

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A020039
v.	:	
	:	HEARING PANEL DECISION
SALVATORE CLARK	:	
(CRD #2580477)	:	Hearing Officer - SW
Deer Park, NY,	:	
	:	
Respondent.	:	November 10, 2003
	:	

Respondent was suspended for 10 business days and fined \$7,500 for executing one unauthorized trade in customer EO's account in violation of Rule 2110. The Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that (i) Respondent executed nine additional unauthorized transactions in customer MI's account, or (ii) Respondent was responsible for the failure to execute two additional transactions in MI's account. The Hearing Panel also directed Respondent to pay \$3,263.06 for the costs of the Hearing.

Appearances

Roger D. Hogoboom, Jr., Esq., Regional Counsel, Denver, CO, and Michael J. Newman, Esq., Regional Counsel, Woodbridge, NJ, for the Department of Enforcement.

Michael S. Finkelstein, Esq., and Timothy Feil, Esq., Finkelstein & Feil, LLP, Garden City, NY, for Salvatore Clark.

DECISION

I. Introduction

A. Complaint and Answer

NASD Department of Enforcement ("Enforcement") filed a one-count Complaint on August 12, 2002, alleging that Respondent Salvatore Clark ("Respondent"), while

associated with Cambridge Capital, LLC (“Cambridge Capital”), engaged in unauthorized transactions and failed to execute buy orders in violation of NASD Conduct Rule 2110. Specifically, Respondent is alleged to have: (i) executed one unauthorized transaction in customer EO’s Cambridge Capital account; (ii) executed nine unauthorized transactions in customer MI’s Cambridge Capital account; and (iii) failed to execute two buy orders in customer MI’s Cambridge Capital account.

Respondent denied the allegations.

B. The Hearing

The Parties presented evidence to a Hearing Panel, consisting of two current members of the District 10 Committee and the Hearing Officer, on June 10, 2003, at a Hearing in New York, New York.¹ Closing arguments were presented telephonically on July 3, 2003.

During the Hearing, Enforcement presented exhibits labeled CX-1--CX-18, which were accepted. Subsequently, on July 2, 2003, Enforcement presented two additional exhibits, which were accepted. Enforcement presented the testimony of four witnesses: (i) the two customers, EO and MI; (ii) an NASD employee, Caryn Gentry²; and (iii) Respondent. Respondent also testified on his own behalf.

¹ References to the testimony set forth in the transcript of the June 10, 2003 Hearing will be designated as “Tr. p.” with the appropriate page number. References to exhibits presented jointly by Enforcement and Respondent will be designated as “CX-.”

² At the time of the investigation in 2000, Ms. Gentry, an NASD senior compliance examiner, was known as Ms. Napoli. (Tr. pp. 94-95).

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

In May 1995, Respondent initially became registered as a general securities representative with Gaines, Berland Inc. (CX-1, pp. 10, 12). From October 21, 1998 to April 5, 2000, Respondent was registered as a general securities representative with Cambridge Capital. (CX-1, p. 5). Respondent is currently registered with Joseph Stevens & Company, Inc. (“Joseph Stevens”). (CX-1, p. 1). Enforcement filed the Complaint in this proceeding on August 12, 2002 while Respondent was registered with Joseph Stevens. (Id.). Accordingly, NASD has jurisdiction over this proceeding.

B. Unauthorized Transactions

According to IM-2310-2, unauthorized trading is “[c]ausing the execution of transactions which are unauthorized by customers or the sending of confirmations in order to cause customers to accept transactions not actually agreed upon.”³ The Securities and Exchange Commission has affirmed that unauthorized trading in a customer’s account is a violation of Conduct Rule 2110’s requirement to observe just and equitable principles of trade.⁴

1. Customer EO’s Account

The Complaint alleges that Respondent, on April 14, 1999, executed an unauthorized trade in customer EO’s account for the purchase of 2,000 shares of Preview

³ IM-2310-2(b)(4)(A)(iii).

⁴ In re Robert Lester Gardner, Securities Exchange Act Release No. 35899, 1995 SEC LEXIS 1532, at 1 n.1 (1995).

Travel, Inc. (“Preview Travel”) for a cost of \$49,142.50. This trade generated a net commission to Respondent of \$1,285. (CX-18, p. 36).

The evidence supporting the allegations of the Complaint regarding EO’s account consists of EO’s testimony, and a tape recording of several telephone conversations between EO and Respondent provided by EO.

EO is a chartered accountant, residing in New Zealand. (Tr. pp. 177-178). In January 1999, EO opened an account at Cambridge Capital in response to a cold call received from Respondent. (Tr. pp. 178-179). On January 14, 1999, EO completed an account statement with Cambridge Capital, which listed as EO’s investment objectives: (i) preservation of capital; (ii) speculation; and (iii) growth. (CX-9, p. 1). Between January 1, 1999 and March 31, 1999, there were 38 transactions executed in EO’s account. (CX-10, pp. 1-6).

On April 14, 1999, at 11:14 a.m., Eastern Time, Respondent executed a purchase of 2,000 shares of Preview Travel at \$24.5625 per share for \$49,142.50. (CX-11, p. 1). When Respondent executed the purchase, it was 3:14 a.m., on April 15, 1999, for EO in New Zealand. (CX-13).

In a telephone conversation taped by EO, Respondent advised EO that he had purchased Preview Travel at \$24 per share. (CX-16, p. 11). EO expressed surprise at the purchase, indicating that he had not authorized the purchase. (Id.). Respondent stated that he had tried to reach EO prior to the purchase, and that he had told EO he was going to sell Fresh America Corp (“FRES”) stock.⁵ (Id.). Respondent advised EO that, in any

⁵ On April 14, 1999, Respondent sold 2,500 shares of FRES stock in EO’s account. (CX-18, p. 36).

event, the price of Preview Travel had increased.⁶ (CX-16, p. 11). EO responded that the price of Preview Travel had gone down and then gone up and indicated that Preview Travel was losing money. (Id.).

EO testified that he had never heard of Preview Travel before he saw it on his account statement. (Tr. pp. 188-189). Respondent testified that he and EO had previously discussed Preview Travel, and EO had agreed to purchase Preview Travel “when it got near” \$25 per share. (Tr. p. 234). Although the taped conversation provided by EO indicated that there was a prior telephone conversation about the sale of FRES stock, the other taped conversations provided by EO did not reflect a discussion of an intention to sell FRES stock. (CX-16). However, whether or not all of the prior telephone discussions have been provided to the Hearing Panel, it is clear that EO was surprised that Respondent had purchased Preview Travel on April 14, 1999.

2. Unauthorized Trading in Customer EO’s Account Proven

Although Respondent may have believed that EO had agreed to purchase Preview Travel upon the sale of the FRES shares, the Hearing Panel finds that the preponderance of the documentary evidence supports EO’s statement that he did not specifically authorize Respondent to purchase the Preview Travel securities. Respondent’s own words indicate that he tried to reach EO prior to executing the Preview Travel trade, but was unable to reach him. (CX-16, pp. 11-12).

The Hearing Panel believes that Respondent executed the trade believing that EO would accept his advice. (CX-16, p. 11). In fact, EO did accept Respondent’s recommendation and decided to hold on to the stock. (CX-16, p. 12; Tr. p. 221).

⁶ On April 30, 1999, the current price of Preview Travel was \$26.00 per share. (CX-10, p. 7).

However, subsequent customer ratification does not excuse an unauthorized transaction.⁷ Accordingly, the Hearing Panel finds that the Preview Travel purchase was unauthorized and that Respondent violated Conduct Rule 2110.

3. Customer MI's Account

The Complaint alleges that, from March 10, 1999 to April 27, 1999, Respondent executed nine transactions in MI's account, without MI's authorization, and was responsible for the failure to execute two additional buy orders in MI's account.

The primary evidence supporting the allegations of the Complaint with respect to MI's account is the testimony of MI.

MI is a chartered accountant, residing in Ireland. (Tr. pp. 19-20, 66). At the time of the alleged unauthorized purchases and sales, MI was the CEO of a wholesale food company, ADM. (CX-2, p. 1; Tr. p. 19). MI opened an account with Respondent based on the recommendation of the chairman of ADM, JF. (Tr. pp. 20-21, 245). Respondent testified that JF was a substantial client. (Tr. p. 245). MI initiated the call to Respondent to open the account. (Tr. pp. 21, 245).

a. Dell 1,000 Share Buy Order

On February 18, 1999, MI (i) authorized Respondent to open a Cambridge Capital account, (ii) authorized Respondent to execute the purchase of 1,000 shares of Dell Computer Corp. ("Dell") stock, and (iii) agreed to wire the funds to pay for the purchase. (Tr. p. 22; CX-4, p. 1).

⁷ Dist. Bus. Conduct Comm. v. Euripides, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45 (NAC, July 28, 1997) (The fact that a customer accepts an unauthorized trade does not affect the NASD's authority to discipline the salesman for effecting it).

MI testified that, on February 18, 1999, he told Respondent it would take approximately two weeks to pay for the Dell shares. (Tr. p. 22). Respondent testified that it was his understanding that MI would pay for the shares immediately. (Tr. p. 247). On February 19, 1999, at 10:05 a.m., Eastern Time, (marked February 18, 1999), Respondent executed a purchase of 1,000 shares of Dell in a cash account for MI with a settlement date of February 24, 1999. (CX-4, p. 1). The execution of the Dell purchase in a cash account is consistent with an understanding of immediate payment for the shares.

On February 19, 1999, Cambridge Capital sent a welcome letter to customer MI. (CX-2, p. 6). MI completed account documents for his Cambridge Capital account on February 28, 1999, stating his investment objectives were speculation and short-term gain. (CX-2, p. 1).

When MI did not timely send in the funds, the 1,000 shares of Dell were purchased again on March 5, 1999, in a margin account for MI with a settlement date of March 5, 1999. (CX-4, p. 2). Subsequently, on March 5, 1999, Cambridge Capital canceled the purchase of 1,000 shares of Dell as of February 19, 1999 for nonpayment, and transferred the 1,000 Dell shares to Cambridge Capital's firm account. (Id.).

After the Dell purchase was canceled, Cambridge Capital received, on March 8, 1999, a wire transfer of funds from MI in the amount of \$84,015. (CX-3, p. 2). Confirmation of the cancellation of the Dell purchase was sent to MI on March 5, 1999, at his home address, and the cancellation appeared on MI's account statement, for the period March 1, 1999 to March 31, 1999, which was also sent to his home address.⁸ (CX-4, p. 2;

⁸ MI testified that mail from the United States to Ireland took approximately 3 to 4 days to arrive. (Tr. p. 68).

CX-3, p. 2). Nevertheless, MI testified that he did not discover that the Dell purchase had been canceled until he discussed the matter with an NASD employee in August or September 1999.⁹ (Tr. pp. 23-24, 53, 65).

b. Lycos 2,500 Share Buy Order

On March 10, 1999, Respondent spoke with MI to recommend the purchase of Lycos, Inc. (“Lycos”) stock. (Tr. pp. 25, 251). MI and Respondent agreed that they initially discussed the possibility of MI purchasing 5,000 shares of Lycos. (*Id.*). Ultimately, MI authorized the purchase of 2,500 shares of Lycos, with a downside risk of \$5.00 per share. (Tr. p. 25).

Respondent testified that he alerted MI that MI would not be permitted to purchase 2,500 shares of Lycos because of the earlier late payment for the Dell shares. (Tr. p. 291). On March 10, 1999, at 9:40 a.m., Eastern Time, Respondent executed a purchase of 1,500 shares of Lycos at \$115.5625 per share for \$173,358.75. (CX-4, p. 3). MI testified that he called Respondent the next day to discuss Lycos, and that he did not speak with Respondent again after the March 11, 1999 conversation. (Tr. pp. 26, 36-37).

On March 26, 1999, MI sent a fax to Respondent questioning the amount of the funds to be sent to Cambridge Capital. (CX-6, p. 1).

On March 24, 1999, Capital Cambridge transferred the Lycos purchase from MI’s cash account to a margin account for MI, thereby extending the settlement date from March 15, 1999 to March 24, 1999. (CX-4, p. 4).

⁹ Cambridge Capital had only sent one prior account statement to MI before it sent the March account statement showing the Dell cancellation. (CX-4).

On April 1, 1999, at 9:26 a.m., Eastern Time, there was a 1.2-minute telephone call, from Cambridge Capital to MI's business telephone number. (CX-7, p. 1; CX-2, p. 1). On April 1, 1999, at 2:45 p.m., Eastern Time, Respondent executed the sale of the 1,500 shares of Lycos stock at \$88.125 per share for \$130,920.51. (CX-4, p. 5). The sale of Lycos resulted in a loss to MI of \$42,438.24. (CX-8, p. 1). The commission on the sale was reduced from full commission to \$1,245.08. (CX-4, p. 5).

c. Seven Additional Transactions

On April 8, 1999, at 10:01 a.m., Eastern Time, there was a .9-minute telephone call from Cambridge Capital to MI's business telephone number. (CX-7, p. 3; CX-2, p. 1). On April 8, 1999, at 2:00 p.m., Eastern Time, Respondent executed a purchase of 1,000 shares of stock of Broadcom Corp. ("Broadcom") at \$74 per share for \$74,017.50. (CX-4, p. 6).

On April 10, 1999, MI sent another fax to Respondent questioning the amount of the funds to be sent to Cambridge Capital, but did not mention unauthorized trading. (CX-6, p. 2).

On April 21, 1999, at 11:10 a.m., Eastern Time, Respondent executed a purchase of 1,000 shares of Lycos stock at \$92.25 per share for \$92,267.50. (CX-4, p. 7).

On April 22, 1999, at 3:35 p.m., Eastern Time, Respondent executed a purchase of 1,000 shares of stock of Healtheon Corp. ("Healtheon") at \$53.8125 per share for \$53,830. (CX-4, p. 8).

On April 23, 1999, at 12:27 p.m., Eastern Time, Respondent executed the sale of the 1,000 shares of Lycos at \$93.625 per share for \$93,604.37. (CX-4, p. 9).

On April 27, 1999, at 10:01 a.m., Eastern Time, Respondent executed the sale of 1,000 shares of Healthcon at \$53.00 per share for \$52,980.73. (CX-4, p. 11).

On April 27, 1999, at 10:02 a.m. Eastern Time, Respondent executed the sale of the 1,000 shares of Broadcom at \$75.375 per share for \$75,354.98. (CX-4, p. 10).

On April 27, 1999, at 11:19 a.m., Eastern Time, there was a 1.8-minute telephone call from Cambridge Capital to MI's business telephone number. (CX-7, p. 3; CX-2, p. 1).

On April 27, 1999, at 11:50 a.m., Eastern Time, Respondent executed a purchase of 3,000 shares of stock of Onemain.com Inc. ("Onemain.com") at \$35.9375 per share for \$107,830. (CX-4, p. 12).

In a May 12, 1999 response letter, MI wrote Cambridge Capital stating that he had not spoken with Respondent since March 11, 1999, and indicating that all of the transactions after March 11, 1999 were unauthorized. (CX-6, p. 3).

d. Sellout of Onemain.com

On May 17, 1999, Cambridge Capital sold 1,763 shares of Onemain.com at 25.875 per share. (CX-4, p. 13). On May 24, 1999, Cambridge Capital sold 282 shares of Onemain.com at \$20.3125 per share. (CX-4, p. 14). On May 25, 1999, Cambridge Capital sold 347 shares of Onemain.com at 18.5625 per share. (CX-4, p. 15). On June 15, 1999, Respondent sold 608 shares of Onemain.com at 14.5625 per share. (CX-4, p. 16). The Onemain.com shares were sold out of MI's account at a loss of \$42,222.87. (CX-8, p. 2).

4. Unauthorized Trading in MI's Account Not Proven

The Hearing Panel determined that Enforcement did not prove by a preponderance of the credible evidence that Respondent (i) was responsible for the failure to execute the purchases of 1,000 shares of Dell and 2,500 shares of Lycos, or (ii) executed nine

purchases and sales in MI's account without MI's approval. Respondent did execute the purchase of 1,000 shares of Dell stock, but the purchase was cancelled because of MI's failure to pay for the shares timely. Cambridge Capital did not permit Respondent to execute the purchase of 2,500 shares of Lycos, but only authorized the purchase of 1,500 shares of Lycos.

MI testified that he did not speak with Respondent after March 11, 1999. However, according to the excerpt of telephone records provided by Enforcement, Respondent executed the sale of Lycos on April 1, 1999 after there was a 1.2-minute telephone call to MI. Respondent executed the purchase of Broadcom on April 8, 1999 after there was .9-minute telephone call to MI. Respondent executed the purchase of Onemain.com on April 27, 1999 after there was a 1.8-minute telephone call to MI.

MI testified that he was getting a lot of calls from Respondent to his office and mobile telephone, which he refused to accept. (Tr. p. 43). The excerpt of telephone records presented by Enforcement contained only three telephone calls to MI. (CX-7). Ms. Gentry, the NASD examiner, testified that she did not know whether the complete Cambridge Capital telephone records contained telephone listings for either MI's home telephone number or his mobile telephone number. (Tr. pp. 113, 148). Accordingly, the Hearing Panel finds that the excerpt of telephone records presented by Enforcement did not definitively prove that Respondent did not speak with MI after March 11, 1999.

MI testified that he told Respondent that it would take approximately two weeks to provide the funds for the purchases of 1,000 shares of Dell and 2,500 shares of Lycos; however, the initial purchases were executed in a cash account requiring immediate payment. (Tr. pp. 22, 29; CX-4, pp. 1, 3). MI testified that he did not remember

Respondent ever discussing margin interest in connection with his purchases of Dell and Lycos. (Tr. pp. 92-93). MI described himself as a conservative investor. (Tr. p. 73). Later, MI stated that he opened an account because the “Market was going quite high, I wanted to get in and take advantage of that. Sal told me he was very good at doing that.” (Tr. p. 89)

Enforcement alleged that Respondent engaged in unauthorized transactions in MI’s account for the \$18,619.63 in commissions earned on the transactions. (CX-8, p. 2; Tr. p. 119). However, MI’s account suffered a loss of \$42,222.87 when shares of Onemain.com stock were sold out because MI failed to pay for the securities, and Respondent testified without contradiction that Respondent was responsible for losses from sellouts. (Tr. p. 290).

It is not a typical practice for a broker to execute unauthorized trades in an account that has insufficient funds and a history of the customer not providing funds in a timely manner. Respondent explained that he continued to execute transactions in the account although it did not have sufficient funds because MI continued to promise to send in funds, and he believed MI’s promises because a substantial client had recommended MI.

The Hearing Panel found that both Respondent and MI would have reason to shade the truth and yet they appeared to be equally credible.¹⁰ Consequently, it was necessary to base the decision primarily on documentary evidence rather than on the testimony of either party. The Hearing Panel found that Enforcement failed in its burden

¹⁰ MI testified that he had initially delayed filing a lawsuit against Respondent because of the NASD investigation, which, upon completion, he thought would strengthen any legal case against Respondent. (Tr. p. 49).

of showing by a preponderance of the credible evidence that Respondent executed unauthorized trades in MI's account.

III. Sanctions

The Sanction Guidelines for unauthorized transactions suggest a fine between \$5,000 and \$75,000, a suspension of 10 business days to one year, and a longer suspension of up to two years or a bar, in egregious cases.¹¹

The two principal considerations listed in the Guidelines for determining the sanctions for unauthorized transactions are (i) whether the respondent misunderstood his or her authority or the terms of the customer's orders, and (ii) whether the unauthorized trading was egregious.¹²

The National Adjudicatory Council has identified the following three categories of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading, *i.e.*, unauthorized trading that is egregious because of the sheer number of unauthorized trades executed; (2) unauthorized trading accompanied by aggravating factors, such as efforts to conceal the unauthorized trading, attempts to evade regulatory investigative efforts, customer loss, or history of similar misconduct; and (3) qualitatively egregious unauthorized trading, *i.e.*, the strength of the evidence, and respondent's motives, whether the respondent acted in bad faith or as a result of reasonable misunderstanding.¹³

¹¹ NASD Sanction Guidelines, p. 102 (2001).

¹² Id.

¹³ See Dist. Bus. Conduct Comm. v. Hellen, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999).

A. Enforcement's Recommendation

Enforcement argued that the case was egregious because (i) of the sheer number of unauthorized transactions, ten unauthorized transactions (nine unauthorized transactions in MI's account and one unauthorized transaction in EO's account), and (ii) the unauthorized trades were qualitatively egregious based the strength of the evidence of the unauthorized trading, the taped conversation provided by EO, and Respondent's financial motive to earn \$19,954.51 in commissions.

Accordingly, Enforcement recommended that Respondent be: (i) suspended for two years; (ii) fined \$44,954.51 (\$25,000 fine plus commissions of \$19,954.51); and ordered to pay restitution to EO and MI for their actual losses in the amounts of \$15,109.92 and \$82,836, plus interest, respectively.

B. Hearing Panel's Findings

The Hearing Panel found that Enforcement did not prove by a preponderance of the credible evidence that Respondent executed the nine transactions in MI's account without MI's approval, or that Respondent was responsible for the failure to execute the Dell and Lycos purchases in MI's account. Consequently, the Hearing Panel did not impose any sanctions with respect to the transactions in MI's account.

The Hearing Panel did find that Respondent executed one unauthorized purchase of Preview Travel in customer EO's account. The Hearing Panel considered (i) whether Respondent misunderstood his authority or the terms of the customer's orders, and (ii) whether the unauthorized trading was egregious.

The taped conversations provided by EO indicated that there were prior telephone conversations, which were not provided to the Hearing Panel, consistent with

Respondent's testimony. (CX-16). In addition, the Hearing Panel found that the one unauthorized trade is not egregious either based on sheer numbers, or based on qualitative factors, i.e., evidence of unauthorized transaction and the financial motive of \$1,285.

Accordingly, the Hearing Panel decided that Respondent should be fined \$7,500 and suspended for 10 business days.

EO testified that Respondent told him Preview Travel was worth keeping so he decided, "to hang on to it to see what was happening . . ." (Tr. p. 221). Consequently, although the purchase of the shares of Preview Travel was unauthorized, the Hearing Panel determined not to require restitution for customer EO's \$15,109.92 loss. The Hearing Panel found that Customer EO made an investment decision to hold the Preview Travel stock. There was no evidence presented that distinguished between the losses incurred in the Preview Travel stock after EO decided to hold the stock, from losses, if any, incurred prior to EO's decision to hold the stock.

IV. Order

Respondent Clark is suspended for 10 business days and fined \$7,500 for executing one unauthorized trade in customer EO's account in violation of Rule 2110. The Hearing Panel also directs Respondent to pay \$3,263.06 for the costs of the Hearing, consisting of a \$750.00 administrative fee and \$2,513.06 for the cost of the Hearing transcripts.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this decision becomes the final disciplinary action of NASD, except that, if this decision becomes the final disciplinary action of NASD, the ten-business day suspension shall become effective with the opening of business on Monday, January 5,

2004 and end at the close of business on January 16, 2004.¹⁴

SO ORDERED.

HEARING PANEL

by: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
November 10, 2002

Copies to:

Salvatore Clark (via Federal Express and first class mail)
Michael S. Finkelstein, Esq. (via facsimile and first class mail)
Roger D. Hogoboom, Jr., Esq. (via electronic and first class mail)
Michael J. Newman, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

¹⁴ The Hearing Panel has 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.