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)	:	Hearing Officer - SW
Respondent.	:	

ORDER GRANTING PARTIAL SUMMARY DISPOSITION IN FAVOR OF THE DEPARTMENT OF ENFORCEMENT AND CONTINUING THIS PROCEEDING FOR HEARING ON SANCTIONS

The Department of Enforcement ("Enforcement") filed a two-count Complaint in this disciplinary proceeding, alleging that Respondent Gerard J. D'Amaro ("Respondent") violated NASD Conduct Rule 2110: (i) by providing to an institutional customer, Union Trust Guarantee Co. Ltd. ("UTG"), correspondence in the form of letters, facsimile transmissions and telexes,[1] containing false and misleading representations, including, *inter alia*, that UTG had "available" in its account with Respondent's employer, Dean Witter Reynolds, Inc. ("Dean Witter"), the sum of $100 million; 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.

[1] Specifically, there are seven pieces of correspondence in dispute: May 3, 1995 letter to JE, chairman of UTG's parent company, Jaquila Group of Companies; April 5, 1995 letter to UTG; August 3, 1995 letter to UTG; August 8, 1995 letter to UTG; September 8, 1995 telex to ABN-AMRO Nederlands; September 11, 1995 telex to ABN-AMRO Nederlands; and September 11, 1995 letter to UTG.

Respondent answered that the representations that UTG had available the sum $100 million in its Dean Witter account were true, or substantially true, pursuant to UTG's plan to purchase at a substantial discount bank debentures issued by certain European banks, Dean Witter's agreement to resell the bank debentures to Dean Witter clients at a profit for UTG, and UTG's intent to use the proceeds from reselling the bank debentures both to pay for the bank debentures and to finance third world capital projects.

Respondent also answered that one or more principals of Dean Witter approved the business plan, or agreement, to resell the bank debentures, and such approval necessarily included Respondent's subsequent conduct to complete the transaction.

This matter is now before this Hearing Panel on Enforcement's motion for summary disposition and to strike affirmative defenses filed on August 23, 1999. Respondent filed an opposition to Enforcement's motion on August 31, 1999.[2]

For the reasons that follow, the Hearing Panel will grant Enforcement's motion as to liability and continue this proceeding to November 16, 1999, for a hearing on sanctions.

Discussion

Rule 9264(d) of the NASD Code of Procedure permits a Hearing Panel to grant summary disposition when "there is no genuine issue with regard to any material fact and the

[2] References to exhibits attached to the Labat Affidavit included in Enforcement's motion are designated as "CX-" and references to exhibits attached to Respondent's motion in opposition are designated as "RX-."

Party that files the motion is entitled to summary disposition as a matter of law." This is identical to the standard under Rule 56(c) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") governing summary judgments.

It is well established under Fed. R. Civ. P. 56 that the moving party bears the initial burden of showing "the absence of a genuine issue of material fact."[3] The substantive law governing the case will identify those facts which 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."[4] Factual disputes that are irrelevant or unnecessary will not be counted.[5]

If the moving party meets the initial burden, the opposing party must come forward with specific facts "showing that there is a genuine issue for trial."[6] The inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.[7]

[3] Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986).

[4] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[5] Id.

[6] Matsushita Elec. Indus. Corp., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

[7] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

I. Jurisdiction

Respondent was associated with Briarwood Investment Counsel ("Briarwood Investment") as a general securities representative from May 1997 to July 1997. Briarwood Investment filed a Form U-5 for Respondent on July 30, 1997.[8] Respondent is not currently employed in the securities industry.[9] (CX-3, 1).

Under Article V, Section 4(a) of the NASD's By-Laws, the NASD retains jurisdiction over Respondent for two years following the termination of his registration with a member firm, and the NASD may file a complaint against Respondent based upon conduct that occurred prior to his termination. Enforcement filed the Complaint in this proceeding on June 1, 1999, within two years of the termination of Respondent's registration on July 30, 1997, and the alleged conduct related to Respondent's conduct prior to the termination of his registration. Accordingly, the Hearing Panel finds that the NASD has jurisdiction over Respondent.

II. Count One--False Correspondence

Enforcement produced a letter dated August 3, 1995 addressed to UTG signed by Respondent that states:

> 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.[10]

[8] CX-26, 2.

[9] CX-26, 1.

[10] CX-1.

In investigative testimony, Dean Witter principals represented that UTG never had any funds or securities on deposit with the firm. Respondent admits that, at the time the August 3 letter was written, UTG did not have funds in its account at Dean Witter.[11] Respondent also admits that he was aware that the August 3 letter was being presented to a third party, Banco Capital.[12]

Respondent argues that by reason of the agreement between Dean Witter and UTG for the resell of the bank debentures, there "would" be funds available.[13] However, the August 3 letter does not state "there would be funds available," it states UTG "has funds available." In addition, Respondent admits in his investigative testimony that at no time in the agreed transaction, which he described, would UTG have $100 million belonging to it.[14]

Even if there was an agreement between Dean Witter and UTG as described by Respondent, the August 3 letter was false at the time it was drafted and sent. In order for the August 3 letter to be true, UTG's Dean Witter account needed to contain either cash or marketable securities in the amount of $100 million. Neither $100 million in cash nor bank debentures were in UTG's account on August 3, or otherwise available within the next ten days as cited in the letter.

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[11] CX-8, 179.

[12] CX-8, 183.

[13] Respondent's Memorandum of Points and Authorities in Opposition To Motion for Summary Disposition ("Respondent's Memorandum of Points and Authorities"), p. 5.

[14] CX-8, 188.

It is undisputed that the August 3 letter drafted by Respondent contained false information. In his opposition to the motion for summary disposition, Respondent failed to provide any evidence that cast any doubt on this material fact. Accordingly, the Hearing Panel finds there is no genuine issue of material fact, and, hereby, grants Enforcement's motion for summary disposition on count one of the Complaint.

III. Count Two--Prior Approval of All Correspondence

Enforcement produced correspondence, which does not indicate on its face that a Dean Witter principal approved it. Respondent admits that every piece of outgoing correspondence needed to be approved.[15] Respondent did not argue that each of the letters, which he admitted sending, was approved by a Dean Witter principal. He argued that the initial business plan was approved, and, consequently, Dean Witter necessarily approved Respondent's subsequent actions to carry out the business plan.

Contrary to the representation in Respondent's Memorandum of Points and Authorities that Respondent's administrative assistant, MK, testified that all proper fax procedures were followed,[16] Ms. K stated in her investigative testimony that she could not recall whether she had gone through the correct fax procedures.[17]

A finding that Dean Witter management knew nothing about the proposed bank debenture transaction with UTG is not required in order to find that Respondent did not receive

[15] CX-8, 139.

[16] Respondent's Memorandum of Points and Authorities, p. 8.

[17] RX-37, 14.

approval for each piece of correspondence as required. A finding that Respondent reused fax sheets that had been previously initialed is also not required in order to find that Respondent did not receive approval for each of the seven pieces of correspondence sent by Respondent. These disputes are irrelevant to the issue of whether Respondent had each of the seven pieces of correspondence approved because Respondent admitted, in investigative testimony, that all of the correspondence was not approved.[18] Accordingly, the Hearing Panel finds that no dispute exists, and Enforcement is entitled to summary disposition on count two of the Complaint as a matter of law.

IV. Sanctions

The only issue remaining is the appropriate sanctions under the facts and circumstances of this proceeding. On this issue, the Hearing Panel finds that the record is not developed sufficiently, and that Respondent should have the opportunity to present any mitigating evidence he may have. Accordingly, the Hearing Panel defers ruling on the issue of sanctions.

Conclusion

Accordingly, Enforcement's motion for summary disposition is granted on the issue of liability as to counts one and two of the Complaint, and this proceeding is continued to

[18] In response to the question, did he have Dean Witter principals sign everything or almost every thing that he sent out in connection with this transaction, Respondent stated that he had the Dean Witter principals sign "almost everything." (CX-8, 107).

November 16, 1999, for a hearing on the issue of sanctions. Enforcement's alternative motion to strike the affirmative defenses is denied as moot.

SO ORDERED.

Hearing Panel

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by: Sharon Witherspoon,
Hearing Officer

Dated: Washington, DC
October 15, 1999

Copies to:
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