NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MARK F. MIZENKO (CRD No. 1812411) Respondent.	Disciplinary Proceeding No. C8B030012 Hearing Officer – AWH **Hearing Panel Decision** December 29, 2003

Registered representative and principal forged the signature of an officer of the firm on a corporate resolution, without the officer's knowledge or consent, in violation of NASD Conduct Rule 2110. Respondent fined $5,000, suspended for 18 months in all capacities, ordered to requalify in all capacities, and assessed costs.

Appearances:

Pamela Shu, Esq. and James M. Stephens, Esq.
for the Department of Enforcement

David G. Umbaugh, Esq., for Mark F. Mizenko

DECISION

On June 12, 2003, the Department of Enforcement ("Enforcement") issued the Complaint in this matter against Mark F. Mizenko, alleging, that he affixed the signature of an American Express Financial Advisors, Inc. ("AEFA") Executive Vice President on a corporate resolution, without that officer's knowledge or consent, in violation of NASD Conduct Rule 2110. The corporate resolution purported to guarantee automobile purchases and leases from a luxury automobile dealership by prospective customers. Mizenko filed an Answer to the Complaint, admitting that he affixed the AEFA officer's

signature to the corporate resolution, but asserting that he was informed, and had good reason to believe, that he had the officer's knowledge and consent, which he later learned, he did not. Mizenko requested a hearing, which was held in Cleveland, Ohio, on November 4, 2003, before a Hearing Panel composed of the Hearing Officer and two members of the District 8 Committee.

Findings of Fact[1]

In 1988, Mizenko became registered as a general securities representative and Investment Company/Variable Contracts representative with AEFA, and later, as an Investment Company/Variable Contracts principal. On September 27, 2001, AEFA filed a Uniform Termination Notice for Securities Industry Registration Form U-5, terminating his employment and registrations. Complaint ¶1; CX 1. Prior to his termination for the forgery, Mizenko had no disciplinary history or customer complaints. Tr. 220.

The Professional Athlete's Program

DT, a former professional athlete with distant family ties to a well-known boxing promoter, had contacts with a number of professional athletes. In the fall of 2000, after searching the Yellow Pages, he contacted Darrell DeMarko, an associate of Mizenko at AEFA, with an idea to introduce college athletes who were about to turn professional to a financial advisor who could help them conserve and grow the large incomes they anticipated to receive in the near future. Tr. 230-34, 237-240.

Mizenko had known DeMarko since about 1990, when they were introduced by a mutual friend, shortly before DeMarko became associated with AEFA in the same office where Mizenko was located. Tr. 234-35. DeMarko introduced DT to Mizenko, who

[1] References to Enforcement's exhibits are designated as CX_; Respondent's exhibits, as RX_; and the transcript of the hearing, as Tr._.

DeMarko brought into the plan because DeMarko did not consider himself to be sophisticated enough or knowledgeable enough to work with professional athletes. Tr. 237. Mizenko's initial role was to deal with the athletes when they came through the door; DeMarko's role was to build up the clientele. Tr. 246. Mizenko informed Theodore M. Jenkin, Group Vice President of AEFA, about his efforts to attract professional athletes as potential AEFA customers. Jenkin helped Mizenko exhaust AEFA resources for that program, obtaining from an AEFA bank affiliate at least one unsecured credit line of $5,000 for an athlete. Tr. 24-25, 39, 57-58.

DT came up with the idea that, to show their support and belief in college athletes who were about to turn professional, they should help them obtain automobile loans or leases by having AEFA co-sign for the loans or leases. Once the athletes signed their contracts and received income, the loans or leases would be refinanced in the athletes' names only. Tr. 244-47. DT presented the idea to DeMarko who, in turn, told Mizenko about it. DT claimed that another large broker-dealer had done the same thing in some fashion, so Mizenko thought the idea possible. It was DeMarko's responsibility to obtain AEFA's agreement to co-sign the loans or leases. Tr. 246-47.

Later in the fall of 2000, DeMarko briefly showed Mizenko a blank form of a corporate resolution guaranteeing loans and leases, that he had obtained from RW, an automobile salesman with whom he proposed to do business. DeMarko said that if AEFA approved the resolution, they could "do the program." About a week later, DeMarko came into Mizenko's office and told him that he had gotten a signature on the corporate resolution. Tr. 250. DeMarko also said that he and Mizenko had to sign the document as local contacts. Tr. 251. Mizenko signed the document and returned it to

DeMarko. Tr. 252. Because he had worked with DeMarko for ten years, he did not inquire about the corporate officer who signed the resolution or how DeMarko got in touch with him. Tr. 252-53.

<u>The Forged Document</u>

At some time in the Spring of 2001, RW switched automobile dealerships, at the same approximate time that, to be closer to his home, DeMarko left the Hudson, Ohio, office of AEFA, to move to the AEFA office in Tallmadge, Ohio. Tr. 254-55. DT kept coming into the Hudson office, and Mizenko started taking more of a lead in the development of the professional athletes program. Tr. 256.

In late Spring 2001, RW called Mizenko, telling him that, because a new dealership was involved, he would need a new corporate resolution guaranteeing the automobile loans or leases. RW sent Mizenko a blank form. Mizenko called DeMarko about the need for the new form. DeMarko told Mizenko to hold the form until he found out what needed to be done. Tr. 256-58, 308. RW called several times, asking where the form was. Mizenko, in turn, called DeMarko to ask about it. Tr. 260. After four or five days, DeMarko told Mizenko that the form was approved. Mizenko then offered to drive the form to DeMarko for a signature, but DeMarko said, "You don't need to. We have permission to transfer the signature from the existing form onto the new one." Tr. 259. Mizenko then traced the signature that was on the first form (CX 4) onto the new corporate resolution (CX 5). Tr. 261. Mizenko sent the form to RW, on or about June 6, 2001. Tr. 262; CX 6. Upon receiving the form, RW called Mizenko, telling him that the document needed a corporate seal. Mizenko told RW that he didn't know what a corporate seal was. RW replied, "any seal will do." Tr. 264. When Mizenko received

the form back from RW, he then crimped the form with his old notary seal at a couple of different angles so it would not be identified as a notary seal. Tr. 265. DT then delivered the form to RW.

Mizenko never sent any athletes to either dealership to purchase or lease automobiles. He received no financial benefit from any lease or purchase of an automobile under the professional athlete program. Tr. 266-67.

AEFA Investigation

On Monday evening, August 27, 2001, Mizenko received a phone call from AEFA compliance officer Sandy Smith, asking Mizenko to meet her the next day at the office in Independence, Ohio. Mizenko was not told, nor did he suspect, what the meeting was about. Tr. 267-68. He did not speak to DeMarko about the call, because he did not believe it was about the athletes program. Tr. 269. On Tuesday, August 28, 2001, Mizenko met with Smith and John Kohagen, AEFA director of investigations.

Mizenko readily admitted tracing the signature of the corporate officer, Thomas Schick, from the first corporate resolution ("Document #1") onto the second corporate resolution for the new automobile dealership ("Document #2").[2] He also admitted using his notary seal to affix a purported corporate seal on Document #2. Kohagen and Smith left Mizenko alone so that he could handwrite a letter to Jenkin, telling him what had happened. Tr. 141-42.

The only disputed question of fact revolves around the question whether Mizenko knew, at the time he traced Shick's signature onto Document #2, that the signature on Document #1 was not genuine. If he knew it was not genuine, then he had no reason to

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[2] The investigator had not known of the first corporate resolution until Mizenko told him about it during the interview. Tr. 99, 102-103.

believe that he had Shick's authority to affix his signature to Document #2. Kohagen was unwavering in his testimony that Mizenko admitted that, at the time he traced Shick's signature, he knew that Shick's signature on Document #1 was not genuine. On the other hand, Mizenko was unwavering in his testimony that he only learned that Schick's signature was not genuine during his interview with Kohagen and Smith. He testified that when Kohagen asked him about the genuineness of Shick's signature, he thought that Kohagen was referring to Document #2, not to Document #1. Mizenko told Kohagen, and Kohagen learned for the first time, about the existence of Document #1 during the interview. Mizenko testified, and he told Kohagen and Smith, that when DeMarko gave him Document #1, it already bore the signature of Schick. Tr. 277; CX 4. Mizenko testified that he did not know who signed Schick's name to that document.[3] Tr. 277. Smith does not recall the discussion regarding when Mizenko learned that the signature of Document #1 was not genuine. Tr. 155, 157-58.

With the exception of the disputed testimony, Mizenko candidly admitted his role in the forgery of Document #2, the second corporate resolution. Smith described Mizenko at the interview as being cooperative, "[v]ery, very nervous," and feeling "bad" about what had happened. He expressed his contrition in the letter he wrote to Jenkin. Tr. 142, 151; CX 9. He testified that, after he signed that letter, Kohagen suggested to him that "to make things go better for me, he needed me to write on there that I didn't have Thomas Schick's permission to sign the second document. And so that's what I wrote." Tr. 282. Mizenko signed the letter for the second time after he wrote that he did not have Schick's permission. CX 9.

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[3] Mizenko denied that he signed Shick's name to Document #1, and a handwriting expert called by Mizenko, testified that Shick's signature on that document could not have been written by Mizenko. Tr. 183-87.

The Hearing Panel credits Mizenko's testimony that, until the time of the interview, he did not know that Schick's signature on Document #1 was not genuine. Because the existence of that Document was not known to the investigator until the time Mizenko informed him about it, it is likely that there was some confusion about which signature was the subject of Kohagen's questions. That confusion could account for the disparity in the testimony of the two witnesses. In any event, the Hearing Panel does not find Kohagen's testimony persuasive enough to prove, by a preponderance of the evidence, that Mizenko knew, at the time he affixed Schick's signature to Document #2, that the signature on Document #1 was not genuine.

Discussion

NASD's disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security. *See, e.g., Vail v. SEC*, 101 F.3d 37, 38 (5th Cir. 1996). Forgery is a violation of Conduct Rule 2110. *See Dist. Bus. Conduct Comm. v. Peters*, No C02960024, 1998 NASD Discip. LEXIS 42, at **4-5 (NAC Nov. 13, 1998) (citation omitted). By copying Schick's signature onto a corporate resolution, without Schick's knowledge or consent, Mizenko forged his signature, in violation of Conduct Rule 2110.

Sanctions

The NASD Sanction Guidelines for forgery call for a fine of $5,000 to $100,000, and, where mitigating factors exist, consideration of a suspension for up to two years. In egregious cases, the Guidelines recommend consideration of a bar. NASD SANCTION GUIDELINES, at 43. There are two principal considerations: (1) the nature of the

document forged, and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority. *Id*.

The document on which Mizenko forged Schick's signature guaranteed automobile purchase financing or leases for prospective professional athletes who, because of their present financial circumstances, could not qualify for such financing or leases. The seriousness of the forgery was aggravated by the fact that the form that was forged failed to specify any limit to the amount of money AEFA was purportedly guaranteeing. The space on which that amount was to be specified was left blank. CX 5. AEFA paid $10,000 to Toyota Motor Credit Corporation to settle litigation that arose as a result of the corporate resolution. Tr. 129-30.

Mizenko argues that he had a good-faith belief that he had authority from Schick to sign his name, because DeMarko, who was responsible for getting corporate authorization for the automobile financing and lease guarantee, told him that Schick gave his permission to have his signature transferred to the new corporate resolution. Although Mizenko did not know that Schick's signature on the first corporate resolution was not genuine, the Hearing Panel concludes that he was grossly negligent in believing that he had authority to trace Schick's signature on the new resolution, solely on the basis of bald representations by DeMarko that he had such authority. Mizenko should have realized that DeMarko's statement was highly suspicious. No corporate officer would be likely to authorize someone to trace his signature onto a corporate resolution. That negligence was compounded when, informed that the corporate resolution needed a seal,

he faked one by using his own notary seal and rubbing the impression to disguise its true nature.

Although the violation of Conduct Rule 2110 is serious, the Hearing Panel finds certain mitigating circumstances that warrant a sanction less than a bar. Mizenko readily admitted forging the signature, cooperated with the investigation into the forgery, and immediately expressed his embarrassment and contrition. His actions were aberrant and not part of a pattern of conduct intended to deceive his employer. Finally, no customer was harmed, and Mizenko gained no personal benefit from his misconduct. Since his termination from AEFA, he has worked only a few months, earned a small amount of money at approximately one-third of his former salary, and is behind in his mortgage payments. Accordingly, to remediate his misconduct, the Hearing Panel will fine Mizenko $5,000, suspend him in all capacities for 18 months, order him to requalify in all capacities, and order him to pay costs in the total amount of $1,004.50, consisting of a $750 administrative fee and a $254.50 transcript fee.

Conclusion

For forging a corporate officer's signature on a corporate resolution, in violation of Conduct Rule 2110, Mark F. Mizenko is fined $5,000, suspended in all capacities for 18 months, ordered to requalify in all capacities, and ordered to pay costs in the total amount of $1,0004.50.

The sanctions shall become effective on a date determined by NASD, but not sooner than 30 days from the date this Decision becomes the final disciplinary action of NASD, except that, if this Decision becomes the final disciplinary action of NASD, the

suspension shall become effective with the opening of business of Tuesday, February 17, 2004, and end at the close of business on Tuesday, August 16, 2005.

SO ORDERED.

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Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:

Via First Class Mail & Overnight Courier
Mark F. Mizenko

Via First Class Mail & Facsimile
David G. Umbaugh, Esq.

Via First Class & Electronic Mail
Pamela Shu, Esq.
James M. Stephens, Esq.
Rory C. Flynn, Esq.