

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9B020060
v.	:	
	:	Hearing Officer – DMF
MARK PAUL ADLER	:	
(CRD #2194735)	:	HEARING PANEL DECISION
West Orange, NJ	:	
	:	May 14, 2003
	:	
Respondent.	:	

Respondent is suspended from associating with any NASD member in any capacity for 18 months and fined \$20,000 for falsifying firm records in violation of Rule 2110.

Appearances

Michael Newman, Esq., and Lynn M. Kaseta, Esq., Woodbridge, NJ (Rory C. Flynn, Esq., Washington, DC, Of Counsel) for Complainant.

Thomas M. Campbell, Esq., New York, NY, for respondent.

DECISION

1. Procedural History

The Department of Enforcement filed the Complaint in this matter on August 29, 2002, charging that respondent Mark Paul Adler, without authorization, signed the approval initials of a principal of his employer firm on five order tickets for purchases in his personal account, in violation of NASD Rule 2110. Adler filed an Answer and requested a hearing, which was held in Woodbridge, NJ, on March 31 and April 1, 2003,

before a Hearing Panel that included a Hearing Officer and two members of the District 9 Committee.¹

2. Facts

Adler entered the securities industry in 1991 and qualified as a general securities representative in January 1992. From May 1997 to March 2000, he was registered with The Jeffrey Matthews Financial Group (JMFG), an NASD member. JMFG has approximately 35 employees; its primary business is municipal bonds. By all accounts, Adler was a successful bond salesman for JMFG. He had no customer complaints and has no prior disciplinary history.² (Tr. 36, 127-28, 177, 316-17; CX 1.)

Adler had a personal account at JMFG in which he traded equities. In general, JMFG does not require its representatives to obtain prior approval for trades in their personal accounts. In February 2000, however, JMFG's clearing firm, Correspondent Services Corporation (CSC), imposed a 90-day restriction on Adler's account.³ While the restriction was in effect, Adler was not allowed to make a purchase in his account unless a JMFG principal had confirmed that he had enough money in his account to pay for the trade. When JMFG's order clerk, Annette Mavropoulos, attempted to enter a purchase order for Adler's account with CSC, a notice of the restriction came up on the computer screen, with a "yes/no" option. To place the order, Mavropoulos had to override the restriction by entering "yes." She was allowed to do so only if Adler presented her with an order ticket initialed by one of JMFG's managing partners, Jeffrey Halpert or Matthew

¹ The Hearing Panel heard testimony from eight witnesses and received Complainant's Exhibits (CX) 1-14 and Respondent's Exhibits (RX) 1-11.

² Adler is not currently associated with an NASD member, but he remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Art. V, § 4 of NASD's By-Laws.

³ It appears that the restriction was pursuant to CSC's "90 Day Freeze Policy" as a result of several liquidations in Adler's account. (RX 7; Tr. 144.)

Cohen, or its compliance officer, Scott Fagin, approving the trade. In practice, Fagin approved most of Adler's order tickets. (Tr. 40, 42-44, 46, 188, 256, 288; CX 5; RX 9.)

CSC's 90-day restriction expired in May 2000, but the restriction notice continued to appear on the computer screen when Mavropoulos attempted to enter a purchase order for Adler's account with CSC, requiring an override to place the order. Even though CSC's restriction had expired, JMFG did not give Mavropoulos discretion to enter a "yes" on her own; instead, the firm still required that Adler obtain the approval initials of one of the JMFG principals (generally Fagin) on each order ticket before the order was entered.⁴ Adler was aware of this requirement. (Tr. 44-45, 86, 88, 91, 98, 100, 180, 242-43; RX 11.)

On March 8, 2001, according to Mavropoulos, Halpert asked her if she had entered any trades for Adler that day, expressing concern because of a rumor that Adler and two other registered representatives were about to leave the firm. She advised Halpert that she had entered two purchase orders for Adler that had already been executed and one limit order that was still pending. She suggested to Halpert that if he had concerns about Adler's trading, he should instruct Fagin not to approve any more order tickets for Adler. (Tr. 210-13, 257; CX 5-8.)

Mavropoulos testified that Halpert left her, spoke to Fagin, and returned, telling her that Fagin had not approved any of the order tickets for that day's trades. Halpert asked her to show him any future trades by Adler before she entered them, but he also told her not to cancel the pending limit order, even though Fagin had not approved it.

Fagin, in contrast, testified that he did not recall Halpert questioning him about Adler's

⁴ Fagin testified that even after CSC's restriction expired, he confirmed that Adler had sufficient funds in his account to make each purchase, although if Adler represented that he had the necessary funds, Fagin would accept that representation and check later. (Tr. 100-01.)

trades on March 8 or telling Halpert that day that he had not approved the tickets. Fagin testified, however, that shortly after the events of March 15 and 16, described below, he reviewed the March 8 tickets and determined that, in fact, he did not sign his initials on any of them.⁵ (Tr. 54, 57-66, 113, 130-31, 172-73, 257-59, 277, 297-98; CX 6-8.)

On March 13, 2001, according to Mavropoulos, Adler gave her an order ticket bearing Fagin's initials approving a purchase in his account. The initials did not appear to be in Fagin's handwriting, so she took the ticket to Fagin, who spoke to Adler outside her presence, then gave the ticket back to her, having signed a second set of his initials approving the trade. She testified that Fagin told her that he would be out of the office for the next two days, and that he would no longer approve any purchases in Adler's JMFG account – Adler would only be allowed to sell his existing positions. (Tr. 259-61, 283-84; CX 9.)

Fagin confirmed that Mavropoulos brought him the March 13 ticket, and that he signed a second set of his initials and returned it to her for entry. He said that, at the time, he was uncertain whether he had signed the first set of initials, but because Adler had enough funds to make the purchase, he approved the ticket. Once again, after the events of March 15 and 16, described below, he reviewed the ticket more carefully and determined that he did not sign the first set of initials. Fagin also testified that, because of concerns about Adler's trading, he told Adler he would not be allowed to open any new positions in his JMFG account. (Tr. 46-48, 132, 138-40, 180; CX 9.)

On March 15, 2001, according to Mavropoulos, Adler gave her an order ticket for a purchase in his account. The ticket bore the purported approval initials of Fagin, but

⁵ Halpert testified he could not remember if Fagin told him on March 8 that he had not signed Adler's order tickets. (Tr. 213-14.)

she knew that Fagin was not present in JMFG's office that day. She refused to enter the order, and returned the ticket to Adler. She said that Adler was upset, and a trader who worked next to her testified that Adler "was in a rush" and raised his voice when she refused to enter the trade. (Tr. 261-64, 288, 307; CX 10.)

Mavropoulos told Halpert what had occurred. According to Halpert, he then questioned Adler about the ticket. Adler told him that Fagin had initialed the ticket, but Halpert pointed out that Fagin was not in the office. Adler responded that Fagin had initialed it the previous day, but Halpert explained that Fagin had not been in the office that day either. At that point, according to Halpert, Adler "said something like it shouldn't be restricted anyway." Halpert took the ticket from Adler and made a copy, but did not retain the original. Cohen testified that the next day he found the original ticket torn to pieces in Adler's wastebasket. (Tr. 55, 189-91, 236-37, 263-64; CX 10.)

Halpert and Fagin testified that after Halpert copied the ticket, he called Fagin, discussed what had occurred with him and, at Fagin's suggestion, also discussed it with JMFG's outside counsel. The following morning, March 16, Halpert, Fagin and Cohen met with Adler and terminated his employment with JMFG. JMFG subsequently filed a Form U-5 Uniform Termination Notice for Securities Industry Registration with NASD, indicating that Adler had been terminated because "RR [registered representative] wrote CCO's [Chief Compliance Officer's] initials on order ticket. When confronted with order ticket, made misstatement to a principal of the firm." Upon receiving the Form U-5, NASD staff began an investigation that led to the filing of the Complaint. (Tr. 39-40, 48-51, 56-57, 134, 191-94; CX 2.)

At the hearing, Adler testified that he did not sign Fagin's initials on the March 8 or March 13 order tickets. He also denied that Fagin told him on March 13 that he would not be permitted to make any additional purchases in his account. He admitted that he signed Fagin's initials on the March 15 ticket, but he described that day's events somewhat differently than the other witnesses. According to Adler, he first presented the ticket to Mavropoulos without any approval initials. When Mavropoulos pointed out the omission, he took the ticket back, wrote Fagin's initials and gave it back to her "in a laughing fashion," because they both knew that Fagin was not present to sign it. Then he retrieved the ticket from her and placed it on his desk. According to Adler, Halpert did not approach him until "an hour or two hours later," and Adler denied telling Halpert that Fagin had ever initialed the ticket – he merely told Halpert "my account is not restricted." Adler said that Halpert never gave the ticket back to him. (Tr. 244, 249-52, 255, 258-62, 426-27.)

Adler said, at the time, he did not think signing Fagin's initials on the ticket "was a meaningful act. ... I didn't think it was a forgery. God, you could lose your license and get fired for that." He felt that because CSC's restriction on his account had expired, he should not have been required to obtain approval for his trades. He found the requirement "very irritating, frustrating," because when the market was moving, "[i]f you didn't move quickly you were left behind ... there were opportunities you couldn't jump on quick, you couldn't find a signature quick enough." He also believed that JMFG "conspired to ruin my license" because he was planning to leave, and that he was terminated for that reason, not because he signed Fagin's initials on the March 15 order ticket. He thought that Fagin, in particular, knew that if Adler's Form U-5 indicated that

he had been terminated for falsifying firm records, it would be very difficult for him to obtain new employment in the securities industry. But, he also testified, “Now I realize it’s not about that. It’s about that I signed some tickets.... I have to take responsibility for that. I did that. I’m sorry I did it.” (Tr. 417-18, 426, 464.)

3. Discussion

Enforcement charged that Adler, without authority, signed Fagin’s initials approving the three order tickets on March 8, the March 13 order ticket and the March 15 order ticket. As explained above, Adler admitted signing Fagin’s initials on the March 15 ticket, but denied signing them on the March 8 or March 13 tickets. The Hearing Panel, however, found that a preponderance of the credible evidence supported the conclusion that Adler signed all five tickets.

Fagin’s testimony was credible on this point. He testified that he had developed a fairly distinctive way of signing his initials and could therefore testify with certainty that he had not signed the tickets in question. The record includes more than a dozen acknowledged examples of Fagin’s true initials (CX 11 and 12; RX 10; Tr. 182), and on close examination the initials signed on the questioned tickets appear noticeably different from those examples, supporting Fagin’s testimony that he did not write them.⁶ Fagin’s testimony was also consistent with his written accounts of the events in question in a March 21, 2001, “Memo to Adler file” (RX 5) and in an April 2, 2001, letter to NASD staff responding to a staff request for information regarding the events surrounding

⁶ Enforcement did not offer any expert handwriting testimony, but a trier of fact (in this case, the Hearing Panel) “can compare a known handwriting sample with another sample to determine if the handwriting in the latter sample is genuine.” United States v. Russell, 704 F.2d 86, 90 n. 5 (3rd Cir. 1983). In this case, in particular the transition from the letter “S” to the letter “F” and the formation of the “F” in the acknowledged examples of Fagin’s initials appears quite distinctive, and different from the same portions of the “SF” initials on the questioned order tickets.

Adler's termination (RX 1). Adler is the only person who had a motive to falsify Fagin's initials on the order tickets.

Fagin's testimony was also generally consistent with the testimony of Mavropoulos, who was the most credible witness. On her own initiative, she prepared a memorandum detailing her knowledge of the relevant events on March 16, 2001, and gave it to Fagin; her testimony at the hearing was consistent with her March 16 memorandum; she had no apparent motive to fabricate her memorandum or testimony (she is no longer employed by JMFG); and she responded to questions at the hearing in a forthright and candid manner.⁷ (RX 4; Tr. 273-74.)

Adler's testimony was less credible. He has made a number of inconsistent statements regarding the relevant events. For example, during NASD staff's investigation, Adler's then-counsel sent the staff a letter dated April 17, 2001, which, among other things, stated: "It's my client's understanding that he had a few trades (for his personal account) in which, upon his understanding of having apparent authority to do so and in the absence of Employer's Compliance Officer at the time, he initialed those trades on behalf of the Compliance Officer." On the first page of the letter, Adler handwrote and signed the following statement: "I acknowledge the representations made in this correspondence by signing this correspondence herewith." Yet, when he testified

⁷ As noted above, Mavropoulos testified that on March 8, after Halpert asked her about Adler's trades that day, Halpert spoke to Fagin, then told her that Fagin had not approved the tickets. Fagin testified that he did not recall any such conversation with Halpert and Halpert also testified he did not recall such a conversation with Fagin. Nevertheless, having had an opportunity to observe all three, the Hearing Panel found Mavropoulos' account, which was included in her March 16 written statement, credible. Fagin's and Halpert's recollections may have been affected by the passage of time; the Hearing Panel notes that in his April 2, 2001, letter to NASD staff, Fagin stated: "On March 8, 2001, Jeffrey Halpert asked Annette Mavropoulos whether Mr. Adler was trading in his account. Ms. Mavropoulos told Mr. Halpert that she had three tickets with my initials on them. I did not, in fact, initial those tickets." (RX 1.) The Panel also notes that Adler has a \$6 million claim pending against JMFG, which might have influenced Fagin's and Halpert's recollections of events. (Tr. 69.)

before the staff during the investigation on June 26, 2001, he denied the accuracy of these statements, and he did so again at the hearing. And during his investigative testimony, Adler stated that, except for the March 15 ticket, he never signed a principal's initials on any of his order tickets approving the trade. At the hearing, however, he said that in 2000 he signed Cohen's initials on two order tickets for his account, because Halpert, Fagin and Cohen were all out of the office and he wanted to make the trades. (CX 3; CX 13 at 43, 66-69, Tr. 351-360.) Moreover, at the hearing, Adler did not respond to questions in a forthright, candid manner.

The Hearing Panel finds, therefore, by a preponderance of the credible evidence that Adler signed Fagin's initials, without authorization, on the three March 8 trade tickets, the March 13 ticket and the March 15 ticket. By doing so, he violated Rule 2110's requirement that NASD members and associated persons in the conduct of their business "observe high standards of commercial honor and just and equitable principles of trade." See, e.g., Charles E. Kautz, 52 S.E.C. 730, 734, 1996 SEC LEXIS 994 (April 5, 1996) ("it is a violation of NASD Rules to enter false information on official Firm records. The entry of accurate information on official Firm records is a predicate to the NASD's regulatory oversight of its members. It is critical that associated persons, as well as firms, comply with this basic requirement.") (footnote omitted); John G. Abruscato, 43 S.E.C. 209, 1966 SEC LEXIS 198 (Dec. 14, 1996).

4. Sanctions

For falsification of firm records, the NASD Sanction Guidelines recommend that adjudicators impose a fine of \$5,000 to \$100,000 and "[i]n cases where mitigating factors exist, consider suspending respondent in any or all capacities for up to two years [or] [i]n

egregious cases, consider a bar.” In setting specific sanctions, the Guidelines list as particularly relevant factors: (1) the nature of the documents forged or falsified, and (2) whether the respondent had a good-faith, but mistaken belief of express or implied authority. The Guidelines also include a variety of general factors that adjudicators should consider in setting sanctions for any violation. NASD Sanction Guidelines at 9-10, 43 (2001 ed.).

The Hearing Panel found that Adler’s violation was serious, requiring the imposition of substantial sanctions. Order tickets are important firm records, and Adler admitted that he had no good-faith belief of express or implied authority to sign Fagin’s initials. Turning to the general considerations in the Guidelines, the Hearing Panel was particularly troubled by Adler’s failure to accept responsibility for and acknowledge his misconduct. It was clear to the Panel that Adler still blames JMFG’s principals for his situation, believing that, but for the fact they believed he was planning to leave the firm, they would not have taken any action against him for signing Fagin’s initials on the March 15 order ticket.

The Hearing Panel concluded, however, that it would not be appropriate to bar Adler permanently from the securities industry. Although Adler’s misconduct was serious, he did not sign Fagin’s initials in order to perpetrate a fraud on investors or the firm.⁸ His misconduct did not involve customer accounts, and there was no contention or evidence that any of the purchases in question caused, or threatened to cause, any losses

⁸ For that reason, the Hearing Panel determined Adler’s violation is appropriately characterized as “falsification of firm records,” rather than as “forgery,” which generally connotes “[t]he false making or the material altering of a document with the intent to defraud.” Black’s Law Dictionary at 650 (6th ed. 1990).

to JMFG. And apart from this violation, Adler appears to have been a competent and responsible registered representative.

Under these circumstances, the Panel determined that a lengthy suspension and a substantial fine would be sufficient to impress upon Adler the seriousness of his misconduct and to deter both Adler and others, similarly situated, from engaging in such misconduct in the future, thereby fulfilling NASD's remedial goals. Therefore, Adler will be suspended in all capacities for 18 months and fined \$20,000, which will be due and payable when and if he seeks to return to the securities industry.

5. Conclusion

Respondent Mark Paul Adler is suspended from associating with any NASD member in any capacity for 18 months and fined \$20,000 for falsifying firm records in violation of Rule 2110. He is also ordered to pay costs in the total amount of \$3,797.35, which includes a \$750 administrative fee and hearing transcript costs of \$3,047.35. The fine and costs will be due and payable when and if he seeks to return to the securities industry. If this decision becomes the final disciplinary action of NASD, his suspension shall begin on July 7, 2003 and end at the close of business on January 6, 2005.⁹

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to:

Mark Paul Adler (via overnight and first class mail)
Thomas M. Campbell, Esq. (via facsimile and first class mail)
Michael Newman, Esq. (electronically and via first class mail)
Rory C. Flynn, Esq. (electronically and via first class mail)

⁹ The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent on in accord with the views expressed herein.