary history contains five prior actions that we find relevant to this case. Most recently, on August 16, 1999, the Securities and Exchange Commission ("SEC") issued an order that accepted an offer of settlement from Usher and Gilbert Marshall regarding the sale of Sky Scientific, Inc. ("Sky Scientific") stock. See In the Matter of Sky Scientific, Inc., Securities Act Rel. No. 7724; Exchange Act Rel. No. 41744 (Aug. 16, 1999).<sup>6</sup> The SEC barred Usher, revoked Gilbert Marshall's broker-dealer registration, and ordered that Usher and Gilbert Marshall cease and desist from committing or causing any violations of the registration and anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. Furthermore, the SEC fixed the amount of disgorgement to be paid by Usher and Gilbert Marshall at \$5,435,183 plus prejudgment interest, but reduced the amount payable to \$10,000 based upon Usher's and Gilbert Marshall's demonstrated financial inability to pay.

Usher argues that we should not consider the Sky Scientific settlement because it is not related to this matter. Pursuant to the NASD Sanction Guidelines ("Guidelines"), we consider both past similar misconduct and "past misconduct that, while unrelated to the misconduct at issue, evidences prior disregard for regulatory requirements, investor protection, or commercial integrity" as relevant disciplinary history. Guidelines at 3. Because the Sky Scientific settlement evidences disregard of regulatory requirements and investor protection, we consider it to be relevant disciplinary history. But see R.B. Webster Investments, Inc. 51 S.E.C. 1269, 1278 n.37 (1994).

On appeal, Usher argues that all of the Sky Scientific problems were confined to the Firm's Denver office and that at the first sign of a problem he told the entire office to leave the Firm. He also contends that the SEC Administrative Law Judge made many errors in his initial decision and that Usher's subsequent settlement was strictly a financial decision. We find Usher's arguments to be unavailing. Because Usher entered into a settlement of the SEC action, we cannot accept his attacks on the findings in the settlement. Rather, we accept the SEC's findings for the purpose of assessing Usher's disciplinary history.

Ushers' second instance of disciplinary history is an August 1997 settlement with the NASD. The NASD alleged that Usher had failed to provide truthful information in response to the NASD's requests for information made pursuant to Rule 8210 and that he had failed to supervise reasonably.

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<sup>6</sup> The SEC Order found as follows: While Usher was the President of Gilbert Marshall, a branch office of the Firm sold \$5.4 million of Sky Scientific stock to retail customers in 862 transactions. The branch office employed high-pressure, fraudulent sales practices to sell Sky Scientific Stock and sold the stock at excessive, undisclosed mark-ups. Usher, without conducting an appropriate investigation, authorized the branch office to sell Sky Scientific stock to the public and thereby furthered the fraudulent sales.

The NASD censured Usher, fined him \$15,000, and suspended him in any principal capacity for six months, excluding the capacities of FINOP and registered options principal.

Third, Usher settled two actions that arose from allegations that he failed to supervise the personnel in Gilbert Marshall's Denver office, who were accused of failure to execute trades, fraud, and violation of the SEC's penny stock rules.<sup>7</sup> In October 1996, the Colorado Division of Securities suspended Usher's license as a sales representative for 60 days and suspended him from acting as a supervisor in Colorado for one year. The NASD settled with Usher regarding the same allegations in March 1996. The NASD censured Usher, fined him \$25,000, and required him to requalify as general securities principal.

Fourth, in December 1995, Usher entered into a consent agreement in settlement of allegations brought by the State of Indiana that he, Gilbert Marshall, and others engaged in dishonest sales practices. Gilbert Marshall paid a civil penalty of \$7,500 to Indiana.

Fifth, after Usher failed to respond adequately to an order to show cause issued by the State of Alabama, Alabama permanently barred him in June 1995. Alabama had alleged that Usher offered and sold securities in the state without being registered, failed to liquidate a client's account as directed, and failed to supervise reasonably his agents.

In this action, the Hearing Panel imposed sanctions on Usher of a censure, a \$25,000 fine, disgorgement of \$3,914.70, plus interest, and a bar as a general securities principal. The Hearing Panel concluded that a bar as a general securities principal was in the public interest because Usher failed to accept responsibility as a supervisory principal, and because in his prior disciplinary actions he also refused to accept responsibility for his actions.

The NASD has not published a sanction guideline for engaging in a securities business while suspended. The Hearing Panel accepted Enforcement's recommendation that the sanction guideline for allowing a statutorily disqualified person to associate with a firm prior to approval should be used for guidance.<sup>8</sup> Although we consider Usher's violation to be somewhat similar to a firm allowing a statutorily disqualified person to associate with it, we conclude that Usher's misconduct here is a more serious violation of the NASD's rules.

When the NASD takes the extraordinary step of suspending a firm or a registered person, it is entitled to require complete and precise compliance with its directive. Usher's failure to abide by the NASD's suspension manifests a fundamental disregard for the authority of the NASD and fully justifies a

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<sup>7</sup> Securities Exchange Act of 1934 Rule 15g-2.

<sup>8</sup> See NASD Sanction Guidelines ("Guidelines") (1998 ed.) at 41 (Firm Allowing Disqualified Person To Associate Prior To Approval).

\$25,000 fine.<sup>9</sup> In addition, we find that Usher's misconduct was egregious, that in connection with his extensive disciplinary history this violation demonstrates a pattern of misconduct, and that Usher's continued status as a general securities principal would present opportunities for future violations. Because Usher has failed in fulfilling his responsibilities as President of a firm, we bar him from acting as a general securities principal.

Disgorgement. The Hearing Panel ordered that Usher disgorge \$3,914.70, plus interest, the amount of his gross commissions from May 27 through May 30. As set forth in Exhibit A, we agree with the Hearing Panel's calculation of the amount of disgorgement. As a matter of law we order disgorgement when we can identify "direct financial gain obtained by a wrongdoer as a result of his or her wrongful actions." In re F.B. Horner & Assoc., Inc., 50 S.E.C. 1063, 1069 n.19 (1992), aff'd, 994 F.2d 61 (2d Cir. 1993). Here, we order that Usher disgorge his gross commissions and assess a fine in this amount because he was prohibited from engaging in a securities business while he was suspended.

On appeal, Usher argues that commissions on all of the mutual fund trades that showed a "date of transaction" of May 27, 1997 should not be disgorged because he wrote the trade tickets on the Friday before Memorial Day: May 23, 1997. We reject this argument both because Usher failed to raise it at the hearing below and because the time stamps on the trade tickets show May 27, 1997, as the date of the creation of the trade tickets.

We uphold all of the sanctions imposed on Usher, except for the imposition of a censure.<sup>10</sup> Accordingly, Usher is barred from acting as a general securities principal, fined \$25,000, ordered to pay to the NASD disgorgement of \$3,914.70 plus interest, and assessed appeal costs of \$1,000 plus

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<sup>9</sup> We note that at the NAC subcommittee oral argument of this case, the NAC subcommittee offered Usher the opportunity to submit evidence, after the oral argument, that he had a financial inability to pay. Usher chose to submit no such evidence.

<sup>10</sup> Because we are barring Usher as a general securities principal, we have determined not to impose a censure. See NASD NTM 99-59 (July 1999).

transcription costs of \$279.55. Pursuant to Rule 9360, the bar as a general securities principal shall be effective upon service of this decision.<sup>11</sup>

On Behalf of the National Adjudicatory Council,

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Joan C. Conley,  
Senior Vice President and Corporate Secretary

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<sup>11</sup> 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 sanctions, after seven day's notice in writing, will summarily be revoked for non-payment.



**Joan C. Conley**  
Senior Vice President  
and Corporate Secretary

Direct: (202) 728-8381  
Facsimile: (202) 728-8894

April 18, 2000

**VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

Michael A. Usher

Greeley, Colorado

**Re:** Complaint No. C3A980069

Dear Mr. Usher:

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. To do so, you must file an application with the Commission within thirty (30) days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. 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 the 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, N.W., Stop 6-9  
Washington, D.C. 20549

The address of the NASD is:  
Office of General Counsel  
National Association of Securities  
Dealers Regulation, Inc.  
1735 K Street, N.W.  
Washington, D.C. 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

Enclosure

cc: Roger D. Hogoboom, Jr., Esq.