NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C05990019
v.	:	
	:	**Hearing Panel Decision**
GERARD J. D'AMARO (CRD #2385619) Boca Raton, Florida	:	
	:	Hearing Officer - SW
and	:	
Kew Gardens Hills, NY	:	
	:	Dated: August 22, 2000
Respondent.	:	

Digest

The Department of Enforcement filed a two-count Complaint, alleging that Respondent Gerard J. D'Amaro: (i) provided an institutional customer with correspondence in the form of letters, facsimile transmissions, and telexes, which contained false and misleading representations, in violation of NASD Conduct Rule 2110; and (ii) failed to obtain prior approval of the correspondence from a principal of his employer, when he knew or should have known that prior approval of outgoing correspondence was required, in violation of NASD Conduct Rule 2110.

In an October 15, 1999 order, the Hearing Panel granted Enforcement's motion for summary disposition, finding that Respondent had violated Rule 2110 by providing

correspondence which contained false and misleading representations and by failing to obtain the prior approval by a principal of the outgoing correspondence. However, the Hearing Panel continued the proceeding for a hearing on sanctions. After the December 17, 1999 Hearing, the Hearing Panel determined to bar Respondent for violating Conduct Rule 2110. Respondent was also assessed the $1,598 cost of the Hearing.

Appearances

Mark P. Dauer, Esq., Regional Attorney, New Orleans, Louisiana, for the Department of Enforcement.

Theodore C. Anderson, Esq., Kilgore & Kilgore, Dallas, Texas, for Gerard J. D'Amaro.

DECISION

I. Introduction

A. The Complaint

The NASD Regulation, Inc. ("NASDR") Department of Enforcement ("Enforcement") filed the Complaint in this proceeding against Respondent Gerard J. D'Amaro on June 1, 1999. The two-count Complaint alleged that Respondent violated Conduct Rule 2110: (i) by providing correspondence in the form of letters, facsimile transmissions, and telexes, to an institutional customer, Union Trust Guarantee Co. Ltd. ("Union Trust"), which contained false and misleading representations, including, *inter alia*, that Union Trust had "available" in its account with Respondent's employer, Dean Witter

Reynolds, Inc. ("Dean Witter"), the sum of $100 million;[1] and (ii) by failing to obtain prior approval of the correspondence from a principal of Dean Witter, when he knew or should have known that prior approval of outgoing correspondence was required. Specifically, Enforcement argued that the correspondence was issued as part of a fictitious prime bank instrument scheme.

In response to count one of the Complaint, Respondent argued that the representation that Union Trust had $100 million available was substantially true, because Union Trust was involved in a series of bank debenture transactions that would result in it having $100 million in its Dean Witter account. Denying that the bank debentures were fictitious, Respondent, however, admitted that he knew that Union Trust did not have any securities or cash in its Dean Witter account at the time that he wrote the August 3, 1995 proof of funds letter. (Stip. at 3).

In response to count two of the complaint, Respondent admitted that he did not receive approval for each piece of correspondence, but argued that one or more principals of Dean Witter had approved the business plan, and such approval necessarily included Respondent's subsequent conduct in issuing the subject letters to complete the transaction.[2]

[1] Specifically, there were seven pieces of correspondence in dispute: May 3, 1995 letter to JE, chairman of Union Trust; April 5, 1995 letter to Union Trust; August 3, 1995 letter to Union Trust; August 8, 1995 letter to Union Trust; September 8, 1995 telex to ABN-AMRO Nederlands (sic); September 11, 1995 telex to ABN-AMRO Nederlands; and September 11, 1995 letter to Union Trust.

[2] Dean Witter's 1995 manual stated that all outgoing correspondence must be submitted to the branch manager for approval prior to the mailing, and it should be "truthful, in good taste, and not inflammatory or promissory." (CX-24, p. 22).

B. Summary Disposition Granted as to Liability

Enforcement filed a Motion for Summary Disposition on August 28, 1999. Enforcement's Motion for Summary Disposition, with 27 exhibits, argued that there were no genuine issues in dispute with regard to the false statements contained in the seven pieces of correspondence, and there was no dispute with regard to whether Respondent had the particular pieces of correspondence approved by a principal. Enforcement recommended that Respondent be found liable and be barred and fined $75,000 for violating Rule 2110. Counsel for Respondent filed an Opposition to the Motion for Summary Disposition, with 44 exhibits, on August 31, 1999.[3]

The Hearing Panel issued an October 15, 1999 Order granting the Motion for Summary Disposition as to liability, but continuing the proceeding for a hearing on sanctions. In the October 15, 1999 Order, the Hearing Panel found that the NASD had jurisdiction over Respondent pursuant to Article V, Section 4 of the NASD's By-Laws because Enforcement had filed the Complaint on June 1, 1999, within two years of the date that Respondent

[3] Enforcement's 27 exhibits submitted with the Motion for Summary Disposition as well as Respondent's 44 exhibits submitted with the Motion in Opposition to the Motion for Summary Disposition are a part of the record of this proceeding. Hereinafter, Enforcement's exhibits will be designated as "CX-" and Respondent's exhibits will be designated as "RX-"with the page number or paragraph number, as appropriate.

The Parties filed a stipulation on September 13, 1999 stating that all transcripts of depositions taken in the matter styled Firecreek Petroleum, Inc. et al. v. Dean Witter Reynolds, Inc., No. 96-00938-H, 160th Judicial District, Dallas County, Texas, may be used in this disciplinary proceeding in lieu of live testimony of the deponents.

The Parties filed a second stipulation on October 13, 1999; hereinafter, references to the statements in the October 13, 1999 Stipulation will be designated as "Stip at "

terminated his registration with Briarwood Investment Counsel, and the Complaint alleged that Respondent's misconduct began before his registration was terminated.[4]

The Hearing Panel found that it was undisputed that the August 3, 1995 proof of funds letter[5] drafted by Respondent contained false information, and that Respondent admitted that every piece of transmitted correspondence was not approved by a Dean Witter principal.[6]

C. The Hearing

The Parties presented evidence relating to the sanctions to the Hearing Panel, consisting of the Hearing Officer and two current members of the District 5 Committee, in New Orleans, Louisiana at a December 17, 1999 Hearing.[7] Enforcement presented one witness, EL, an attorney at Dean Witter.[8] Respondent testified on his own behalf and

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[4] Briarwood Investment Counsel, an NASD member, filed a Form U-5 with regard to Respondent on July 30, 1997. (CX-25, pp. 1-2).

[5] The August 3, 1995 proof of funds letter addressed to Union Trust signed by Respondent stated:

> We confirm, with full responsibility, that Union Trust Guarantee Co., Ltd. has available to their Account Number 601-375207-222 with us, the sum of One Hundred Million dollars (US $100,000,000).
>
> We further confirm that said funds are legally earned, of non-criminal origin and free and clear of all liens, encumbrances and third party interests.
>
> This confirmation is valid for (10) banking days from the issuance date. (CX-1, Labat Exhibit 1).

[6] The Order granting the Motion for Summary Disposition is attached hereto as Exhibit A. Because there was dispute regarding whether the six remaining pieces of correspondence contained false information, the Order granting the Motion for Summary Disposition did not specifically address whether the six remaining pieces of correspondence contained material misrepresentations.

[7] References to the testimony set forth in the transcript of the December 17, 1999 Hearing on Sanctions will be designated as "Tr."

[8] Dean Witter and Morgan Stanley merged in May 1997, and the entity is now known as Morgan Stanley Dean Witter. (RX-14, bates page 2924).

presented two witnesses, SS of Alcaeus Enterprise, USA Incorporated ("Alcaeus") and JT of Firecreek Petroleum, Inc. ("Firecreek").

D. Background

In 1994, the president of Firecreek, Mr. T, was seeking financing for an oil exploration project off the coast of Vietnam.[9] (Tr. p. 125). Mr. T contacted Mr. S of Alcaeus, a project finance company, in August 1994, as a possible source of financing.[10] (Tr. pp. 104, 133). Mr. S introduced Firecreek to another one of its clients, the Jaquila Group of Companies ("Jaquila Group") located in Nice, France.[11] (Tr. p. 103). Mr. T was advised that Jaquila Group's subsidiary, Union Trust, had the opportunity to purchase bank debentures at a 25% to 30% discount, which Union Trust could then resell for enormous profits. (Tr. pp. 103, 133). The bank debentures with an AA rating were to be issued by the top 25 Western European banks. (CX-1, Labat Exhibit 3). Union Trust agreed to invest a portion of the profits from the resale of the Western European bank debentures into Firecreek's Vietnam petroleum project. (Tr. pp. 103, 133). Mr. T paid Union Trust $70,000 in due diligence fees in connection with obtaining funding for Firecreek's Vietnam petroleum project. (Stip. at 5).

[9] On February 16, 1994, Firecreek had entered into a Memorandum of Understanding with Vietnam Oil and Gas Corporation of the Socialist Republic of Vietnam ("PetroVietnam") to acquire oil and gas rights with respect to the Mekong Delta Basin and shallow coastal waters area of the Socialist Republic of Vietnam. (RX-10 at 2).

[10] Alcaeus was a two-man project financing entity, which had been in existence from 1994. (Tr. p. 116). Mr. S had no experience as a project financier prior to founding Alcaeus. (Tr. p. 117).

[11] Mr. S testified that he worked on over 20 projects for the Jaquila Group beginning in 1992, none of which ever closed. (Tr. pp. 114, 118).

Allegedly, Mr. JE, the chairman of Jaquila Group, had experience in reselling deep discount European bank debentures in Europe, but had no experience in reselling them in the United States. (Tr. p. 99). Mr. S, believing Dean Witter to be an expert on selling debt securities in the United States, arranged for an introduction of Mr. E to Dean Witter. (Tr. p. 103).

Ultimately, Mr. S's phone call to Dean Witter was routed to Respondent in December 1994. (Tr. pp. 101-102). Respondent was a 23 year old retail account executive trainee at Dean Witter with less than three years of investment banking experience, but had a reputation in the office for having an interest in bond, as opposed to equity, transactions. (Tr. p. 104).

In January 1995, Mr. S and Mr. E met with Respondent and Mr. AB of Dean Witter. (Tr. p. 106). Mr. B was an institutional broker at Dean Witter. (RX-40, p. 41). Subsequently, Mr. S's partner spoke with Mr. RB of Dean Witter. (Tr. p. 106). Mr. B, of the corporate finance department of Dean Witter, requested additional information regarding the transaction and, subsequently, told Respondent on May 17, 1995 that the proposed transaction was probably a scam. (Tr. p. 106; RX-36, pp. 6, 21, 49). Mr. B told Mr. S that he couldn't pursue the transaction from a corporate finance perspective and it should be pursued through other appropriate people at Dean Witter. (RX-36, p. 36).

Over the next eight months, Respondent worked on the transaction and sent in excess of 100 pieces of correspondence related to the debenture transaction.[12] (Tr. p. 83). Some of

[12] The Hearing Panel took particular note that a number of faxes were sent from Dean Witter's authorized fax machine to Alcaeus. (Tr. p. 34). Dean Witter did not retain copies of these faxes, although its 1995 manual required that copies of all outgoing correspondence be sent to the Compliance Department at the

the pieces of correspondence were approved by a Dean Witter principal, including a January 27, 1995 letter signed by Respondent, which confirmed the January 27, 1995 meeting with Mr. E and requested financial statements from the Jaquila Group. (RX-4; RX-5).

Seven pieces of correspondence were not approved by a principal of Dean Witter. The unapproved items were all signed by Respondent and included: (i) the April 5, 1995 letter to Union Trust, which confirmed Dean Witter's interest in purchasing bank debentures subject to its approval of the 25 Western European issuing banks and indicating that Dean Witter would sign a proof of funds letter upon receipt of an "approved contract"; (ii) the May 3, 1995 letter to Union Trust, which confirmed that up to $105.3 million of the funds from the resale of the bank debentures would be used to finance the exploration and development of oil and gas deposits in the Mekong Delta of Vietnam;[13] (iii) the August 3, 1995 false proof of funds letter, which indicated that Union Trust had $100 million available in its Dean Witter account; and (iv) the September 8, 1995 telex addressed to ABN-AMBRO Nederland, a European bank, which stated that Dean Witter was issuing a purchase order for 10-year unsubordinated bank debentures up to $10 billion in U.S. currency, at 7.5 percent interest, payable annually in arrears, for an invoice price of no more than 75.5 percent. (CX-1, Labat Exhibits 1, 4, 6-7). Respondent admitted that the letters were composed based on the ideas and language provided by Mr. E and Mr. S. (Tr. p. 91).

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close of each business week. (Tr. p. 34; CX-24, p. 22). The Hearing Panel also noted that, during Respondent's eight month association with Union Trust and Alcaeus, Respondent generally mentioned his "big deal" to a number of principals of Dean Witter who failed to investigate what the deal involved.

[13] The May 3, 1995 letter was presented to PetroVietnam at a meeting held in Hanoi on May 8, and May 9, 1995 in connection with Firecreek's oil exploration project. (RX-10 at 3).

On September 12, 1995, Dean Witter received a letter from Worldwide Financial Network, Inc., U.S.A. of Nice, France seeking verification of the August 3, 1995 proof of funds letter. (Tr. p. 30; RX-24, bates page 2026). Upon determining that Union Trust never had any funds or securities in its Dean Witter account and confirming that Respondent had sent the August 3, 1995 letter without approval, Dean Witter fired Respondent on September 12, 1995. (Tr. p. 33).

In January 1996, Respondent, Firecreek, and Alcaeus filed suit against Dean Witter in a Texas state court alleging wrongful discharge of Respondent and tortious interference with contract in relation to the alleged debenture transaction.[14] (Stip. at 6; CX-1, Labat Exhibit 21 at 3.02).

It was stipulated in this proceeding that neither Dean Witter nor any public or institutional customer of Dean Witter lost money as a result of the purchase or sale, or failed purchase or sale, of any securities described in the correspondence. (Stip. at 4). No part of the $70,000 paid by Mr. T to Union Trust was paid to Respondent. (Stip. at 5). Respondent is to receive 10 percent of any recovery in the Texas lawsuit against Dean Witter.[15] (Stip. at 7).

[14] The Texas court granted Dean Witter's motion for summary judgment on December 18, 1998. (CX-1, Labat Exhibit 9). Firecreek and Alcaeus have filed an appeal.

[15] The plaintiffs in the Texas lawsuit pooled their claims by written agreement, and Respondent is entitled to receive 10 percent of any recovery for the contribution of his claim, although the court dismissed Respondent's claim as arbitrable. (Stip. at 7).

II. Sanctions

A. The Parties Arguments

Enforcement argued that Respondent should be barred and fined $75,000 for the two violations, which constituted one course of conduct, i.e., the sending of a series of letters, telexes, and faxes in furtherance of a prime bank instrument scheme. Enforcement cited the discussions of fraudulent prime bank instruments in the Federal Reserve Bank of New York Circular No. 10858 and the July 17, 1996 testimony of William B. McLucas, former Director, Division of Enforcement, U.S. Securities and Exchange Commission, as evidence that the proposed Union Trust transaction was a fraudulent scheme.[16] (CX-10; CX-11).

Specifically, Enforcement argued that the bank debentures to be purchased and resold by Union Trust were fictitious and that Respondent's conduct was very similar to the conduct of Mr. Kaiden in In re Martin Kaiden, 66 S.E.C. Docket 2004 (March 24, 1998). In the Kaiden case, Mr. Kaiden offered fictitious prime bank instruments to some customers and sent out letters containing false representations about the fictitious prime bank instruments. Although no one purchased the prime bank instruments as a result of Mr. Kaiden's efforts, the SEC barred Mr. Kaiden and cited as an aggravating factor supporting the bar that Mr.

[16] Mr. McLucas testified before the Senate Banking, Housing and Urban Affairs Committee, on July 17, 1996, that investors throughout the world have been defrauded in a variety of schemes involving fictitious financial instruments. (CX-11). He listed several representations made by the sellers of these fictitious financial instruments: (i) the financial instrument is to be issued by a so-called "prime bank" or a "top 100 world bank"; (ii) the seller has special access to programs in which these prime banks participate; (iii) those who purchase prime bank instruments at a discount can sell the instruments shortly thereafter at enormous premium; and (v) the market for these instruments is secret and the institutions involved or regulatory agencies will deny the existence of the program, if asked. (CX-11).

Kaiden continued to refuse to acknowledge the fictitious nature of the securities described in the correspondence.

Respondent argued that he should not be sanctioned because the debenture transaction was legitimate and Dean Witter stopped the transaction when it realized that Respondent could earn commissions on the transaction of $50 million. (CX-1, Labat Exhibit 21 at 2.38). Respondent's arguments were not persuasive.

To support his claim that the transaction was legitimate, Respondent submitted an affidavit of JR, which had been previously submitted in the Texas litigation. The JR affidavit stated, among other things, that: (i) Mr. R received a Masters of Business Administration from the Wharton School of Business at the University of Pennsylvania in 1994, (ii) he had personally closed eleven deals involving the international trading of deep-discount medium term bank debentures, and (iii) the August 3, 1995 proof of funds letter, in his opinion, was not false because Dean Witter had agreed to provide the funds to Union Trust.[17] (RX-8 at 2-3, 19). Enforcement submitted a statement, from the Recorder of the Administrative Records Office of the Wharton Graduate Division of the University of Pennsylvania, that there was "no record of JR attending the MBA program and receiving a degree." (CX-9). Based on the false statement regarding Mr. R's degree from Wharton and his strained interpretation of the August 3, 1995 proof of funds letter, the Hearing Panel did not find the R affidavit credible.

[17] Mr. R stated that the discounted price of the medium term bank debentures might be as low as eighty cents on the dollar or less because the debentures were approved by the international banking community as efficient means of increasing the worldwide flow of cash. (RX-8 at 10). He also asserted that often a prerequisite for a bank engaging in such transactions was the existence of an investment project in an underdeveloped nation, to which proceeds from the sale of the debentures must be devoted, such as Firecreek's Vietnam project. (RX-8 at 10). According to Mr. R, banks are willing to sell debentures at substantial discounts because the transactions substantially and quickly increase a bank's equity capital. (RX-8 at 11).

Respondent admitted that he never spoke with any European bank that substantiated that it was going to sell debentures to Union Trust. (Tr. p. 89). Mr. S of Alcaeus admitted that he never personally saw any contracts for European banks to sell debentures to Union Trust or the Jaquila Group. (Tr. p. 123). Mr. T of Firecreek admitted he had never seen any agreements pursuant to which European banks were under an obligation to sell bank debentures to the Jaquila Group or Union Trust. (Tr. p. 131). Mr. T also admitted he has never talked with any foreign bank official who stated that his bank agreed to sell bank debentures to the Jaquila Group. (Tr. pp. 131-132).

Enforcement's argument that the debentures were fictitious was much more persuasive. EL of Dean Witter testified that it made no economic sense for a major European bank, which trades debt at a few basis points below market, to issue debt to a particular entity for up to thirty points off the market. (Tr. p. 70). The Federal Reserve Circular, submitted by Enforcement, included an Interagency Advisory issued in 1983 by the federal financial institutions supervisory agencies, and updated in June 1996, which warned investors and bankers that financial instruments promising unrealistic returns on multimillion dollar investments and allegedly approved by the International Chamber of Commerce were earmarks of a potential fraud. (CX-10).

B. Discussion

The Hearing Panel agrees with Enforcement that Respondent's issuance of correspondence without approval of a Dean Witter principal, including the false August 3, 1995 proof of funds letter, involved one course of conduct. In determining the sanctions, the Hearing Panel reviewed the Sanction Guidelines for intentional or reckless misrepresentations

or material omissions of fact. The Guidelines recommend a fine of $10,000 to $100,000 and suspension in any or all capacities for 10 business days to two years, and a bar, in egregious cases.[18]

The Hearing Panel determined that the proposed deep-discount for the debentures, the length of time Respondent worked on the debenture transaction, the secrecy surrounding the names of the issuing banks, the discussion of the elements of fraudulent prime bank instruments set forth in the Interagency Advisory, the potential $50 million commission for an inexperienced retail broker, and Mr. B's warning to Respondent that the transaction was probably a sham were red flags that should have caused Respondent to question whether the bank debentures were fictitious. At a minimum, Respondent should have carefully obtained approval of every piece of correspondence concerning the debentures. Respondent's actions in going forward with the proposed transaction despite these red flags constituted extreme recklessness.

Even if Respondent truly believed that the proposed debenture transaction was legitimate at the time that he wrote and distributed the seven pieces of correspondence, by the time of the Hearing, Respondent should have acknowledged, at least, the possibility that the transaction was not legitimate. Respondent has not done so. He still insists that the transaction was legitimate although neither he nor his two witnesses ever saw a written contract from a European bank obligating it to issue such deep discount notes. He continues to assert that the debenture transaction was legitimate although the affidavit of his expert on

[18] NASD Sanction Guidelines, p. 80 (1998).

such transactions has proven to be false in at least one respect, and the description of the transaction has the earmarks of a sham as set forth in the Interagency Advisory.

Either Respondent is lying or he is very naive when he states he still believes, without qualification, that the transaction was legitimate. Through his recklessness in sending the false proof of funds letter, Respondent exposed Dean Witter to a potential $100 million liability. Having failed to acknowledge the seriousness of his misconduct, the Hearing Panel is not confident that Respondent would be any less reckless in the future, and possibly could expose a public customer to an enormous liability. Whether Respondent is lying or naive, the Hearing Panel believes that Respondent is a danger to the investing public and should be barred from association with any NASD member.

Because Respondent is being barred, the Hearing Panel determined that a fine was not necessary. Unlike the Kaiden case, Respondent was clearly not the ring leader of the proposed transaction. Respondent did not gain financially from his misconduct, and no public customer suffered a loss as a result of his misconduct.

IV. Conclusion

Based on the evidence submitted at the Hearing and the factors discussed above, the Hearing Panel barred Respondent D'Amaro for violating Conduct Rule 2110 by sending false correspondence and by failing to obtain prior approval from a principal for the seven pieces of outgoing correspondence. Respondent was also assessed $1,598 for the cost of the Hearing, consisting of a $750 administrative fee and $848 for the cost of the transcript. The bar will

become effective immediately upon this Decision becoming the final disciplinary action of the NASD.[19]

SO ORDERED.

Hearing Panel

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by: Sharon Witherspoon,
Hearing Officer

Dated: Washington, DC
August 22, 2000

Copies to:
Gerard J. D'Amaro (via Airborne Express and first class mail)
W. D. Masterson, Esq. (via facsimile and first class mail)
Mark P. Dauer, Esq. (via facsimile and first class mail)
Rory C. Flynn, Esq. (via first class mail)

[19] 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.