

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

GERARD F. BYRNE
(CRD No. 1032847),

Respondent.

Disciplinary Proceeding
No. 20050008469-01

Hearing Officer – SNB

DEFAULT DECISION

January 3, 2007

Respondent obtained a wrongful extension of credit, in violation of Section 7(f) of the Exchange Act and Regulation X promulgated thereunder, and NASD Rule 2110, and caused a firm's books and records to be inaccurate, in violation of NASD Rules 3110 and 2110. For these violations, Respondent is barred from associating with any member firm in any capacity.

Appearances

Lara C. Thyagarajan, Esq., David Jaffe, Esq., New York, NY, (Rory C. Flynn, Esq., Washington, DC, and Mark Dauer, Esq., New Orleans, LA, Of Counsel) for the Department of Enforcement.

No appearance by Respondent.

DECISION

I. Background

On August 7, 2006, the Department of Enforcement ("Enforcement") filed a two cause complaint against Gerard F. Byrne ("Respondent"), attached to this Decision as Exhibit A. The Complaint alleges that Respondent violated Section 7(f) of the Exchange Act, and Regulation X promulgated thereunder, and NASD Rules 2520(f)(7) and 2110,

by wrongfully inflating the value of his brokerage account so as to obtain a wrongful extension of credit. In connection with this conduct, the Complaint also alleges that Respondent violated Rules 3110 and 2110, by causing his broker-dealer's books and records to be inaccurate. Respondent did not file an Answer to the Complaint. On October 19, 2006, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, supported by the declaration of Lara C. Thyagarajan and 12 exhibits. Respondent did not reply to the Motion. Accordingly, pursuant to Rules 9215 and 9269, the Motion is granted.¹

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on August 3, 2006, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address"). In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to the same address on September 1, 2006. Respondent did not file an Answer to the Complaint.

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, and the declaration and exhibits filed by Enforcement with its motion.

III. Jurisdiction

Respondent first became registered with NASD as a Government Securities Limited Representative in 1988. Respondent became registered as a General Securities Representative through member firm Kabrik Trading LLC ("Kabrik") on February 7, 2005. On March 3, 2005, Kabrik filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") disclosing that Byrne was terminated on February 17, 2005, for the conduct alleged in the Complaint. Respondent has not been registered with NASD since then. Respondent is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the Complaint was filed within two years of the termination of Respondent's registration, and Respondent is charged with misconduct that occurred while he was registered.

IV. Violations

A. Section 7(f) of the Exchange Act, Regulation X, and NASD Rule 2110

Section 7(f) of the Exchange Act states that it is unlawful for any person to receive an extension of credit for the purchase of securities if the credit is prohibited by regulations promulgated under that statute. Regulation T, promulgated thereunder, requires investors to deposit into their securities accounts at least 50% of the purchase price of any securities purchased on margin. 12 CFR Section 220.12. Regulation T also prohibits broker-dealers from extending credit except where the purchaser posts the required funds into his or her account. 12 CFR Section 220.3. Regulation X, promulgated under the same statute, applies to borrowers. It provides that a borrower who willfully causes credit to be extended in contravention of Regulation T violates

Regulation X, regardless of whether the purchases were made in a cash account or a margin account.

Moreover, Rule 2520(f)(7) provides:

When a “margin call,” as defined in Section 220.2 of Regulation T, is required in a customer’s account, no member shall permit a customer to make a practice of either deferring the deposit of cash or securities beyond the time when such transactions would ordinarily be settled or cleared, or meeting the margin required by the liquidation of the same or other commitments in the account.

This prohibition on liquidations shall apply to those accounts that, at the time of liquidation, are not in compliance with the equity to be maintained pursuant to the provisions of this Rule.

The Complaint alleges that on February 15, 2005, Respondent placed an order with Kabrik’s trading desk to buy 40,000 shares of Audible, Inc. (“ADBL”) on margin for his own account, for \$792,392. When the Kabrik trading desk later contacted Respondent to ask for the value of his account, Respondent lied and said the value was \$500,000. In reality, Respondent’s account was worth only \$143,605 at the time, so there was insufficient collateral for the purchase of 40,000 ADBL shares. Respondent failed to post this purchase with Kabrik’s clearing firm, as required. He also failed to post two transactions that he had effected the same day involving shares of Charles River Laboratories International, Inc. (“CRL”).

On February 16, 2005, Kabrik learned of Respondent’s trading activity for the prior day, and requested that Respondent post his trades with the clearing firm immediately. In response, Respondent did post his CRL transactions, but failed to post his 40,000 share ADBL purchase. Instead, Respondent continued to trade ADBL in his account, buying an additional 110,000 shares on margin at a cost of \$2,006,708, and

selling 30,000 shares at \$572,882.13. To make matters worse, Respondent also instructed the clearing firm to wire him the \$134,548 balance in his Kabrik account, leaving his account without any assets with which to pay for his ADBL purchases. Had Respondent posted his trades with Kabrik's clearing firm as required, he would not have been able to liquidate his account, because his account would have reflected a debit balance of (\$678,844).

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this proceeding, that Respondent violated Sections 7(f) of the Exchange Act, Regulation X, and NASD Rule 2110, which provides that, "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."²

B. Books and Records; Rules 3110 and 2110

Rule 3110 requires that broker-dealers make and keep certain records. The obligation to make and keep records carries the implication that those records must be accurate.³ Here, the Complaint alleges that Respondent failed to post trades made in his personal margin account to the clearing firm, rendering Kabrik's books and records incomplete and inaccurate. The Hearing Officer therefore finds that the allegations in the second cause of the Complaint, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent violated Rules 3110 and 2110.

² In light of these findings, it was unnecessary to reach the issue of whether Respondent violated Rule 2520(f)(7).

³ *Stephen M. Sohmer*, Exch. Act Rel. No. 49052, 2004 SEC LEXIS 41, at *24 (Jan. 12, 2004) ("The requirement that records be kept entails that those records must be true and accurate.") (citation omitted); *James F. Novak*, Exch. Act Rel. No. 19660, 1983 SEC LEXIS 2023, at *12 (Apr. 8, 1983) ("The requirement that records be kept embodies the requirement that such records be true and correct.") (citation omitted).

V. Sanctions

Where multiple related violations arise out of the same underlying transaction or event, a single set of sanctions may be appropriate and effective.⁴ Though the First and Second Counts of Complaint allege different violations, the Hearing Officer finds that the allegations are based upon the same series of transactions and that a single set of sanctions is, therefore, appropriate for these violations.

For Count One, Enforcement argues that a bar is appropriate, pointing to NASD Sanction Guidelines that provide for a bar for violations of Regulation T and margin requirements, in egregious circumstances.⁵ The Guidelines also provide for a bar for egregious record keeping violations.⁶ Here, Respondent willfully misrepresented the value of his account for his own personal gain. Accordingly, the Hearing Officer finds that his misconduct was egregious and a bar is warranted.

VI. Conclusion

Respondent received a benefit from a wrongful extension of credit, in violation of Section 7(f) of the Exchange Act and Regulation X promulgated thereunder, and NASD Rule 2110, and caused a firm's books and records to be inaccurate, in violation of NASD Rules 3110 and 2110. For these violations, Respondent is barred from associating with

⁴ See, e.g., *Dep't. of Enforcement v. Respondent Firm 1*, No. C8A990071, 2001 NASD Discip. LEXIS 6, at *30-31 (NAC Apr. 19, 2001).

⁵ *Guidelines* at 31 (2006 ed.).

⁶ *Guidelines* at 30 (2006 ed.).

any member firm in any capacity. The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Sara Nelson Bloom
Hearing Officer

Copies to:

Gerard F. Byrne *(via overnight and first-class mail)*
Lara Thyagarajan, Esq. *(via electronic and first-class mail)*
Rory C. Flynn, Esq. *(via electronic and first-class mail)*
Mark P. Dauer, Esq. *(via electronic and first-class mail)*

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COMPLAINT

Upon information and belief, the *Department of Enforcement* ("Complainant") alleges that:

JURISDICTION

1. Respondent Gerard F. Byrne ("Respondent") first became registered with NASD as a Government Securities Limited Representative (RG) on July 28, 1988.
2. Subsequently, Respondent became registered as a Corporate Securities Representative (CS) on September 1, 1998 and as a General Securities Representative (GSR) on August 3, 2004.
3. From on or about February 7, 2005 to on or about February 17, 2005, Respondent was registered with NASD as a GSR through member firm Kabrik Trading LLC (BD No. 104460) ("Kabrik").
4. On March 3, 2005, Kabrik filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") concerning Respondent. The Form U-5 disclosed that Respondent's last day of employment at Kabrik was on February 17, 2005.

5. Currently, Respondent is not associated with any member firm. However, NASD retains jurisdiction over Respondent pursuant to Article V, Section 4 of its By-Laws.

FIRST CAUSE OF COMPLAINT
(Receipt of Benefit from Wrongful Extension of Credit)

Violations of Section 7(f) of the Securities and Exchange Act of 1934 (the "Exchange Act") and Regulation X promulgated thereunder, NASD Conduct Rules 2110 and 2520(f)(7).

6. Paragraphs 1 through 5 are re-alleged and incorporated herein by reference.
7. Byrne was hired by Kabrik in February 2005 as a registered representative and was permitted to trade for his own personal margin account.
8. In order to effect transactions in his personal account, Byrne was required to complete a two step process. First, he was required to call or email Kabrik's trading desk with information necessary to effect the trade. Second, he was required to post the identical trade information with the Firm's clearing firm (the "Clearing Firm"), via computer.
9. With the exception of the trades at issue here, Byrne followed the required procedures and timely posted his trades with the Clearing Firm.

Byrne's Trading on February 15, 2005

10. On February 15, 2005, Byrne placed an order with Kabrik's trading desk to buy 40,000 shares of Audible, Inc. ("ADBL") on margin for his own account. The aggregate purchase price was \$792,392.00.
11. On that same day, a senior Kabrik trading desk employee contacted Respondent and inquired as to the value of Respondent's account. Respondent told the

employee that he had \$500,000 in the account, which, if true, would have been a sufficient amount to fund up to \$2,000,000.00 in purchases on margin.

12. In actuality, Respondent's account was worth only \$143,605.00 at the time the senior Kabrik trading desk employee contacted him. This was insufficient collateral for the purchase of the 40,000 ADBL shares. Respondent lied to the employee concerning the value of his account.
13. Even though he had insufficient margin capacity available to make the ADBL trades, Respondent went ahead with the purchases and then failed to post those purchases with the Clearing Firm as required. Respondent did, however, post other trades he made on that same day.
14. Additionally, Respondent failed to post two other trades made on February 15, 2005. These trades were an 8,000 share short sale (\$403,845.91) and a buy cover (\$410,334.40) of Charles River Laboratories International, Inc. ("CRL"), on which Respondent lost a total of \$6,488.49.

Respondent's Trading on February 16, 2005

15. On the morning of February 16, 2005, Kabrik learned of Respondent's prior day trading activity and the Firm's president and chief executive officer ordered Respondent to post his trades with the Clearing Firm immediately.
16. In response, Respondent did post his CRL short sale and buy cover, but he failed to post his February 15th ADBL purchases. Instead, Respondent continued to trade in ADBL, and purchased an additional 110,000 shares of ADBL (\$2,006,708.00) on margin and sold 30,000 shares of ADBL (\$572,882.13). Again, Respondent failed to post any of these trades.

Respondent's Liquidation of His Account

17. Also on February 16th, Respondent instructed the Clearing Firm to wire \$134,548.00 out of his Kabrik account, leaving his account devoid of any assets with which to pay for any of the ADBL purchases.

Had Respondent posted his trades with the Clearing Firm as required, he would not have been able to liquidate his account because his account would have reflected a debit balance of -\$678,844.00.

18. Respondent's course of conduct violated his obligation to observe high standards of commercial honor and just and equitable principles of trade.

Based on the foregoing, Respondent violated Section 7(f) of the Exchange Act, Regulation X promulgated by the Board of Governors of the Federal Reserve System, NASD Conduct Rule 2520(f)(7) and NASD Conduct Rule 2110.

SECOND CAUSE OF COMPLAINT
(Books and Records)

Violation of NASD Conduct Rule 3110 for Causing Broker-Dealer's Books and Records to be Inaccurate

19. Paragraphs 1 through 18 are re-alleged and incorporated herein by reference.

20. Respondent was required to post information concerning all of his trading directly with the Clearing Firm.

21. On February 15, 2005 and February 16, 2005, Respondent failed to post certain trades made in his personal margin account that he was required to post. As a result, he caused the Firm's books and records to be inaccurate.

By reason of the foregoing, Respondent violated NASD Conduct Rules 3110 and 2110.

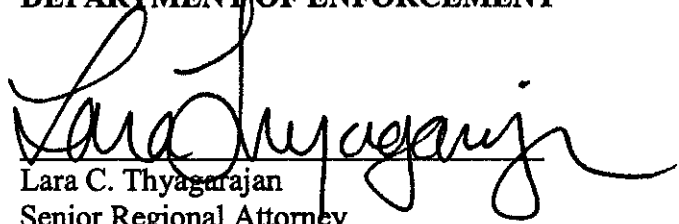
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon Respondent in accordance with NASD Procedural Rule 8310;
- C. An order imposing such costs of any proceedings as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330; and
- D. An order imposing any other fitting sanction.

Dated: August 3, 2006

DEPARTMENT OF ENFORCEMENT



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