

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN R. BINGHAM
(CRD #1917145)

Belize, Central America,

Keller, Texas,

Wichita, Kansas,

Respondent.

Disciplinary Proceeding
No. C05020060

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

August 27, 2003

Respondent engaged in unauthorized transactions, in violation of NASD Conduct Rule 2110, and he failed to respond to requests for information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The Respondent is barred from association with any member firm in any capacity for each violation.

Appearances

Mark P. Dauer, Regional Counsel, New Orleans, LA (Rory C. Flynn, Chief Litigation Counsel, Washington, D.C., Of Counsel) for the Department of Enforcement.

Respondent John R. Bingham appeared on his own behalf.

DECISION

I. Introduction

On January 13, 2003, the Department of Enforcement (“Enforcement”) filed this disciplinary proceeding against the Respondent John R. Bingham (“Bingham” or the

“Respondent”). The Complaint contains two causes. The First Cause of Complaint alleges that the Respondent effected 20 unauthorized securities purchase transactions, totaling \$2,007,833.61, for the account of public customers NB and TB, in violation of NASD Conduct 2110. The Second Cause of Complaint alleges that the Respondent failed to respond to two requests for information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

The Respondent answered the Complaint in the form of a letter to Enforcement dated January 21, 2003, denying the charges and waiving a hearing. In accordance with NASD Code of Procedure Rule 9241(d), the Hearing Officer determined that an Initial Pre-Hearing Conference was unnecessary and, instead, ordered the parties to submit their respective cases in writing.¹ On March 14, 2003, Enforcement submitted a Memorandum of Points and Authorities in Support of Complaint and four exhibits.² The Respondent failed to submit a response, and he has had no further contact with NASD regarding this proceeding.

Two current members of the District 5 Committee were appointed to serve as Hearing Panelists, along with the Hearing Officer.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

According to Bingham’s Central Registration Depository (“CRD”) Record, he was associated with NASD member firm Edward D. Jones & Co., now known as Edward Jones, from December 31, 1991, until his termination on July 24, 2001.³ Bingham had been a General

¹ Scheduling Order dated February 14, 2003.

² The exhibits are cited as “C-___.”

³ C-1, Ex. A at 2.

Securities Representative since March 1998.⁴ Currently, Bingham is neither associated with an NASD member firm nor registered with NASD.⁵ Bingham's latest registration terminated effective August 13, 2001.⁶

The Hearing Panel finds that, under NASD By-Laws Article V, Section 4, NASD has jurisdiction of this proceeding. Enforcement filed the Complaint within two years after Bingham's registration as a General Securities Representative terminated. Moreover, the Complaint alleges misconduct while he was associated with Edward Jones and failure to respond to requests for information that were issued within two years of the date his registration terminated.

B. Unauthorized Transactions

The First Cause of Complaint alleges that, from on or about February 1, 2001, through on or about February 12, 2001, Bingham effected 20 unauthorized securities transactions, totaling \$2,007,833.61, in NB and TB's account at Edward Jones.⁷

According to NB, he and his wife opened a money market account at Edward Jones in September 1996 with an initial deposit of \$14,485.⁸ NB also maintained a custodianship account at Edward Jones for the benefit of his granddaughter.⁹

On January 31, 2001, NB sold a piece of real estate and deposited the sales proceeds in the amount of \$2,104,995 into his Edward Jones money market account.¹⁰ The next day, NB went

⁴ *Id.* at 4.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ Bingham canceled nine of the trades. Accordingly, Enforcement seeks a finding of liability only with respect to the 15 unauthorized transactions that settled. *See* Enforcement's Mem. of P. & A. in Supp. of Compl. at 4, 9.

⁸ C-2 (Aff. of NB) at ¶ 2.

to the local Edward Jones branch office to transfer the custodianship on his granddaughter's account to her mother.¹¹ Pat Edmondson ("Edmondson"), the office administrator who customarily assisted NB with his money market transactions, referred him to Bingham for advice on how to accomplish the change to his granddaughter's account.¹² NB had met Bingham in the past, but had never done any business with him. Bingham answered NB's questions about the transfer forms for his granddaughter's account and then spoke to him briefly about a financial plan.¹³ NB, who suffered poor vision and hearing, could not follow Bingham's presentation.¹⁴ The room was quite dark, and Bingham spoke too rapidly.¹⁵ After a few minutes, Bingham's assistant interrupted the meeting and stated that he had an appointment waiting. Bingham's assistant then ushered NB out of the office. NB left without understanding Bingham's presentation and without authorizing Bingham to effect any transactions in NB's account.¹⁶ During this brief meeting, Bingham did not ask NB any questions about his financial situation and needs.¹⁷

Despite the fact that NB had not authorized Bingham to make any investments on his behalf, on February 5, 2001, NB received a confirmation by mail, indicating that, on February 2, the day after the meeting, Bingham had purchased a collateralized mortgage obligation security

⁹ *Id.* ¶ 6.

¹⁰ *Id.* ¶ 5.

¹¹ *Id.* ¶¶ 6–7.

¹² *Id.*

¹³ *Id.* ¶ 9.

¹⁴ *Id.* ¶ 9.

¹⁵ NB observed that the office, which had no windows, was completely dark once the office door was closed except for the light from Bingham's computer screen. (C-2, at ¶ 8.)

¹⁶ C-2, at ¶ 9.

¹⁷ *Id.* ¶ 10.

for NB's account.¹⁸ NB immediately returned to the Edward Jones branch office and demanded to know who authorized the transaction.¹⁹ Edmondson referred NB to Bingham. However, rather than answer directly, Bingham once again began to hurriedly present his financial plan to NB.²⁰ After a few minutes, Bingham's assistant interrupted the meeting to inform Bingham that he had a conference call.²¹ NB was then ushered out of Bingham's office. Although Bingham never answered NB's question about who had authorized the transaction in his account, he left with the assumption that Bingham would cancel the unauthorized investment.²² At the time, NB did not know that Bingham also had made another nine purchases in NB's account on February 2.

Bingham did not cancel the purchase of the collateralized mortgage obligation security, but he did cancel the other nine purchases on February 5, 2001, only to re-enter eight of the unauthorized purchases on February 6 and 7 and to make an additional five unauthorized purchases on February 6, 7, and 12.²³

Concerned about the one known unauthorized transaction, NB unsuccessfully tried contacting Bingham several times following their meeting on February 5, 2001.²⁴ Bingham was

¹⁸ *Id.* ¶¶ 11–12; C-1, Ex. J.

¹⁹ *Id.* ¶¶ 11–12.

²⁰ *Id.* ¶ 13. Once again, NB observed that Bingham's computer screen provided the only light in his office.

²¹ *Id.*

²² *Id.*

²³ *See* C-1, Ex. J at 11-13. *See also* C-1, Ex. K.

²⁴ C-3 at ¶ 6.

never available.²⁵ Finally, on February 16, NB was directed to Dennis Jackson, another Edward Jones broker, who told NB about the additional purchases in his account.²⁶

NB then requested his son, KB, to contact Bingham to discuss the activity in his account.²⁷ KB spoke to Bingham by telephone, but was unable to resolve the situation. Bingham told KB that he made the trades in his parents' account in accordance with the "financial plan" Bingham had presented to NB.

Next, NB took a complaint letter to Bingham's office on February 20, 2001.²⁸ Edmondson informed NB that Bingham was not in the office, so NB tried to leave the letter with her. Edmondson refused to take the letter. Instead she prepared a memorandum, which NB signed, instructing Bingham not to effect further transactions without NB's written authorization.²⁹ Subsequently, NB complained to NASD and Edward Jones.³⁰ On March 2, 2001, NB retained counsel, who demanded that Edward Jones rescind the unauthorized trades.³¹ The firm rejected the demand, and NB filed an arbitration claim.³² On March 21, 2001, NB liquidated his account, at a loss of \$156,162.67 on the transactions at issue.³³

²⁵ *Id.*

²⁶ *Id.*

²⁷ C-2 at ¶ 5.

²⁸ *Id.* at ¶ 16; C-3, Ex. A.

²⁹ C-1, Ex. M.

³⁰ C-2 at ¶¶ 18, 21.

³¹ *Id.* at ¶ 22.

³² C-1, Ex. R.

³³ *Id.*, Ex. N; Ex. J at 52–90.

Based on the foregoing findings, the Hearing Panel concludes that Bingham violated NASD Conduct Rule 2110, as alleged in the Complaint. The SEC and NASD have consistently held that “unauthorized trading in a customer’s account violates Conduct Rule 2110.”³⁴ Here, the evidence establishes that, over a period of ten days, Bingham effected 15 unauthorized transactions totaling \$1,509,219.44. Moreover, Bingham made fourteen of the purchases after receiving instructions from NB not to trade in the account. None of the transactions resulted from a misunderstanding or a miscommunication.

In Bingham’s response to the Complaint, Bingham denied these allegations, stating that he and NB had engaged in several conversations and meetings about the investments. Bingham claimed that he called NB before each transaction and obtained his approval, then promptly mailed transaction confirmations. He asserted, “all transactions were placed with [NB’s] full knowledge and consent.” In his written explanation of the events to NASD Staff dated May 23, 2001 letter, Bingham also stated that NB showed very little concern about the investments until the financial markets took a downturn.³⁵

However, all of the evidence contradicts Bingham’s contentions. NB promptly and repeatedly complained about the unauthorized transactions, seeking redress first from Bingham, then from Edward Jones and NASD. In addition, NB had his son intervene on his behalf to obtain more information from Bingham, who refused to take NB’s telephone calls after their February 5

³⁴ *Jeffrey B. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4 at *13-14 (NAC Mar. 27, 2002) (citations omitted); *see also Robert Lester Gardner*, Exch. Act Rel. No. 35,899, 1995 SEC LEXIS 1532, at *1 n.1 (June 27, 1995); *Keith L. DeSanto*, Exch. Act Rel. No. 35,860, 1995 SEC LEXIS 1500 (June 19, 1995), *aff’d*, 101 F.3d 108 (2d Cir. 1996).

³⁵ C-1, Ex. B at 4.

meeting. This evidence indicates that the trades at issue were unauthorized.³⁶ Moreover, in his May 23 letter, Bingham acknowledged NB's frequent calls and messages and noted NB's growing concern about the trades. Bingham's unexplained cancellation and re-entry of trades in the account further erodes his credibility.³⁷ Additionally, Bingham was in a position to benefit financially from executing these unauthorized trades; he received \$16,200 in net commissions from the transactions.³⁸ In conclusion, the Hearing Panel finds that the evidence demonstrates that Bingham intentionally executed these 15 trades, without authorization, for his own economic benefit, in violation of NASD Conduct Rule 2110.

C. Failure to Provide Information

The Second Cause of Complaint alleges that Bingham failed to respond to two NASD requests for information issued pursuant to NASD Procedural Rule 8210.

NASD sent the first request, dated October 22, 2001, to Bingham via regular mail at his two residential addresses reported in CRD.³⁹ Bingham never responded to the request.⁴⁰

On November 7, 2001, NASD staff sent Bingham a second request via regular and certified mail at both his CRD addresses and two additional addresses that the staff then believed

³⁶ See *DBCC v. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22 at *13 (NAC June 15, 1999) (finding that customers' oral complaints and written complaints within 45 days of first learning about transactions supports an allegation of unauthorized trading).

³⁷ See C-1, Ex. K at 13-14.

³⁸ *Id.*, Ex. O.

³⁹ These addresses are: _____, Keller, Texas _____ and _____, Wichita, Kansas _____. C-1, Ex. A at 1.

⁴⁰ C-1 at ¶ 5.

might be more current than his CRD addresses. Bingham also never responded to the second request for information.⁴¹

NASD Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power.⁴² Under Procedural Rule 8210(d), notice of an information request is considered received if the request is mailed or otherwise transmitted to the person's last known CRD address. Accordingly, the Hearing Panel finds that Bingham received valid constructive notice of the requests for information and that, by failing to respond, he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

III. Sanctions

A. Unauthorized Trading

Based on the NASD Sanction Guideline for unauthorized trading⁴³ and the decision in *District Business Conduct Committee No. 10 v. Hellen*,⁴⁴ the Hearing Panel has determined to bar Bingham.

The Hearing Panel finds Bingham's conduct was egregious under the criteria set forth in *Hellen*. In that decision, the National Adjudicatory Council delineated three categories of

⁴¹ *Id.*

⁴² See *Joseph G. Chiulli*, Exch. Act Rel. No. 42359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information); *DOE v. Benz*, 2003 NASD Discip. LEXIS 11, at *18 (OHO Mar. 4, 2003), *appeal docketed*, No. C01020014 (NAC Mar. 31, 2003) ("Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD's self-regulatory function").

⁴³ NASD Sanction Guidelines, 102 (2001 ed.).

egregious unauthorized trading.⁴⁵ First, there is “quantitatively egregious” unauthorized trading, which is characterized by a large number of unauthorized transactions.⁴⁶ The existence of numerous unauthorized transactions “often constitutes compelling circumstantial evidence that the [trades] were not the result of miscommunications or mistakes.”⁴⁷ Second, there is unauthorized trading that is “egregious because it is accompanied by certain aggravating misconduct.” This type of egregious unauthorized trading includes those cases where a respondent attempts to conceal the conduct or to evade NASD investigative efforts, or where there is a history of prior unauthorized trading.⁴⁸ Third, there is “qualitatively egregious” unauthorized trading. Typically, unauthorized trading is deemed to be “qualitatively egregious” where the respondent was motivated to make money at the customer’s expense, or executed unauthorized trades after using high-pressure sales tactics designed to intimidate and induce the customers to authorize the trades.⁴⁹ In *Hellen*, the NAC identified two factors as relevant to a determination of whether the unauthorized trading was or was not qualitatively egregious: (1) “the strength of the evidence that

⁴⁴ No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999).

⁴⁵ *See id.* at **15-18.

⁴⁶ *See also, DBCC v. Granath*, No. C02970007, 1998 NASD Discip. LEXIS 19, at *19-20 (NAC Mar. 6, 1998) (imposing a bar when the Respondent executed 24 unauthorized transactions); *DBCC v. Levy*, No. C07960085, 1998 NASD Discip. LEXIS 22, at *12 (NAC Mar. 6, 1998) (imposing a bar when the Respondent executed 16 unauthorized transactions).

⁴⁷ *Hellen*, 1999 NASD Discip. LEXIS at *16 (“In addition, the volume of the violations significantly increases the gravity of the respondent’s transgression.”).

⁴⁸ *See id.*

⁴⁹ *See id.* at *17-18.

the trades at issue were unauthorized”;⁵⁰ and (2) “the evidence relating to the respondent’s motives.”⁵¹

In this case, the Hearing Panel concludes that the evidence supports a finding that Bingham’s unauthorized trading is both quantitatively and qualitatively egregious. As found above, Bingham intentionally effected 15 unauthorized trades in NB’s account, resulting in a loss in the account of \$156,162.67 on the transactions at issue. Accordingly, the Hearing Panel finds that Bingham should be barred from the securities industry.

B. Failure to Provide Information

With respect to the Second Cause of Complaint, failing to respond in any manner to the requests for information issued pursuant to NASD Procedural Rule 8210, the Guidelines recommend the imposition of a bar unless mitigating circumstances exist warranting a lesser sanction.⁵² Here, the record discloses no mitigating factors. Accordingly, the Hearing Panel will bar Bingham from associating with any member firm in any capacity for his failure to respond to the requests for information.

IV. Order

John R. Bingham is barred from association with any member firm in any capacity for unauthorized trading, in violation of NASD Conduct Rule 2110, and for failing to respond to the two requests for information NASD Staff issued, in violation of NASD Conduct Rule 2110 and

⁵⁰ *Id.* at *18.

⁵¹ *Id.*

⁵² *NASD Sanction Guidelines*, 39 (2001 ed.).

NASD Procedural Rule 8210. The bars shall become effective once this decision becomes the final disciplinary action of NASD.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

John R. Bingham (by overnight carrier and first-class mail to domestic addresses and by first-class international mail to Belize)

Mark P. Dauer, Esq. (by first-class and electronic mail)

Rory C. Flynn, Esq. (by first-class and electronic mail)