

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

PERPETUAL SECURITIES, INC.
(BD No. 36841),

CATHY Y. HUANG
(CRD No. 2370253),

and

YOUWEI P. XU
(CRD No. 2370245),

Respondents.

Disciplinary Proceeding
No. C9B040059

DEFAULT DECISION

Hearing Officer – SW

Date: July 1, 2005

For violating Conduct Rule 2110 through Perpetual Securities conducting a securities business for approximately 30 days while it was subject to a suspension, the Respondents are jointly and severally fined \$5,000, and Respondents Huang and Xu are suspended in all capacities for 60 days.

In addition, for violating Rules 8210 and 2110 by failing to timely respond to the NASD staff's requests for information, Respondent Huang is suspended in all capacities for an additional six months.

Appearances

Jonathan M. Prytherch, Esq., Regional Attorney, Woodbridge, NJ, and Rory C.

Flynn, Esq., Of Counsel, Washington, DC, for the Department of Enforcement.

Cathy Y. Huang appeared pro se prior to her default.

Youwei P. Xu appeared pro se prior to his default.

Youwei P. Xu appeared on behalf of Perpetual Securities, Inc. prior to its default.

I. Procedural Background

On June 30, 2004, the NASD Department of Enforcement ("Enforcement") filed a three-count Complaint against Cathy Y. Huang, Youwei P. Xu, and Perpetual Securities, Inc. (the "Firm" or "Perpetual Securities") (collectively, the "Respondents").

Count one of the Complaint alleges that Perpetual Securities violated NASD Conduct Rule 2110 by continuing to conduct a securities business from December 2002 through January 14, 2003, while its broker-dealer registration was suspended for failure to pay an arbitration award as reflected in a November 25, 2002 Summary Suspension Decision ("November Decision"). Count two of the Complaint alleges that Respondents Xu and Huang, as the Firm's principals and owners, knew or had reason to know of the November Decision and violated NASD Conduct Rule 2110 by allowing Perpetual Securities to conduct a securities business despite its suspension. Count three of the Complaint alleges that, on March 18, 2004 and April 7, 2004, the NASD staff issued Rule 8210 requests for information to Respondent Huang, and Respondent Huang violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by not responding to the requests for information.

On September 7, 2004, the Respondents filed an answer to the Complaint, denying all the allegations in the Complaint and requesting a Hearing.¹ The Respondents specifically denied that the Firm processed any trades while suspended and further denied that they had received written notification that NASD had suspended the Firm. Respondent Huang stated that she responded to the requests for information on August 6, 2004.

¹ The Hearing Officer treated Respondent Xu, the President of Perpetual Securities, as the representative of Perpetual Securities pursuant to Rule 9141(b).

When the Respondents failed to appear at two pre-hearing conferences scheduled on January 27, 2005 and February 14, 2005, the Hearing Officer issued an order deeming the Respondents in default.

On March 4, 2005, Enforcement filed a Motion for Entry of Default Decision ("Motion"), supported by the affidavit of Jonathan M. Prytherch, Regional Attorney in NASD's Woodbridge, NJ office, and by 27 exhibits.² For the reasons set forth below, Enforcement's Motion is granted.³

II. The Respondents' Defaults

On June 29, 2004, Enforcement, complying with NASD Procedural Rule 9134, served a Complaint and Notice of Complaint on the Firm at its main address and its mail address as reflected in NASD's Central Registration Depository System ("CRD"), via first class mail and certified mail.⁴ (CX-1, p. 1; CX-3A, p. 15). Enforcement also served the Complaint on the Firm at two alternative addresses, the Crimson King address and the Holmdel address.⁵ (CX-3A, pp. 15-16).

² Hereinafter, the statements in the Motion will be designated as "Motion, p.", the statements in the Prytherch Declaration will be designated as "DECL at ¶", and Enforcement's exhibits will be designated as "CX-" with the appropriate page numbers.

³ On March 11, 2005, the Respondents filed an objection to Enforcement's Motion. On April 12, 2005, the Respondents filed Part I of another motion for summary disposition, having filed other motions for summary disposition on September 27, September 28, October 4, and October 7, 2004, and January 5, March 11, and April 12, 2005. By granting Enforcement's Motion, the Hearing Officer hereby denies Respondents' March 11, 2005 and April 12, 2005 motions.

⁴ The Firm's main CRD address is [REDACTED] and the Firm's mail CRD address is [REDACTED] (CX-1, p. 1).

⁵ The first alternate address is [REDACTED] a variation of the Firm's mail CRD address ("Holmdel address"). The second alternate address is [REDACTED] ("Crimson King address"). (CX-3A, pp. 15-16). On November 5, 2002, the Firm filed a BD amendment listing the Crimson King address as its new main address and mailing address. (CX-1, p. 24).

On June 29, 2004, Enforcement also served the Complaint and Notice of Complaint on Respondents Huang and Xu at their respective CRD addresses.⁶ (*Id.*). On September 7, 2004, the Respondents filed an Answer to the Complaint. (CX-3B).

On October 20, 2004, the Office of Hearing Officers issued an order scheduling a pre-hearing conference for December 10, 2004. On December 7, 2004, the Respondents filed a request to postpone the December 10, 2004 pre-hearing conference because of Respondent Xu's alleged health issues.⁷ The Hearing Officer, in a December 9, 2004 order, denied the Respondents' request to postpone the December 10, 2004 pre-hearing conference. On December 10, 2004, a third party, Sp Xu, filed a notice indicating that Respondent Xu was in the hospital and would not appear at the December 10, 2004 pre-hearing conference.

Despite the December 10, 2004 written representation that he was hospitalized, Respondent Xu did participate in the December 10, 2004 pre-hearing conference for approximately one-half hour; after which he stated that he could not remain on the telephone call because of alleged medical issues.

At the December 10, 2004 pre-hearing conference, the Hearing Officer specifically told Respondent Xu that he could not represent Respondent Huang and that she needed to note her appearance on the conference call even if she did nothing but

⁶ Respondent Huang's CRD address is the Firm's alternate Crimson King address. (CX-2). Respondent Xu's CRD address is the Firm's mail CRD address. (CX-3).

⁷ Previously, on September 17, 2004, the Office of Hearing Officers issued an Order scheduling a pre-hearing conference for October 21, 2004. On October 14, 2004, the Respondents filed a request to postpone the October 21, 2004 pre-hearing conference because of the alleged ill health of Respondent Xu, which the Office of Hearing Officers granted, and rescheduled the initial pre-hearing conference for December 10, 2004.

agree with Respondent Xu's statements. Respondent Huang failed to appear in person or via counsel at the December 10, 2004 pre-hearing conference.

Subsequently, in a December 21, 2004 order, the Hearing Officer, with the consent of the Parties, scheduled a second pre-hearing conference to be held on January 27, 2005. The December 21, 2004 order specifically stated:

Each Party is reminded that a failure to appear at the Conference, in person or through counsel, or to remain throughout the entire Conference, without the prior filing of a doctor's opinion that explicitly substantiates the Party's assertions regarding his or her inability to participate in [a] telephone call, may be deemed a default.

On January 26, 2005, at 7:19 p.m., the day before the scheduled pre-hearing conference, the Respondents filed, via facsimile transmission, a request to postpone the pre-hearing conference because of the alleged medical condition of Respondent Huang. The Respondents, however, filed nothing to substantiate Respondent Huang's alleged inability to participate in a telephone conference call or to explain why Respondent Xu could not participate. Moreover, approximately two hours prior to the filing of the motion to postpone, Respondent Huang spoke with the Hearing Officer's case administrator, exhibited an ability to conduct a telephone conversation, and made no reference to a medial condition that made her unable to participate in a telephone conference call. Therefore, the Hearing Officer did not grant the request to postpone the pre-hearing conference.

None of the Respondents appeared at the January 27, 2005 pre-hearing conference. At the January 27, 2005 pre-hearing conference, Enforcement made an oral motion to hold the Respondents in default, which the Hearing Officer granted. On

January 28, 2005, the Hearing Officer issued an order holding the Respondents in default pursuant to Code of Procedure Rules 9241(f) and 9269.

Subsequently, the Hearing Officer scheduled another pre-hearing conference on February 14, 2005 to provide the Respondents with an opportunity to explain why the order deeming the Respondents in default should be vacated.⁸

On February 10, 2005, the Respondents filed a letter indicating that the Respondents would not attend the February 14, 2005 pre-hearing conference. The Hearing Officer treated the February 10, 2005 letter as a request to postpone the February 14, 2005 pre-hearing conference, which she denied. None of the Respondents appeared at the February 14, 2005 pre-hearing conference.

Pursuant to Rule 9269, the Hearing Officer finds that the Respondents received actual notice of the January 27, 2005 and February 14, 2005 pre-hearing conferences, based on their requests to postpone the scheduled pre-hearing conferences, and that they defaulted by failing to appear.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

1. The Firm

The Firm became a member of NASD on July 14, 1995. (Complaint at ¶1; DECL at ¶5). The Firm filed a Form BDW to withdraw from NASD membership on December 16, 2003, which the NASD has not approved. Accordingly, when the Complaint was

⁸ Previously, on February 1, 2005, the Hearing Officer issued an order scheduling a pre-hearing conference on February 8, 2005. On February 3, 2005, the Respondents filed a letter, which the Hearing Officer deemed a motion to reschedule the pre-hearing conference because of a Chinese holiday. The Hearing Officer granted the motion and rescheduled the pre-hearing conference for February 14, 2005.

filed on June 30, 2004, the Firm's registration was still in effect.⁹ (Complaint at ¶2; DECL at ¶6; CX-1, p. 2). Thus, the Hearing Officer finds that NASD has jurisdiction over the Firm.

2. Individual Respondents Huang and Xu

Article V, Section 4 of the NASD's By-Laws creates a two-year period of retained jurisdiction over former associated and registered persons, covering misconduct occurring before the registration or association terminated, as well as any failures to provide information requested by the NASD staff pursuant to Rule 8210 during the two-year period of retained jurisdiction.

Respondent Huang was registered as a general securities principal, general securities representative, and financial and operations principal with the Firm from July 14, 1995 until February 27, 2004.¹⁰ (Complaint at ¶¶4, 6; DECL at ¶8; CX-2, p. 4). Respondent Huang is not currently registered with any NASD member firm. (Complaint at ¶5; DECL at ¶9; CX-2, p. 4).

Enforcement filed the Complaint on June 30, 2004, within two years of the February 27, 2004 termination of Respondent Huang's registrations, and the Complaint alleges misconduct occurring before Respondent Huang's registration terminated and alleges that Respondent Huang failed to respond to requests for information issued during

⁹ Even if the BDW form had been approved by NASD on the December 16, 2003 filing date, under Article IV, Section 6 of the NASD's By-Laws, a firm that has resigned continues to be subject to the filing of a complaint based on conduct commencing prior to the effective date of the member's resignation, for two years after resignation of membership. NASD, therefore, would have retained jurisdiction over the Firm until December 16, 2005 for conduct that commenced prior to December 16, 2003.

¹⁰ Respondent Huang was also a registered options principal with the Firm from July 16, 2001 to February 27, 2004. (CX-2, p. 4).

the two-year period of retained jurisdiction. Accordingly, NASD has jurisdiction over Respondent Huang.

Respondent Xu was registered as a general securities principal, general securities representative, and registered options principal with the Firm from July 14, 1995 until March 2, 2004. (Complaint at ¶¶9, 11; DECL at ¶¶13, 14, 15; CX-3, p. 5). Respondent Xu is not currently registered with any NASD member firm. (Complaint at ¶10).

Enforcement filed the Complaint on June 30, 2004, within two years of the March 2, 2004 termination of Respondent Xu's registrations, and the Complaint alleges misconduct occurring before Respondent Xu's registrations terminated. Accordingly, NASD has jurisdiction over Respondent Xu.

B. Background

On November 25, 2002, NASD's Office of Hearing Officers issued and served on the Firm's counsel, via facsimile and first class mail, the November Decision, pursuant to which Perpetual Securities was suspended for failing to pay an arbitration award.¹¹ (Complaint at ¶¶14, 15; CX-4, p. 11). After receipt of the November Decision, counsel for Perpetual Securities, on November 29, 2002, filed an application with the Securities and Exchange Commission ("SEC") to stay the November Decision, pending the SEC's review of the decision. (Complaint at ¶16; CX-5).

On December 2, 2002, NASD's Office of Hearing Officers re-served the November Decision on Respondent Huang and the Firm at the Crimson King address, via first class mail and Federal Express. (Complaint at ¶18; CX-4, p. 13). In a letter dated February 17, 2004, Federal Express confirmed that it delivered the November Decision to

¹¹ A courtesy copy of the November Decision was also served on the Respondents, but it was served at an incorrect prior CRD address. (CX-4, p. 12).

Respondent Huang and the Firm at the Crimson King address on December 3, 2002.¹²

(Complaint at ¶19; CX-7, p. 6).

On December 11, 2002, the Office of Hearing Officers served on Perpetual Securities, at the Crimson King address, a courtesy copy of the index of the record of the suspension proceeding, which noted the issuance of the November Decision and the filing of the appeal with the SEC.¹³ (CX-6, p. 5). On December 12, 2002, the SEC issued an order denying Perpetual Securities' request to stay the effectiveness of the suspension imposed by the November Decision pending the SEC's review of the decision. (CX-8). The SEC denied the Firm's request for a stay, in part, because of the Firm's failure to demonstrate a strong likelihood that it would succeed on appeal. (CX-8, p. 3). The SEC later affirmed the suspension by dismissing the Firm's appeal.¹⁴ (Motion, p. 6).

On January 14, 2003, during an audit of Perpetual Securities, the NASD staff orally advised the Respondents that the Firm was violating NASD Conduct Rule 2110 by conducting a securities business while suspended. (CX-16). In response, the Respondents represented that they were not aware of the Firm's suspension. (Answer at ¶42; CX-16, p. 2). On the same day, Respondent Xu advised the Firm's clearing agent that the Firm had been told to cease its security business. (CX-10, p. 4). Immediate steps were taken to cease the Firm's securities operations. (*Id.*).

¹² In their Answer, the Respondents denied that they received the November Decision. (Answer at ¶¶32, 36). Although the Federal Express label required a signature, Federal Express was unable to provide Enforcement with a signed receipt for the December 2, 2002 mailing. (CX-4, p. 13; CX-7).

¹³ A copy of the index of the record of the proceeding was also served on the Firm's counsel via facsimile transmission. (CX-6, p. 4).

¹⁴ Perpetual Securities, Inc., Exchange Act Release No. 48,433, 2003 SEC LEXIS 2096 (2003).

From December 2002 through on or about January 14, 2003, Perpetual Securities conducted a retail and proprietary trading business. (Complaint at ¶20). Perpetual Securities' blotter and transaction confirmations evidenced Perpetual Securities' continuation of its securities business while it was suspended. (CX-10, pp. 5-16; CX-11; CX-12; CX-13). The Respondents acknowledged that approximately \$1,895.01 in retail business occurred during that time period. (Answer at ¶47). On May 16, 2003, the suspension was terminated because the arbitration award was paid. (CX-1, p. 16).

C. Count One: Perpetual Securities Conducted a Securities Business While Suspended

The first cause of the Complaint, attached to this Default Decision as Exhibit A, alleges that Perpetual Securities violated NASD Conduct Rule 2110 by continuing to conduct a securities business from December 2002 through January 14, 2003 while its broker-dealer registration was suspended for failure to pay an arbitration award.

Pursuant to Rule 9215(f) and NASD Notice to Members 99-77, these allegations are deemed admitted, and in addition, they are supported by the evidence submitted by Enforcement in support of its Motion.

The NAC has held that failure to comply with an NASD suspension "manifests a fundamental disregard for the authority of the NASD" and violates NASD Conduct Rule 2110.¹⁵

The Complaint alleges, and the evidence submitted by Enforcement shows, that Perpetual Securities engaged in securities transactions between December 2002 and January 14, 2003, in violation of its suspension. Although the Respondents argued that

¹⁵ See Dep't of Enforcement v. Usher, No. C3A9800069, 2000 NASD Discip. LEXIS 5 at *8-9 (NAC Apr. 18, 2000).

the amount of trading was minimal and that the trades were generated because their clients placed unsolicited orders through the clearing firm's order platform, those arguments go to sanctions, not liability. (Answer at ¶47). A firm that is suspended may not engage in any securities business; if it does so, as Perpetual Securities did here, it violates NASD Conduct Rule 2110.¹⁶

The Respondents also contended that they did not receive effective notice of the suspension from NASD because the November Decision was not properly served on them. (CX-7, p. 1; Answer at ¶47). The Respondents stated that they did not find out about the suspension until January 14, 2003, and that they took immediate steps to abide by the suspension when they were advised of the suspension. (Answer at ¶¶47, 51).

At the relevant time, NASD Procedural Rule 9514(g)(4)(2002) provided that non-summary suspension decisions, such as the November Decision, were to be served pursuant to NASD Procedural Rule 9132.¹⁷ NASD Procedural Rule 9132(a) provided then and continues to provide that a decision issued by the Hearing Officer shall be served on each party or each party's counsel, and NASD Procedural Rule 9132(c) provided then and continues to provide that whenever service is required to be made upon a person who is represented by counsel, service shall be made upon the counsel.

¹⁶ See, In re Troy A. Wetter, Administrative Procedure File No. 7926, 55 S.E.C. Docket 648 (Oct. 21, 1993).

¹⁷ Effective June 28, 2004, non-summary proceedings under the Rule 9510 Series for failure to comply with an arbitration award or related settlement agreement were relocated to Rule 9554 (Failure to Comply with an Arbitration Award or Related Settlement). See NASD Notice to Members, No. 04-36 (May 2004).

In accordance with these rules, the NAC has held that, when a party is represented by counsel, service on counsel is effective service.¹⁸ The Complaint alleges, and the records of the Office of Hearing Officers confirm, that the November Decision was served on the Firm's counsel in compliance with NASD Procedural Rule 9132. Moreover, there is clear evidence that Perpetual Securities' counsel received the November Decision because, upon receipt of the decision, counsel filed an appeal and a motion to stay with the SEC. The Office of Hearing Officers' initial error in serving the courtesy copy of the November Decision on the Respondents at an incorrect address does not negate the proper service of the November Decision on Perpetual Securities' counsel.

Based on the allegations deemed admitted in the Complaint, admissions made in the Answer, and the evidence presented in support of the Motion, the Hearing Officer finds that Perpetual Securities violated NASD Conduct Rule 2110's requirement to *observe high standards of commercial honor and just and equitable principles of trade*, when it continued to effect securities trades after it received proper notice that it was suspended.

C. Count Two: Respondents Huang and Xu Permitted Perpetual Securities to Transact a Securities Business While Suspended

The second cause of the Complaint alleges that Respondents Xu and Huang, as the Firm's principals and owners, knew or had reason to know that the Firm was suspended and violated NASD Conduct Rule 2110 by allowing Perpetual Securities to conduct a securities business despite being suspended.

¹⁸ See Dep't of Enforcement v. Douglas, No. C10000026, 2002 NASD Discip. LEXIS 3 (NAC Mar. 25, 2002).

Under Rule 9215(f) and NASD Notice to Members 99-77, the allegations of the second cause of the Complaint are deemed admitted, and they are hereby incorporated into this Default Decision as findings of fact. In addition, the allegations are supported by the evidence submitted by Enforcement in support of its Motion.

*A registered principal who allows a firm to conduct business while suspended violates NASD Conduct Rule 2110.*¹⁹

Respondent Xu was the Firm's Chief Executive Officer and President, held an ownership interest in the Firm, and was registered as a general securities principal of the Firm. (Complaint at ¶9; CX-1, p. 32; CX-3, p. 5). Respondent Huang was the Firm's Chief Financial Officer and Executive Vice President, held an ownership interest in the Firm, and was registered as a general securities principal of the Firm. (Complaint at ¶4; CX-1, p. 32; CX-2, p. 4). It is undisputed that the Firm conducted retail business between December 2002 and January 14, 2003. (Answer at ¶¶42, 47). The Firm was suspended between December 2002 and January 14, 2003. (CX-4; CX-1, p. 14).

In their Answer to the Complaint, Respondents Huang and Xu stated that they were not aware that Perpetual Securities had been suspended until January 2003. (Answer at ¶47). The Respondents denied that their counsel had advised them of the November Decision and stated that their counsel had received prior authority to file an appeal, if necessary, because Respondents Huang and Xu were going to be out of the country for two months. (Answer at ¶¶21, 22). In a Wells submission, the Respondents also stated that their counsel did not advise them of the appeal because counsel believed NASD's representation that NASD had directly notified the Respondents. (CX-21, p. 3).

¹⁹ See Dep't of Enforcement v. Usher, No. C3A9800069, 2000 NASD Discip. LEXIS 5 at *8-9 (NAC Apr. 18, 2000).

By defaulting, however, the Respondents waived their opportunity to advance these or any other factual allegations in their defense.²⁰ To hold otherwise would reward the Respondents for their actions.²⁰ In that regard, the Hearing Officer notes that, because they defaulted, the Respondents did not offer sworn testimony to support those allegations, nor did Enforcement have an opportunity to cross-examine the Respondents, or to offer impeaching evidence.

Moreover, the Hearing Officer notes that the Respondents failed to explain why the certification of the index of the record sent to them on December 11, 2002 did not alert them to the issuance of the November Decision, or why their counsel would not have told them that the SEC had denied their request to stay the NASD's decision to suspend Perpetual Securities. (CX-6; CX-8). Finally, the arrangements that the Respondents made with the Firm's counsel to file an appeal provides further evidence that Respondents Huang and Xu were aware that a suspension was a possibility, and under those circumstances they had a duty to monitor the status of the suspension. (Answer at ¶22).

Based on the allegations deemed admitted in the Complaint, admissions made in the Answer, and the evidence presented in support of the Motion, the Hearing Officer finds that: (i) Perpetual Securities conducted a securities business while it was suspended; (ii) Respondents Huang and Xu knew or should have known of the suspension no later than December 2002, and (iii) Respondents Huang and Xu as principals of Perpetual Securities were responsible for the Firm's compliance with the suspension order.

²⁰ The Hearing Officer notes that, even if the Respondents had been permitted to prove their contention that they did not receive the courtesy copy of the November Decision, Perpetual Securities would still have been deemed to have received the decision because it was properly served on the Firm's counsel.

Accordingly, the Hearing Officer finds that Respondents Huang and Xu violated NASD Conduct Rule 2110 by not taking steps to prevent Perpetual Securities from conducting a securities business while subject to a suspension.

D. Respondent Huang Failed to Respond Timely to NASD Requests for Information

The third cause of the Complaint alleges that Respondent Huang failed to respond to two letters from the NASD staff. (Complaint at ¶¶30-34). Each request was sent pursuant to NASD Procedural Rule 8210. (Complaint at ¶¶30, 34).

Specifically, the NASD staff sent Respondent Huang written requests for information on March 18, 2004 and April 7, 2004, via first class and certified mail, to Respondent Huang's CRD address, and to the alternate Holmdel address and the Firm's main CRD address. (Complaint at ¶¶30, 33; DECL at ¶¶35, 37; CX-25; CX-26). Respondent Huang failed to respond to the NASD staff's requests for information by the deadlines. (Complaint at ¶¶32, 34; DECL at ¶¶35, 37).

Under Rule 9215(f) and NASD Notice to Members 99-77, the allegations of the third cause of the Complaint are deemed admitted, and they are hereby incorporated into this Default Decision as findings of fact. In addition, the allegations are supported by the evidence submitted by Enforcement in support of its Motion.

Enforcement's Motion provided the additional information that (i) NASD had sent Respondent Huang prior requests for information, to which Respondent Huang had responded, and (ii) Respondent Huang provided a response to the March 18, 2004 and April 7, 2004 requests for information on August 6, 2004, after the Complaint was filed on June 30, 2004. (CX-17; CX-20; CX-22).

In the March 18, 2004 request for information, the NASD staff requested that Respondent Huang provide all incoming and outgoing calls to the Firm for the time period November 2002 through May 2003 and a copy of the Firm's written supervisory procedures no later than March 31, 2004. (CX-25, p. 1). In the April 7, 2004 second request for information, the NASD staff requested that the information be provided no later than April 14, 2004. (CX-26).

In her August 6, 2004 response, Respondent Huang explained her delay in responding by stating that she had not been in the United States since March 17, 2004. (CX-22, pp. 1-2). Respondent Huang stated that she received both the request letters and the Complaint on July 26, 2004. (*Id.*). Respondent Huang further wrote that the Firm did not have the phone records showing all incoming and outgoing calls and indicated that she had contacted the telephone company and that they denied having the service to provide such information. (CX-22, p. 2). With respect to the Firm's written supervisory procedures, Respondent Huang described the Firm as being under a special procedure of closing business and then described what the special procedures provided. (*Id.*).

Under NASD Procedural Rule 8210, NASD may require any person subject to its jurisdiction to provide information regarding any matter under investigation. Because NASD lacks subpoena power, Rule 8210 is the means by which NASD carries out its regulatory functions. It is a "key element in the NASD's efforts to police its members."²¹ Failure to comply with Rule 8210 requests for information is a serious violation because

²¹ Richard J. Rouse, Exchange Act Release No. 32,658, 1993 SEC LEXIS 1831, at *7 (1993). See also *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) ("[i]t 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).

it subverts the NASD's ability to perform its regulatory responsibilities.²² A violation of Rule 8210 is also a violation of NASD Conduct Rule 2110.²³

Because the requests were sent to Respondent Huang at her CRD address, she is deemed to have received them, pursuant to Rule 8210(d). The Hearing Officer finds that, by failing to respond within the time limits set forth in the requests, Respondent Huang violated Procedural Rule 8210 and thereby violated Conduct Rule 2110. Further, because Respondent Huang defaulted, the Hearing Officer will give no weight to Respondent Huang's allegations that she did not receive the requests because she was out of the country.²⁴ As explained above, to do otherwise would reward her for her default.

IV. Sanctions

A. Counts One and Two: Conducting A Securities Business While Subject to a Suspension

The NASD has not published sanction guidelines for engaging in a securities business while suspended. Enforcement argues, however, that the Hearing Officer should be guided by the recommended sanctions for allowing a statutorily disqualified person to associate with a firm prior to approval. That guideline recommends a fine of \$5,000 to \$50,000 and a suspension or bar for supervisory principals.²⁵

Enforcement argued that this was an egregious violation warranting expulsion for Perpetual Securities and a bar for Respondents Xu and Huang. Enforcement argued that

²² Id.

²³ See Dep't of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at **21, 25 (NAC Apr. 19, 2000).

²⁴ The Hearing Officer notes that, even if she were to find that Respondent Huang did not actually receive the NASD requests for information timely because Respondent Huang failed to obtain her mail in a timely manner, Respondent Huang, having been deemed to have received the mail pursuant to Rule 8210(d), would still have violated Conduct Rule 2110 and Procedural Rule 8210.

²⁵ NASD Sanction Guidelines, p. 46 (2005).

the Firm and Respondent Xu were recidivists, stating that on November 8, 1999, Perpetual Securities and Respondent Xu entered into an Acceptance, Waiver and Consent under the terms of which they were jointly and severally censured, fined \$6,000, and subject to advertising restrictions for advertising violations and for opening an unapproved branch office in violation of NASD Conduct Rules 2210 and 2110. (Motion, pp. 3-4).

In addition, Enforcement argued that the Respondents' failure to promptly pay the underlying arbitration award was an example of the Respondents' disregard for the NASD regulatory process. (Motion, pp. 3, 6). Moreover, Enforcement argued that the Respondents have not accepted responsibility for the violations, and instead have attempted to shift the blame first to NASD, arguing that they did not receive the November Decision, and second to the investing public, arguing that their customers initiated the transactions. (Motion, pp. 4-5).

Enforcement argued that the Respondents' conduct if not intentional was reckless and warrants expulsion of the Firm and bars for Respondents Huang and Xu. Finally, Enforcement argued that the Respondents' refusal to participate in the hearing process and their engaging, through a series of written submissions, in a barrage of baseless attacks on the staffs of Member Regulation, Enforcement, and the Office of Hearing Officers is relevant to their ability and fitness to function as members of NASD who interact with the investing public.²⁶

The Hearing Officer does not agree, based on the evidence presented, that a bar is appropriately remedial. First, although the Hearing Officer considered the Firm's and

²⁶ The Hearing Officer agrees that the Respondents have been difficult litigants, but, in the absence of an egregious violation of the NASD Conduct Rules, she does not find that their behavior warrants a bar.

Respondent Xu's past disciplinary history, the Hearing Officer does not view increasing the sanctions from a \$6,000 fine to a bar as the next step required by the concept of progressive punishment. Although the Hearing Officer agrees that the Respondents should have known about the suspension, it is possible, although improbable, that they did not have actual knowledge of the suspension until January 14, 2003, at which time they took immediate steps to terminate the securities transactions of the Firm. The Hearing Officer also does not find that the Respondents' disregarded the NASD regulatory process by requesting a suspension hearing.

Finally, the Hearing Officer also does not agree with Enforcement's argument that the Respondents' failure to participate in the disciplinary process is necessarily an aggravating factor that warrants a bar. The appropriate sanction for refusing to participate in the process is being deemed in default. It is not necessary that the reasons for the default also be treated as aggravating factors for the prior misconduct.

Accordingly, taking into consideration (i) the short period of time of the misconduct, (ii) the incidental amount of income generated by the misconduct, (iii) the Respondents' efforts to comply with the suspension at the time they stated they first became aware of the suspension, and (iv) the lack of any customer harm shown by the misconduct, the Hearing Officer fines the Respondents \$5,000 jointly and severally and suspends Respondents Huang and Xu in all capacities for 60 days.²⁷

B. Count Three: Failure to Timely Respond to a Rule 8210 Request for Information

The applicable NASD Sanction Guideline recommends that, where an individual does not respond in a timely manner to a request for information issued under NASD

²⁷ No suspension was imposed on the Firm because the Firm has been dissolved.

Procedural Rule 8210, a suspension of up to two years and a fine ranging between \$2,500 and \$25,000 should be imposed.²⁸ Enforcement requested that the Hearing Officer bar Respondent Huang in all capacities.

Under NASD Sanction Guidelines, the following factors are relevant in determining the appropriate remedial sanctions: (1) the nature of the information requested; (2) the number of requests made; (3) the time respondent took to respond; and (4) the degree of regulatory pressure required to obtain a response.²⁹

In a recent NAC decision, Van Dyk, the NAC stated that it would have imposed a two-year suspension on Van Dyk for his failure to timely respond to an NASD request for information because he took more than one year and five requests to respond.³⁰ When imposing the two-year suspension for failure to respond timely, the NAC noted that NASD was forced to exert a significant amount of regulatory pressure to obtain an adequate response because some of the information was provided after the filing of the complaint.³¹

The Hearing Officer notes that, while Respondent Huang's failure to timely respond warrants a sanction, Respondent Huang responded in less than five months, unlike Van Dyk, and there were only two requests, rather than five. In addition, although

²⁸ NASD Sanction Guidelines, p. 35 (2005).

²⁹ Id.

³⁰ Dep't of Enforcement v. Van Dyk, No. C3B020013, 2004 NASD Discip. LEXIS 12 (NAC Aug. 9, 2004) (the NAC did not impose the two-year suspension for Van Dyk's violation of NASD Procedural Rule 8210 because Van Dyk was barred for violating NASD Conduct Rule 3040). See also Robert Fitzpatrick, Exchange Act Release No. 44,956, 2001 SEC LEXIS 2185 (2001) (for failing to respond timely, Fitzpatrick was censured, fined \$2,500, and suspended for five business days); Dep't of Enforcement v. Benz, No. C01020014, 2004 NASD Discip. LEXIS 7 (NAC May 11, 2004) (for failing to respond timely, Benz was fined \$2,500, suspended for 30-days in a principal capacity, and required to requalify as a principal).

³¹ Van Dyk at *29.

the response was made after the Complaint was issued, the requests were sent only a short time before the Complaint was issued. And, because Respondent Huang demonstrated a prior willingness to answer questions, as shown by her prior responses to the NASD staff's Rule 8210 requests, it is possible that Respondent Huang did not in fact receive the requests for information at the time that they were sent. Taking into consideration (i) the information requested, (ii) the time of the response, and (iii) the number of requests, the Hearing Officer finds that a six-month suspension is sufficiently remedial to insure that Respondent Huang responds timely to Rule 8210 requests in the future.

Accordingly, the Hearing Officer suspends Respondent Huang in all capacities for six months for failing to respond timely to two requests for information issued pursuant to NASD Procedural Rule 8210.

V. Order

For violating NASD Conduct Rule 2110 through Perpetual Securities conducting a securities business while subject to a suspension, the Respondents are jointly and severally fined \$5,000, and Respondent Huang and Respondent Xu are suspended in all capacities for 60 days.

For violating Rules 8210 and 2110 by failing to timely respond to the NASD staff's requests for information, Respondent Huang is suspended for an additional six months in all capacities (total suspension of eight months).

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after the date of service of the Decision constituting final disciplinary action of NASD; except that, if this Decision becomes the final disciplinary action of NASD,

Respondent Xu's suspension shall become effective with the opening of business on August 1, 2005, and end at the close of business on September 30, 2005, and Respondent Huang's suspensions shall become effective with the opening of business on August 1, 2005, and end at the close of business on March 31, 2006.

SO ORDERED.

Sharon Witherspoon
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
July 1, 2005

Copies to:

Cathy Y. Huang (via Federal Express and first class mail)
Youwei P. Xu (via Federal Express and first class mail)
Perpetual Securities, Inc. (via Federal Express and first class mail)
Jonathan M. Prytherch, Esq. (via electronic mail and first class mail)
Rory C. Flynn, Esq. (via electronic mail and first class mail)

EXHIBIT A

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

PERPETUAL SECURITIES, INC.,
(BD NO. 36841),

CATHY Y. HUANG
(CRD NO. 2370253), and

YOUWEI P. XU
(CRD NO. 2370245)

Respondents.

Disciplinary Proceeding
No. C9B040059

Hearing Officer -

COMPLAINT

Upon information and belief, Complainant, the Department of Enforcement, alleges the following:

JURISDICTION

1. Respondent Perpetual Securities, Inc., ("Perpetual" or "Firm") became a member of NASD on July 14, 1995.
2. Perpetual's registration remains in effect although a Form BDW is currently pending approval. Accordingly, NASD's jurisdiction over Perpetual is ongoing.
3. Respondent Cathy Y. Huang ("Huang") first became registered with NASD as a General Securities Representative through member firm Anglo-American Investor Services Corp. (BD No. 14278) on September 22, 1993.
4. On July 14, 1995, Huang became registered with NASD as General Securities Representative, General Securities Principal, and Financial and Operations Principal through

Perpetual. At all times relevant to the First and Second Causes of this Complaint, Huang served as Perpetual's Chief Financial Officer and Executive Vice President, while also holding an ownership interest in the Firm.

5. Huang is not currently registered with any NASD member firm.
6. Perpetual filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") concerning Huang on February 27, 2004.
7. Accordingly, pursuant to Article V, Section 4 of NASD's By-Laws, NASD has jurisdiction over Huang until at least February 26, 2006.
8. Respondent Youwei P. Xu ("Xu") first became registered with NASD as a General Securities Representative through member firm Anglo-American Investor Services Corp. (BD No. 14278) on September 22, 1993.
9. On July 14, 1995, Xu became registered with NASD as General Securities Representative, General Securities Principal, and Registered Options Principal through Perpetual. At all times relevant to the First and Second Causes of this Complaint, Xu served as Perpetual's Chief Executive Officer and President, while also holding an ownership interest in the Firm.
10. Xu is not currently registered with any NASD member firm.
11. Perpetual filed a Form U-5 for Xu on March 2, 2004.
12. Accordingly, pursuant to Article V, Section 4 of NASD's By-Laws, NASD has jurisdiction over Xu until at least March 1, 2006.

FIRST CAUSE OF COMPLAINT
(Conducting Business while Suspended)
Violations of NASD Conduct Rule 2110-Perpetual

13. Paragraphs 1 through 12 of this Complaint are re-alleged and incorporated herein by reference.

14. On or about November 25, 2002, NASD's Office of Hearing Officers issued a decision in which Perpetual was suspended for failing to pay an arbitration award. See Department of Enforcement v. Perpetual Securities, Inc., No. ARB020026 (Hearing Officer Perkins, Nov. 25, 2002) (hereinafter the "November 25, 2002 decision").
15. On or about November 25, 2002, the November 25, 2002 decision was served on Perpetual's counsel via facsimile and first-class mail and on Perpetual and Huang via first-class mail and Federal Express.
16. On or about November 29, 2002, Perpetual's counsel filed an application with the Securities and Exchange Commission seeking a review and stay of the November 25, 2002 decision.
17. The November 25, 2002 service of the November 25, 2002 decision on Huang and Perpetual was returned to NASD's Office of Hearing Officers because Perpetual had moved and left no forwarding address.
18. Accordingly, on or about December 2, 2002, NASD's Office of Hearing Officers re-served the November 25, 2002 decision on Huang and Perpetual via first-class mail and Federal Express.
19. Federal Express confirmed that the November 25, 2002 decision was delivered to Huang and Perpetual on or about December 3, 2002.
20. During in or about December 2002 through on or about January 14, 2003 (the "Relevant Time Period"), Perpetual, while it was suspended, nevertheless conducted a retail and proprietary trading business.
21. Indeed, on or about March 31, 2003, in a remand decision regarding a motion for Rule 11 sanctions made by the underlying arbitration claimants in connection with Perpetual's motion to have the arbitration award vacated, the United States District Court for the Southern

District of New York assessed Rule 11 sanctions against Perpetual and stated the following in its opinion on that matter:

*Perpetual now before me has offered nothing to suggest it would refrain from its vexatious conduct towards its customers. [T] and [C] still have not received payment of their arbitration award, confirmation of which remains pending in state court. Indeed, at oral argument, its attorney . . . , represented to this Court that Perpetual went out of business because of a license suspension and because it could not afford all the arbitration awards against it. The Court, however, was presented with internet evidence that Perpetual remained in business, taking orders by phones, continuing to operate a website called Best Trade, and issuing account statements at least through December 31, 2002, a month after its suspension. [Perpetual's attorney] then said that his representation that Perpetual was out of business was based on information received from Perpetual itself. Perpetual has thus not only forced its customers to amass legal fees to defend against frivolous motions, but placed its own attorney in the precarious position of unwittingly making factual misrepresentations to this Court on its behalf. It is clear to me that Perpetual's vexatious conduct towards its customers further supports the imposition of sanctions. I therefore grant [T] and [C]'s motion and award them attorneys' fees in the amount of \$ 4,620.00, [*4] and it is hereby ordered that that amount be paid by Petitioner Perpetual Securities, Inc.*

Perpetual Securities, Inc. v. Tang, No. 00 CV 9389, 2003 U.S. Dist. LEXIS 5016 (S.D.N.Y. Apr. 1, 2003).

22. As a result of the business that it conducted during the Relevant Time Period, Perpetual earned commissions from its retail business and generated gains in its trading account from its proprietary trading.
23. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 by Perpetual.

SECOND CAUSE OF COMPLAINT
(Allowing Perpetual to Conduct Business While Suspended)
Violations of NASD Conduct Rule 2110-Huang and Xu

24. Paragraphs 1 through 23 of this Complaint are re-alleged and incorporated herein by reference.

25. During the Relevant Time Period, both Huang and Xu were associated with, and principals of, Perpetual.
26. Huang and Xu both had knowledge, or had reason to know, of the November 25, 2002 decision suspending Perpetual.
27. Nevertheless, during the Relevant Time Period while Perpetual was suspended, Huang and Xu allowed Perpetual to conduct business as described above.
28. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 by Huang and Xu.

THIRD CAUSE OF COMPLAINT

**(Failures to Respond to Requests for Documents and Information)
Violations of NASD Procedural Rule 8210 and Conduct Rule 2110-Huang**

29. Paragraphs 1 through 28 of this Complaint are re-alleged and incorporated herein by reference.
30. By letter dated March 18, 2004, sent via first-class and certified mail to Huang at: a) her last known residential address as reflected in the records of NASD's Central Registration Depository [REDACTED] (the "CRD address"); b) a more recent address provided by Huang to the Staff on February 25, 2004 [REDACTED] [REDACTED] (the "Holmdel address"); and c) the Firm's main address as reflected in CRD [REDACTED] (the "Forest Hills address"), the Staff requested that Huang provide copies of the Firm's written supervisory procedures (previously outstanding from an earlier request) and telephone records (the "March 18 Request").
31. Prior to sending the March 18 Request, the Staff conducted an Equifax search for Huang which did not reveal any additional addresses beyond those listed above.

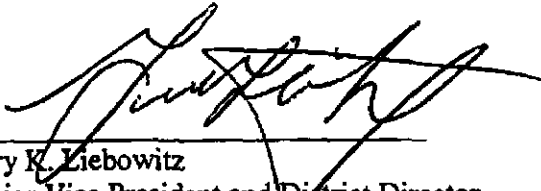
32. The March 18 Request cited Rule 8210, required a response by March 31, 2004, and warned of potential disciplinary action for not responding. None of the first class mailings was returned to the Staff. The certified mailing to the CRD address was returned to the Staff with the notation "return to sender-no forward order on file-unable to forward." The Staff received signed return receipts for the certified mailings to the Holmdel and Forest Hills addresses bearing the signatures of "J.Z." However, Huang did not respond.
33. Accordingly, on April 7, 2004, via first class and certified mail, the Staff sent a second request to Huang at the above-referenced addresses attaching the March 18 request. In the same envelope, the Staff enclosed a separate request, also dated April 7, 2004, requesting a list of customer telephone numbers. These requests will be jointly referred to as the "April 7th Requests."
34. The April 7th Requests cited Rule 8210, required a response by April 14, 2004, and warned of potential disciplinary action for not responding. The Postal Service returned to the Staff both the first class and certified mailings to the Forest Hills address, one of which bore the notation "return to sender-attempted not known," and the other bearing the notation "forwarded" and listing the Holmdel address. The Staff did not receive any first class, certified mailings, or return receipts back for the envelopes that were sent to the Holmdel or CRD addresses. According to the Postal Service's online tracking system, both certified mailings were delivered to a Buffalo, New York address, but the specific address (i.e., street and number) were not provided. To date, Huang has failed to respond to those requests.
35. Such acts, practices and conduct constitute separate and distinct violations of NASD Procedural Rule 8210 and Conduct Rule 2110 by Huang.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Perpetual, Huang and Xu committed the violations charged and alleged herein;
- B. An order imposing appropriate sanctions upon Perpetual, Huang and Xu in accordance with NASD Rule 8310;
- C. An order requiring Perpetual, Huang, and Xu to disgorge fully any and all ill-gotten gains and/or make full restitution, together with interest;
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- E. An order granting all further relief that is warranted under the circumstances.

Dated: June 29, 2004



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