

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DAVID WILLIAM HABURJAK
(CRD #2233093),
W. Gastonia, NC,

Respondent.

Disciplinary Proceeding
No. C07010100

Hearing Officer—Andrew H. Perkins

Hearing Panel Decision

August 13, 2002

Respondent exercised discretionary power in two customer accounts without written authority, in violation of NASD Conduct Rules 2110 and 2510(b). The Respondent is fined \$10,000 and suspended for 20 business-days from associating with any member firm in any capacity.

Appearances

For the Department of Enforcement: William Brice LaHue, NASD Regional Counsel, Atlanta, GA (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel).

For David William Haburjak: Gregory Bartko, Atlanta, GA.

DECISION

NASD charged David William Haburjak (“Haburjak” or the “Respondent”) with violating NASD Conduct Rules 2110 and 2510(b) by exercising discretionary power in two accounts maintained at member firm Linsco/Private Ledger Corp. (“LPL” or the “Firm”) without first obtaining his customers’ written authority and the Firm’s acceptance of the accounts. At the time, Haburjak was registered with NASD as a

General Securities Representative and an Investment Company and Variable Contracts Products Representative.

I. Procedural History

The Department of Enforcement (“Department”) filed the Complaint on December 21, 2001, and, on January 15, 2002, the Respondent filed an Answer requesting a hearing. In essence, the Respondent contended that the challenged trade in customer J.H.’s account involving the purchase of 2000 shares of Palm, Inc. was an error and that the purchase of 3000 shares of Palm, Inc. in customer P.C.’s account did not involve the exercise of discretionary power.¹ The Respondent did concede that neither customer had given him written discretionary authority for his account.

On February 21, 2002, the Respondent moved for partial summary disposition of the claim pertaining to J.H.’s account. In response, on March 7, 2002, the Department cross-moved for summary disposition as to both accounts. On May 7, 2002, the Hearing Panel granted the Department’s Motion for Summary Disposition as to the issue of liability, denied the Respondent’s motion, and continued the case for a hearing on the issue of sanctions. This Decision sets forth the bases for the Hearing Panel’s findings on the motions for summary disposition.²

On June 6, 2002, the Respondent filed a written waiver of hearing, and the Hearing Panel canceled the hearing. Thus, the Hearing Panel decided this case based on the written record.

¹ Ans., Ex. A.

² As a matter of expediency, the Hearing Panel’s Order stated that the bases for its ruling on the motions for summary disposition would be set forth in its Decision.

II. Findings of Fact

A. The Respondent

Haburjak entered the securities industry in April 1992 when he associated with LPL.³ Haburjak registered with NASD as an Investment Company and Variable Contracts Products Representative, effective June 5, 1992, and as a General Securities Representative, effective July 27, 1995. On May 1, 2000, Haburjak resigned from LPL.⁴

After leaving LPL, Haburjak was associated with Securities America, Inc. from May 2000 to November 2001. Currently, Haburjak is registered as a General Securities Representative and associated with Synergy Investment Group, LLC, an NASD member firm in Charlotte, NC.⁵

B. Unauthorized Exercise of Discretionary Power in Customer Accounts

(1) J.H.'s Account

Haburjak and J.H. engaged in a series of discussions in early 2000 concerning J.H.'s interest in purchasing a substantial position in one or more "hot" public offerings of technology stocks, such as Palm.⁶ From these discussions, Haburjak concluded that he had verbal authority "to make a 'substantial' purchase of shares that became available in select technology public offerings coming to market."⁷ Thus, on March 2, 2000, Haburjak

³ C-1. (Each Party submitted exhibits with their pre-hearing submissions. References to the Department's exhibits are cited as "C- __," and references to the Respondent's exhibits are cited as "R- __.")

⁴ Department's Statement of Undisputed Facts, Ex. A.

⁵ C-1.

⁶ Respondent's Statement of Undisputed Facts ¶¶ 3-4.

⁷ *Id.* ¶ 5. Haburjak interpreted "substantial" to mean a purchase with a cost of approximately \$200,000.

purchased 2000 shares of Palm at \$137 per share in J.H.'s account.⁸ The total purchase price, including commissions and fees, was \$275,053.99.⁹ Haburjak admits that he never had discretionary trading authority on J.H.'s account.¹⁰

Upon receiving the confirmation reflecting the March 2 purchase of Palm stock, J.H. telephoned Haburjak and complained that he had not authorized the purchase. According to the written statement Haburjak gave to NASD Staff during the investigation of this matter dated August 31, 2000, J.H. told Haburjak that the "trade was too large and his current financial situation would not allow him to accept it."¹¹ Haburjak contends that he apologized to J.H. for misinterpreting his intentions and told J.H. that he would take care of it. Haburjak immediately contacted LPL's trading department to determine how to process the purchase as a trading error.¹²

Based on Haburjak's call to LPL's trading department, LPL prepared an equity error report¹³ rescinding the purchase of 2000 shares of Palm in J.H.'s account as a trading error. LPL canceled the trade on March 28, 2000, and charged the error to Haburjak.¹⁴ In August 2000, Haburjak and his branch office paid LPL \$134,003 (of which

⁸ *Id.* ¶ 2; Department's Statement of Undisputed Facts ¶ 6 and Ex. E (customer confirmation).

⁹ Respondent's Statement of Undisputed Facts ¶ 2; Department's Statement of Undisputed Facts ¶ 6 and Ex. E (customer confirmation).

¹⁰ Department's Statement of Undisputed Facts, Ex. F at 1.

¹¹ *Id.*

¹² Respondent's Statement of Undisputed Facts ¶ 8.

¹³ *Id.* Ex. B.

¹⁴ *Id.* ¶ 9.

Haburjak contributed \$51,356) to reimburse a portion of the loss LPL sustained because of the trade cancellation.¹⁵

(2) P.C.'s Account

On March 2, 2000, Haburjak also purchased 3000 shares of Palm for P.C.'s account. And, as with J.H.'s account, Haburjak did not have written discretionary authority for this account.¹⁶

Haburjak contends that he had ample authority to purchase Palm stock because of the relationship he had with P.C. In effect, Haburjak argues that he had a working relationship which permitted Haburjak to make trading decisions on PC's behalf.¹⁷ With regard to the specific purchase in question, Haburjak contends that he had discussed the spin-off of Palm by 3 Com and that he believed P.C. "was interested in Palm and that he wished to make a significant purchase" as he had done with some other initial public offerings.¹⁸ Thus, even though he did not have written authority from P.C., Haburjak placed the order to purchase 3000 shares of Palm without first discussing the purchase with P.C.¹⁹ The total purchase price, including commission and fees, was \$412,559.36.²⁰ Haburjak claims that he informed P.C. of the purchase the following day, but P.C. showed little interest in the trade.

¹⁵ Respondent's Statement of Undisputed Facts ¶ 13; Department's Statement of Undisputed Facts, Ex. F at 2.

¹⁶ Department's Statement of Undisputed Facts ¶ 8 and Ex. F at 2.

¹⁷ In the Respondent's Brief in Opposition to the Department's Cross-Motion for Summary Disposition, Haburjak justifies the purchase on the basis that the trading history he had with P.C. shows that he had given Haburjak authority from time to time to purchase large blocks of speculative securities, including initial public offerings. (Opp'n Br. at 4.)

¹⁸ Department's Statement of Undisputed Facts, Ex. F at 2.

¹⁹ *Id.*

²⁰ Department's Statement of Undisputed Facts ¶ 8 and Ex. G (customer confirmation).

The following week, when P.C. received the confirmation of the trade, he telephoned Haburjak and stated that he no longer wanted the trade. By this time, the stock had declined significantly in value. Haburjak advised P.C. to wait until the price of the stock recovered before selling it. P.C. then contacted LPL's compliance department, and, on March 27, 2000, Haburjak's branch manager received a telephone call from LPL's compliance department concerning P.C.'s account. The next day, the branch manager spoke to P.C. after which the stock was sold at a claimed loss of \$248,410.82.²¹

III. Conclusions of Law

A. Jurisdiction

NASD has jurisdiction over this proceeding. Haburjak was registered with NASD both when he is alleged to have committed the violation charged in the Complaint and when the Department filed the Complaint.

B. Standard for Summary Disposition

NASD Procedural Rule 9264 states that a Hearing Panel may grant a motion for summary disposition if there is no genuine issue with regard to any material fact, and the party that files the motion is entitled to summary disposition as a matter of law. The moving party (in this case, the Department) bears the burden of demonstrating the absence of a genuine issue of material fact.²² The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."²³ If the moving party meets this burden, the opposing party must come

²¹ Department's Statement of Undisputed Facts, Ex. F at 2.

²² *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

²³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

forward with specific facts showing that there is a genuine issue in dispute.²⁴ In so doing, the non-moving party “must do something more than simply show that there is some metaphysical doubt as to the material facts.”²⁵

C. Exercise of Discretionary Power without Written Authority

NASD Conduct Rule 2510(b) prohibits a registered representative from exercising any discretionary power in a customer’s account unless such customer has given prior written authorization and the representative’s firm has accepted the account.²⁶ In this case, there are no material facts in dispute. Haburjak admits that he never had written discretionary authority from either J.H. or P.C. and that his firm never accepted their accounts as discretionary accounts. Thus, Haburjak violated NASD Conduct Rules 2510(b) and 2110.

The Hearing Panel further finds no merit in Haburjak’s argument that he did not exercise any discretion with respect to these trades. Haburjak’s own written statement outlining the events leading up to both trades shows that he did not have specific trading instructions from his customers. In the case of J.H., even if they discussed the possible purchase of Palm stock among a list of other possible securities, Haburjak admits that J.H. had not specified the company or the number of shares. Haburjak states that he understood J.H. wanted to make a “substantial” purchase in any one of a number of initial public offerings involving technology companies, which, if true, left Haburjak with the discretion of selecting the security and the quantity of shares to purchase. Such authority does not come within the exception to Rule 2510 that permits the exercise of discretion as

²⁴ *Matsushita Elec. Indus. Corp. v. Zenith Radio Co.*, 475 U.S. 574 (1986).

²⁵ *Id.* at 586.

²⁶ *See, e.g., Paul F. Wickswat*, 50 S.E.C. 785 (1991).

to price where a customer gives an order for the purchase or sale of “a definite amount of a specified security.”²⁷

Likewise, Haburjak admits that P.C. had not placed an order for a “definite amount” of Palm stock. Here also, Haburjak contends that he believed P.C. “was interested in Palm and that he wished to make a significant purchase.”²⁸ Thus, accepting Haburjak’s version of events, he was left with the discretion of selecting the amount of Palm stock to purchase for P.C.’s account. Again, this is not specific enough to meet the criteria of the exception contained in Rule 2510(d).

IV. Sanctions

On June 25, 2002, both Parties filed Post-Hearing Briefs on the issue of sanctions: the Department requested the maximum and the Respondent requested the minimum sanctions recommended by the NASD Sanction Guidelines (“Guidelines”).²⁹ The Department requested that the Hearing Panel impose the following sanctions: (1) a \$20,000 fine; (2) a 60-day suspension; (3) a requirement that the Respondent requalify by examination as a General Securities Representative within 15 days of the date the Decision is final; and (4) a requirement that the Respondent be subject to heightened supervision, including a prohibition that his father supervise him in the future. In contrast, the Respondent suggested that a fine of no more than \$2,500 was appropriate.³⁰

²⁷ See Rule 2510(d)(1).

²⁸ Department’s Statement of Undisputed Facts, Ex. F at 2.

²⁹ The applicable Guidelines recommend a fine of \$2,500 to \$10,000 and a suspension of 10 to 30 business days. See NASD Sanction Guidelines 94 (2001 ed.).

³⁰ The Respondent also argued that a substantial fine should not be imposed due to his financial condition. In support, the Respondent submitted a “Statement of Financial Condition” dated April 29, 2002. The Hearing Panel finds, however, that the Statement shows that the Respondent has the ability to pay the fine imposed by this Decision.

The Hearing Panel carefully weighed the Parties' arguments and determined that the appropriate sanctions under all of the circumstances of this case are a \$10,000 fine and a 20 business-day suspension. The Hearing Panel believes no purpose would be served by requiring the Respondent to requalify as a General Securities Representative, or by requiring that he be placed under heightened supervision once he re-enters the securities industry. The record does not show that the Respondent misunderstood the applicable Rule or that his violation resulted from the fact that his father was his supervisor.

In imposing the above sanctions, the Hearing Panel considered the relative seriousness of the offense. Both transactions were for substantial amounts and LPL ultimately lost more than \$160,000 due to the Respondent's misconduct. The Hearing Panel also finds that the customers' grant of discretionary authority was implied rather than expressed and that LPL's policies prohibited discretionary accounts.³¹ These factors make this an egregious case. On the other hand, both trades occurred on the same day and in the same security. Contrary to the Department's argument, the Hearing Panel does not find a continuing course of violative conduct. Moreover, the Respondent contributed a significant amount of money to the settlements with the two customers. According to the Department, the Respondent and his father paid \$224,003 towards these settlements. In consideration of these factors, the Hearing Panel concludes that a \$10,000 fine and a 20 business-day suspension will deter the Respondent and others from committing similar violations in the future and that these sanctions meet NASD's regulatory goal of protecting the investing public.

³¹ See Principal Considerations in Determining Sanctions, Guidelines 94.

V. Order

David William Haburjak is fined \$10,000 and suspended for 20 business days from associating with any member firm in any capacity.³² These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD, except, if this Decision becomes the final disciplinary action of the NASD, the suspension shall commence with the opening of business on Monday, October 7, 2002, and end at the close of business on November 1, 2002.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

David William Haburjak (by FedEx, next day delivery, and first-class mail)
Gregory Bartko, Esq. (by facsimile and first-class mail)
William Brice La Hue, Esq. (by first-class and electronic mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

³² 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.