NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. VINCENT J. PUMA (CRD #2358356), Marlboro, NJ Respondent.	:	Disciplinary Proceeding No. C10000122 Hearing Officer - DMF **HEARING PANEL DECISION ON REMAND** December 20, 2002

Registered representative effected one unauthorized transaction in a customer account in violation of NASD Conduct Rule 2110. Respondent was fined $10,000 and suspended from associating with any NASD member firm in any capacity for ten business days.

Appearances

Leo F. Orenstein, Esq. on behalf of the Department of Enforcement.

David A. Shrader, Esq., on behalf of Vincent J. Puma.

DECISION

I. Procedural Background

Enforcement filed a Complaint on July 17, 2000, charging that between July 19, 1995 and August 31, 1995, respondent Vincent J. Puma violated NASD Conduct Rule 2110 by effecting ten transactions in eight customer accounts without the customers' prior knowledge or consent. A hearing was held in New York, New York, on February 21-23, 2001, and by conference telephone call on March 1, 2001, before a Hearing Panel composed of a Hearing Officer, a then-current member of the District Committee for District No. 9 and a current member of the District Committee for District No. 10. The

Panel heard testimony from, among others, Puma, two of his former supervisors and five of the customers in whose accounts Puma allegedly effected unauthorized trades.

Following the hearing, the full Panel deliberated and determined that Enforcement had failed to prove by a preponderance of the evidence that Puma was responsible for unauthorized trades in seven of the eight customer accounts. As to the eighth customer account, the Panel found that Puma had effected a single unauthorized trade. The Panel concluded that the appropriate sanctions for this violation were a $10,000 fine and a 10 business day suspension.

Puma appealed to the National Adjudicatory Council challenging the Panel's finding of a violation and its imposition of sanctions. Enforcement cross-appealed the Panel's dismissal of the charges relating to three accounts, but did not challenge the Panel's dismissal of the charges relating to the remaining four accounts.

On October 21, 2002, the NAC remanded this proceeding to the Office of Hearing Officers for further proceedings. Specifically, the NAC found that in dismissing the charges relating to the accounts of three customers who did not testify at the hearing, the Panel's decision "(1) failed to explain adequately and to provide support for the Panel's differing credibility determinations regarding Puma's testimony; and (2) failed to take into account the hearsay evidence from customers that appears to contradict the Panel's implicit determination to credit Puma's testimony." The NAC directed the Hearing Panel on remand to "make complete findings and impose sanctions, if applicable, and explicitly discuss: (1) its general impression of Puma's demeanor and candor; (2) any specific examples in which it found Puma not to be credible and the relationship of those credibility findings to the credibility determinations it makes regarding other aspects of

Puma's testimony; and (3) its findings with respect to the reliability of the hearsay evidence, including a complete analysis of the factors that are used to assess the reliability of such evidence."

II. The Replacement Hearing Officer

The Hearing Officer who sat on the Panel at the hearing and who participated in the Panel's deliberations left the Office of Hearing Officers after drafting a decision reflecting the Panel's determinations, but before the decision was finalized and issued, and a replacement Hearing Officer was appointed. The new Hearing Officer edited the draft decision in accordance with comments from the remaining Panelists and signed and issued the decision for the Panel, but did not otherwise participate in the decision.

In its remand order, the NAC stated that this procedure was not permitted under NASD's then-current rules. The NAC explained that in Department of Enforcement v. U.S. Rica Financial Corp., Complaint No. C01000003 (NAC Oct. 26, 2001), it interpreted those rules as requiring that the Hearing Officer who signed the decision participate in the decisional process. The NAC noted, however, that NASD had subsequently amended its rules in that regard, and stated that it intended "to permit the replacement Hearing Officer to discharge his duties on remand in accordance with Procedural Rule 9231(e)."

Rule 9231(e) became effective June 4, 2002. See 67 Fed. Reg. 39,769 (June 10, 2002). It provides that when a replacement Hearing Officer is appointed after a hearing has commenced, the replacement Hearing Officer has discretion either (1) to allow the Hearing Panelists to resolve the issues in the proceeding without the replacement Hearing Officer's participation, in which case the replacement Hearing Officer may advise the

Panelists on legal issues and should prepare and sign the decision on behalf of the Panel, or (2) to certify his or her familiarity with the record and participate in the decision, in which case the replacement Hearing Officer may recall any witness before the full Hearing Panel.

Following the remand, the Chief Hearing Officer appointed a replacement Hearing Officer, pursuant to Rule 9231(e). The replacement Hearing Officer subsequently held a conference with the parties, soliciting their views as to whether he should participate in the decision, and, if so, what additional proceedings would be required. Enforcement urged the Hearing Officer not to participate in the decision; Puma urged him to do so. Both sides agreed that if the Hearing Officer did participate, it would be necessary to substantially re-try the proceeding.

The replacement Hearing Officer also consulted the Panelists to determine whether there was any disagreement among them as to the proper resolution of the issues raised in the NAC's remand order. If there had been, the replacement Hearing Officer would have been required to participate in order to cast the deciding vote. In fact, however, the Panelists were in agreement.

Finally, the Hearing Officer considered whether he would be able to participate in the remand decision in a meaningful way. The issues in this case concern events that occurred in 1995, and the original hearing took place nearly two years ago. Even if it were possible to recall witnesses to testify, it is reasonable to expect that their recollection of the relevant events would be less reliable now than at the original hearing.

Taking all these circumstances into consideration, the Hearing Officer decided to exercise his discretion in this case by proceeding under the provisions of Rule 9231(e)(1).

Accordingly, the Hearing Officer did not participate in the resolution of the issues raised by the NAC's remand order, but provided legal advice to the Panelists and prepared this decision on behalf of the Panel. Thus, the determinations set forth below are those of the two remaining Panelists who participated in the hearing in this matter.

III. Facts

The Panel reaffirms its factual findings as set forth in the original Hearing Panel decision dated October 22, 2001. Those findings will not be reiterated here, except as necessary to address the issues raised in the NAC's remand order.

A. Puma

Puma first entered the securities industry in July 1993, becoming associated with Gruntal & Co. in an unregistered capacity. In August 1994, when he was 22 years old, Puma became associated with Josephthal, Lyon and Ross, initially as an unregistered "cold caller." He became registered with Josephthal as a General Securities Representative in November 1994 and voluntarily left Josephthal effective September 1, 1995. Puma has been registered with another NASD member since September 1995, initially as a General Securities Representative, but by the time of the hearing also as a General Securities Principal. (CX 1; Feb. 21 Tr. 43-44, 51; Feb. 22 Tr. 66; Feb. 23 Tr. 198-202.)

While he was at Josephthal, Puma worked directly for Michael Volpe, the branch manager, and Mitchell Fitter, an assistant branch manager, answering telephones, sending letters to customers, and performing other secretarial tasks. He also completed order tickets and filled out indication of interest sheets for public offerings at their direction. After he became registered, Puma was required to open 20 new accounts for Volpe and

Fitter. Then he was given his own Josephthal account executive number under which he could effect trades and earn commissions, and Volpe and Fitter assigned certain accounts to him. (Feb. 23 Tr. 206-08, 225-26.)

B. Trades Puma Effected Based on Instructions from Volpe and Fitter

Enforcement alleged that Puma effected a total of 10 unauthorized trades in eight customer accounts. As to the trades in four of the accounts, Puma testified that he simply filled out the order tickets at the direction of Volpe and Fitter.

As explained in the original Panel decision, after evaluating Puma's testimony, the conflicting testimony of Volpe and Fitter, the testimony of three of the four customers, and the documentary evidence, the Hearing Panel credited Puma's testimony and held that Enforcement failed to prove by a preponderance of the evidence that Puma was responsible for unauthorized trades in those accounts. Enforcement did not appeal this portion of the original Panel decision. Insofar as necessary to comply with the NAC's remand order, however, the Panel reaffirms its findings and conclusions with respect to those accounts.

C. Trades Puma Effected

Puma candidly admitted his responsibility for effecting the remaining five allegedly unauthorized trades in four customer accounts, but said the customers authorized them. (Feb. 23 Tr. 290, 297, 301-02, 310-11.) One of the customers, RR, testified at the hearing, and he and Puma were subjected to questioning by the parties and the Panelists about their differing recollections of their conversations regarding the trade in question, which took place in August 1995, some five and a half years prior to the hearing. For reasons explained in the original decision, the Panel found that RR's

recollection of those conversations was somewhat more credible than Puma's, and therefore found that the trade was unauthorized. The Panel re-affirms its findings regarding the RR trade and its conclusion that the trade was unauthorized, as set forth in the original decision.

The remaining three customers did not testify. An NASD examiner testified that he left messages for those customers prior to the hearing asking whether they were willing to cooperate with NASD in this matter, but none returned his calls. (Feb. 23 Tr. 164-66, 169-70, 172.)

Instead of live testimony from these customers, Enforcement offered, first, declarations that Enforcement obtained from them in June 1996. Except for the customers' names, addresses, and basic account and transaction details, the declarations are virtually identical. Each states, without elaboration, "This transaction was [or These transactions were] executed without my [our] authorization or consent." The only additional information in any of the declarations is a statement by customer JJ that "upon receiving confirmation of the unauthorized transactions, I contacted Mr. Puma, who stated that it was an error and that my account would be restored to its original status." (CX 7, p. 1; CX 8, p. 1; CX 9, p.1.)

In addition, Enforcement offered written complaints that the customers submitted to Josephthal. JJ sent Josephthal a complaint letter dated September 8, 1995. By that time, Puma had resigned from Josephthal. According to the letter, on August 4, 1995, "an unauthorized transaction was made to my account. 800 shares of Infrasonics was sold and 3500 shares of Biotechnology General was purchased. After receiving a notification of this transaction 1 week later, I then tried to get a hold of Vincent Puma to

correct this. After finally getting a call back from him approx. another week later, he stated that this transaction was a mistake made by your firm and that my account would be restored to its original form …." (CX 7, p. 2.)

On September 19, 1995, Puma sent Josephthal a letter responding to JJ's complaint. In the letter, Puma stated that JJ had confirmed the trades at the time they were made, but subsequently decided that he preferred to hold the Infrasonics stock, rather than the Biotechnology General. At the hearing, Puma reiterated that he placed the orders only after speaking to and receiving authorization from JJ. (RX 10b; Feb 23 Tr., pp. 310 - 312.)

Customers ER and JR sent Josephthal a two sentence complaint letter dated September 11, 1995. Once again, this was after Puma had resigned from Josephthal. According to the letter, "This purchase was not authorized by me, nor was it ever discussed with me by any of your agents or staff. Please cancel this purchase immediately." On September 19, 1995, Puma sent Josephthal a letter stating that he had spoken to ER about the trade and that it "was most certainly authorized by the customer." At the hearing, Puma testified that he solicited ER to make the purchase in question based on a buy recommendation issued by Josephthal and confirmed the statement in his September 19 letter that ER authorized the trade. (CX 8, p.2; RX 13b; Feb 23 Tr. 297-301.)

Customers MS and DS sent Josephthal a brief letter dated September 10, 1995. According to MS, he had "been dealing with Vincent Puma at your firm. On August 31, 1995, 2000 shares of Genemedicine … were put into my account …. The trade was never authorized by myself or my wife." On September 19, 1995, Puma sent Josephthal a letter

stating, "On the date the trade was executed, I spoke to [MS] in which [sic] he confirmed the buy of 2000 shares of Genemedicine." At the hearing, Puma reiterated that MS approved the purchase. (CX 9, p. 2; RX 15b; Feb. 23 Tr. 301-02.)

IV. Discussion

Enforcement had the burden of proving, by a preponderance of the evidence, each violation charged in the Complaint. See Department of Enforcement v. Reynolds, 2001 NASD Discip. LEXIS 17 at *54-55 (NAC June 25, 2001), citing SEC v. Moran, 922 F. Supp. 867, 892 (S.D.N.Y. 1996). With respect to the allegations relating to the trades in the accounts of customers JJ, ER and JR, and MS and DS, Enforcement's case rested on each customer's complaint letter and declaration, because none was willing to testify. The Hearing Panel was therefore required to determine whether those materials were entitled to more weight than Puma's contemporaneous denials and in-person testimony.

As the NAC pointed out in its remand order, it is well established that in NASD proceedings "hearsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact." Charles D. Tom, 50 S.E.C. 1142, 1992 SEC LEXIS 2000 at *7 (Aug. 24, 1992). In determining how much weight to give hearsay evidence, "[t]he factors to consider include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to …, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated." Id.

In this case, the hearsay statements came from customers who were unhappy with trades in their accounts, and therefore had a possible bias. The statements were contradicted by Puma's direct testimony, as well as his contemporaneous responses to the

customers' complaints. The hearsay consisted of very brief complaint letters and conclusory sworn declarations. The customers were unavailable only in the sense that they apparently were unwilling to cooperate with NASD – indeed, they would not even return the NASD examiner's calls. Finally, the individual statements were uncorroborated.

That is not to say the evidence was entitled to no weight. The customer declarations were sworn; the complaint letters were signed and were reasonably contemporaneous; the trades all occurred in a single month; it is hardly unusual for customers not to cooperate after the passage of several years from the events in question; and there is usually little to corroborate even valid complaints of unauthorized trading. In the absence of persuasive countervailing evidence, the declarations and complaint letters might well have supported findings that Puma effected the unauthorized transactions, as alleged. But the customer hearsay evidence was hardly compelling, and in weighing the evidence the Panel found Puma's in-person testimony, which was consistent with his contemporaneous hearsay statements, more convincing than the bare complaint letters and conclusory declarations offered by Enforcement.

Having had an opportunity to observe Puma over an extended period, the Panel found him to be generally a credible witness. He responded to questions in a frank and candid manner. His description of his role assisting Volpe and Fitter was convincing; in contrast, Volpe and Fitter were evasive and their testimony regarding Puma's role was not credible. Puma carefully distinguished between trades that he placed at the direction of Volpe and Fitter and the trades in the accounts of RR, JJ, ER and JR, and MS and DS, for which he took complete responsibility. His testimony that the customers had authorized

the trades was forthright and appeared candid, and was consistent with his contemporaneous written responses to the customers' complaints.

In its remand order, the NAC seemed to suggest that it was inconsistent for the Panel to credit Puma's testimony as to the trades in the accounts of JJ, ER and JR, and MS and DS, but not as to the trade in RR's account. As explained in the original Panel decision, both RR and Puma testified about their conversations relating to the trade in issue and had differing recollections about the substance of those conversations. Based on an assessment of the relative likelihood of the conflicting details of the conversations RR and Puma provided – details that were not included in the declarations and complaint letters from JJ, ER and JR, and MS and DS – the Panel concluded that RR's recollection was somewhat more credible than Puma's. That is not to say that Puma deliberately lied to the Panel; it is hardly unusual for two persons, both of whom are attempting to be candid, to recall the details of a conversation differently.[1]

Witness credibility is not an all or nothing matter. A witness, like any of us, may recall some events clearly and accurately, but other events only vaguely or inaccurately. The Panel found Puma to be a credible witness on many topics. For example, it accepted his testimony that as to several of the alleged unauthorized trades, he merely completed order tickets for Volpe and Fitter, and Enforcement did not even challenge those findings on appeal. The Panel also found his testimony regarding the JJ, ER and JR, and MS and

[1] Both RR and Puma agreed that they spoke prior to the unauthorized purchase. According to RR, during that conversation he indicated that would consider purchasing, but did not make a commitment, and told Puma to get back to him before effecting the purchase. According to Puma, RR expressed interest in the offering, and Puma understood at the end of the conversation that he was authorized to make the purchase. The evidence thus was consistent with Puma effecting the purchase based on a good faith mistake as to his authority. (Feb. 22 Tr. 231-32; Feb. 23 Tr. 290-91.)

DS trades to be credible. It was not required to reject that testimony just because it found Puma's recollection of his conversations with RR to be less convincing than RR's.[2]

In the end, the Hearing Panel was required to weigh the forthright, candid testimony of a witness the panel saw and was able to question against brief, conclusory hearsay statements of customers who were unwilling to participate in the hearing. As noted in the original Panel decision, because the customers did not appear, the parties and the Panel were unable to probe for the sorts of details, missing from the customers' complaints and declarations, that might have convinced the Panel that the trades in question were, in fact, unauthorized. As a result, the Panel found that the balance tipped in favor of Puma; Enforcement failed to prove its case by a preponderance of the credible evidence.

Therefore, the Panel reiterates the findings and conclusions in the original Panel decision. Enforcement proved by a preponderance of the evidence only the charge that Puma effected one unauthorized trade in the account of RR. The other charges are dismissed.

V. Sanctions

For unauthorized trading, the NASD's Sanction Guidelines recommend that the adjudicators impose a fine of $5,000 to $75,000 and a suspension for a period of 10 business days to one year, except in egregious cases, where the adjudicators should consider a suspension of up to two years or a bar. NASD Sanction Guidelines, p. 102 (2001 ed.).

[2] Even if a witness deliberately lies in some portions of his testimony, the witness's testimony need not be rejected as to other matters. "The maxim 'Falsus in uno, falsus in omnibus' has been well said to be itself 'absolutely false as a maxim of life.'" United States v. Weinstein, 452 F.2d 704, 713 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972), quoting 3A Wigmore, Evidence §1008 at 982 (Chadbourn rev. 1970).

According to the Guidelines, there are three categories of egregious cases: (1) quantitatively egregious unauthorized trading; (2) unauthorized trading accompanied by certain aggravating factors; and (3) qualitatively egregious unauthorized trading, as determined by the strength of evidence that the trades were unauthorized and the respondent's motives in effecting the trade.

The Panel reiterates the sanctions analysis in the original Panel decision. Since the Panel found that Puma effected a single unauthorized transaction in a single customer account, his violation was plainly not quantitatively egregious. And the evidence did not establish that the single unauthorized transaction was accompanied by any of the aggravating factors identified in the Guidelines – efforts to conceal the unauthorized trade, attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct – or any other aggravating circumstance.

Finally, the evidence also failed to establish that the unauthorized trade was qualitatively egregious. The Panel did not find the evidence against Puma to be strong, it simply found RR's recollection of their conversations somewhat more convincing than Puma's. And the Panel did not find that Puma acted in bad faith; he may have misunderstood RR's wishes as expressed during his telephone conversation with RR that both parties testified occurred before Puma placed the purchase order.

The Hearing Panel therefore re-adopts its conclusions that Puma should be sanctioned for a single, non-egregious unauthorized transaction, and that for such a violation the sanctions should be at the low end of the ranges recommended in the Guidelines. Therefore, Puma will be fined $10,000 and suspended in all capacities for 10 business days.

IV. Conclusion

Respondent Vincent J. Puma violated NASD Conduct Rule 2110 by effecting one unauthorized transaction in a customer account. Respondent is fined $10,000 and suspended from association with any member firm in any capacity for 10 business days. In addition, Respondent shall pay costs in the amount of $6,436.00, consisting of a $750.00 administrative fee and $5,686.00 for the cost of the Hearing transcript. These sanctions shall become effective on a date set by the Association, but not earlier than 30 days after this decision becomes the final disciplinary action of the Association, except that if this decision becomes the final disciplinary action of the Association, the suspension shall become effective with the opening of business on March 3, 2003, and end at the close of business on March 14, 2003.[3]

HEARING PANEL

by: _____
David M. FitzGerald
Hearing Officer

Copies to:

Vincent J. Puma (via overnight courier and first class mail)
David A. Shrader, Esq. (via facsimile and first class mail)
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[3] The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.