

## NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

MITCHELL A. WEISBERG  
(CRD No. 1882341),

Respondent.

Disciplinary Proceeding  
No. C07050020

Hearing Officer – SNB

**DEFAULT DECISION**

August 19, 2005

**Respondent is barred from associating with any NASD member in any capacity for failing to respond to requests for information in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. In light of this bar, no further sanctions are imposed for executing unauthorized transactions in customer accounts in violation of NASD Conduct Rule 2110 and IM-2310-2.**

### *Appearances*

Gene E. Carasick, Esq., Regional Counsel, Atlanta, Georgia, and Rory C. Flynn, Esq., Washington, DC, of Counsel, for the Department of Enforcement.

No appearance by or for Respondent.

### **DECISION**

#### **I. Background**

On March 29, 2005, the Department of Enforcement (“Enforcement”) filed a two-cause Complaint in this proceeding, attached to this Decision as Exhibit A. The first cause of action alleges that the Respondent Mitchell A. Weisberg (“Respondent”) violated Conduct Rule 2110 and IM-2310-2 by purchasing securities in three customer accounts without their prior knowledge or authorization. The second cause of action alleges that the Respondent violated

Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to multiple NASD Staff requests for information. Respondent did not file an Answer to the Complaint. Accordingly, on June 20, 2005, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, supported by the declaration of Gene E. Carasick and two exhibits. Respondent did not reply to the Motion. For the reasons set forth below, the Motion is granted.<sup>1</sup>

## **II. Respondent's Default**

Enforcement sent the Complaint and Notice of Complaint to Respondent on March 23, 2005, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address"), as well as a second forwarding address provided by the Postal Service in response to a previous mailing. In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to Respondent on April 21, 2005. Respondent did not file an Answer to the Complaint.

Enforcement complied with 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.

## **III. Jurisdiction**

Respondent first registered with NASD in November 1996 as a General Securities Representative. Between June 26, 2003, and June 25, 2004, Respondent was registered as General Securities Representative with member firm LH Ross & Company, Inc. He is not currently registered with an NASD member firm.

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<sup>1</sup> 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.

NASD has jurisdiction to bring this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws, because Enforcement filed the Complaint within two years after Respondent's registration terminated, and the Complaint alleges misconduct while he was registered with NASD.

#### **IV. Violations**

##### **A. Unauthorized Trading**

The first cause of the Complaint alleges that Respondent violated Conduct Rule 2110 and IM-2310-2 by purchasing, or causing to be purchased, securities in three customer accounts without the customers' prior knowledge or consent, as follows: a purchase of 1000 shares of Consolidated Mercantile in the account of customer LR on August 18, 2003; a purchase of 200 shares of Nextel in the account of customer ML on September 15, 2003; and a purchase of 250 shares of Consolidated Mercantile in the joint account of customers JG and SG on October 31, 2003.

The SEC and NASD have consistently held that "unauthorized trading in a customer's account violates Conduct Rule 2110." *Jeffrey B. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at \*13-14 (NAC Mar. 27, 2002) (citations omitted); *see also Robert Lester Gardner*, Exchange Act Release No. 35,899, 1995 SEC LEXIS 1532, at \*1 n.1 (1995). Further, executing unauthorized trades violates a registered representative's responsibility to deal fairly with customers under IM-2310-2(4)(A)(iii).

Therefore, the allegations of the Complaint, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent violated Conduct Rule 2110 and IM-2310-2 by executing three unauthorized securities transactions.

## **B. Failure to Respond**

On October 15 and November 1, 2004, NASD Staff sent Respondent requests for information concerning allegations in the first count of the Complaint. The Staff sent the requests to Respondent at his CRD address by first class and certified mail pursuant to Rule 8210, and Respondent is deemed to have received them. Respondent did not respond.

Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power. *See, e.g., Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at \*12 (NAC May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at \*16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information). Here, although Respondent received valid constructive notice of the Staff's requests, he failed to respond to them. *See David I. Cassuto*, Exchange Act Release No. 48,087, 2003 SEC LEXIS 1496, at \*9 (June 25, 2003). By violating Rule 8210, Respondent also violated Rule 2110. *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at \*25 (NAC Apr. 19, 2000).

## **V. Sanctions**

A bar is standard for failure to provide required information. NASD Sanction Guidelines ("Guidelines") at 35 (2005 ed.) There are no mitigating circumstances that would warrant a

lesser sanction; accordingly Respondent is barred from associating with any NASD member for this violation.

For unauthorized trading, the Guidelines recommend a fine between \$5,000 and \$75,000, and a suspension ranging from 10 business days to one year. Guidelines at 103. In egregious cases, a longer suspension or a bar may be considered. *Id.* In its Motion, Enforcement contends that the Respondent's conduct was egregious and warrants a bar. However, neither the Complaint nor the declaration supporting the Motion for Entry of Default Decision sets forth the egregious or aggravating conduct that is necessary to justify a bar. Therefore, the Hearing Officer will not impose a bar for this violation, and imposition of a lesser sanction would not serve a remedial purpose in light of the bar imposed for Respondent's violations of Procedural Rule 8210 and Conduct Rule 2110. *See Jeffrey B. Hodde*, 2002 NASD Discip. LEXIS 4 (NAC Mar. 27, 2002); *DBBC v. Daniel S. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999). Thus, no additional sanction is imposed for Respondent's unauthorized trading.

#### **VI. Conclusion**

Respondent is barred from association with any member firm in any capacity for failing to respond to requests for information in violation of Procedural Rule 8210 and Conduct Rule 2110. In light of this bar, no further sanctions are imposed for Respondent's unauthorized transactions. 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: Mitchell A. Weisberg (via overnight and first class mail)  
Rory C. Flynn, Esq. (via electronic and first class mail)  
Gene E. Carasick, Esq. (via electronic and first class mail)

**NASD  
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Mitchell A. Weisberg  
CRD No. 1882341

Respondent.

Disciplinary Proceeding  
No. C07050020

Hearing Officer:

**COMPLAINT**

Upon information and belief, Complainant alleges as follows:

1. Respondent Mitchell A. Weisberg was registered with NASD member L.H. Ross & Company, Inc. ("L.H. Ross") from about June 26, 2003, until about June 25, 2004. His employment end date with L.H. Ross was June 25, 2004. Weisberg first became registered with NASD in November 1996. He is not currently registered with an NASD member firm. NASD retains jurisdiction over Weisberg pursuant to Article V, Section 4 of NASD Bylaws.

**FIRST CAUSE OF COMPLAINT  
Unauthorized Transactions  
NASD Conduct Rules 2110, IM-2310-2**

2. From in or about August 2003, through in or about October 2003, Respondent Weisberg effected or caused to be effected the following stock purchases in the following customer accounts, without the customers' prior knowledge or authorization:
  - the purchase of 250 shares of Consolidated Mercantile stock for \$1,457.45 on October 31, 2003, in the joint account of customers J&SG;
  - the purchase of 200 shares of Nextel stock for \$3,896.95 on September 15, 2003, in the account of customer ML; and

- the purchase of 1000 shares of Consolidated Mercantile stock for \$5,219.95 on August 18, 2003, in the account of customer LR.
3. Each such unauthorized purchase constitutes a separate and distinct violation of NASD Conduct Rule 2110 by Respondent Weisberg.

**SECOND CAUSE OF COMPLAINT**  
**Failure to Respond to Information Requests**  
**NASD Procedural Rule 8210; NASD Conduct Rule 2110**

4. By letter dated October 15, 2004, sent via first class mail to Respondent Weisberg's CRD address, at [REDACTED] the staff requested Weisberg, pursuant to Rule 8210, to provide a written statement by October 29, 2004 in response to specific questions relating to the allegations made by customers J&SG, ML, and LR. The mailing was not returned by the Postal Service.
5. No response having been received, by letter dated November 1, 2004, sent via first class and certified mail to Respondent Weisberg's CRD address, the staff again requested, pursuant to Rule 8210, that Weisberg provide the same information as requested in the October 15 letter, this time by November 12, 2004. Neither the first class mailing nor the certified mailing was returned by the Postal Service; nor did the staff receive a delivery receipt for the certified mailing.
6. To date, Respondent Weisberg has not responded to the staff's Rule 8210 requests.
7. Respondent Weisberg's failure to respond to the staff's Rule 8210 information requests constitutes separate and distinct violations of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

**PRAYER FOR RELIEF**

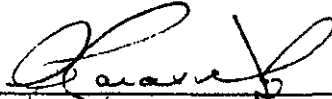
**WHEREFORE**, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent Weisberg committed the violations charged and alleged herein;

- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310.
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- D. An order imposing any other fitting sanction.



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