

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

BARRY A. KAUFMAN
(CRD No. 2774898)



Respondent.

Disciplinary Proceeding
No. CAF030061

Hearing Officer – DMF

DEFAULT DECISION

January 4, 2005

Respondent effected unauthorized trades in customer accounts, in violation of NASD Rule 2110, and failed to execute customer orders, in violation of Rule 2110. For the unauthorized trades, he is barred from associating with any NASD member in any capacity and ordered to pay restitution to two customers. In light of the bar, no additional sanctions are imposed for failing to execute customer orders.

Appearances

Paul D. Taberner, Esq., Boston, MA (Rory C. Flynn, Esq., Washington, DC, Of Counsel), for Complainant.

No appearance by or for Respondent.

DECISION

I. Introduction

The Department of Enforcement filed a Complaint on November 14, 2003, alleging that Respondent Barry A. Kaufman effected unauthorized trades in the accounts of three customers, in violation of Section 10(b) of the Securities Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110, and failed to execute orders given to him by two customers, in violation of Rule 2110. Respondent has not filed an Answer or otherwise responded to the Complaint and on October 27, 2004, Enforcement

filed a motion for a default decision, supported by the declaration of Paul D. Taberner and five exhibits. Respondent did not reply to the motion.¹

II. Respondent's Default

On November 14, 2003 and January 9, 2004, Enforcement sent the Complaint and the Notice of Complaint and Second Notice of Complaint to Respondent, by certified and first class mail, at an address that Enforcement believed was more current than Respondent's most current residential address in the Central Registration Depository (CRD), but Enforcement did not send the mailings to the CRD address. Respondent did not file an Answer or otherwise respond to the Complaint, and on March 5, 2004, Enforcement filed a motion for a default decision. On March 15, 2004, the Hearing Officer issued an order denying the motion, because Enforcement had not sent the Complaint and Notices of Complaint to the CRD address, as required under Rule 9134.

Enforcement subsequently indicated that it intended to issue and serve an Amended Complaint, rather than the original Complaint. On May 17, the Hearing Officer issued an order directing Enforcement to file and serve any such Amended Complaint by June 7, 2004. Enforcement served the Amended Complaint and a Notice of Complaint on June 3, 2004, but sent the Amended Complaint only to the CRD address, not to the more recent address to which Enforcement had sent the original Complaint. On July 30, 2004, the Hearing Officer issued an order pointing out that Enforcement had,

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, the additional materials filed by Enforcement with its motion, and subsequent documentation filed by Enforcement at the request of the Hearing Officer.

once again, failed to follow the requirements of Rule 9134 in serving the Amended Complaint.²

On August 4, 2004, Enforcement served the Amended Complaint and the Notice of Complaint on Respondent by certified and first class mail to both the CRD address and the more recent address, and on September 2, 2004, Enforcement served the Amended Complaint and the Second Notice of Complaint on Respondent by certified and first class mail to both addresses, thereby giving Respondent constructive notice of this proceeding, in accordance with Rule 9134. By failing to respond, Respondent defaulted. Pursuant to Rule 9215(f), the Hearing Officer will deem the allegations in the Complaint admitted.

III. Jurisdiction

Respondent was registered as a corporate securities representative with NASD member L.H. Ross & Company, Inc. from November 2000 to July 2001, and was subsequently registered in the same capacity with NASD member Berry-Shino Securities, Inc. from July 2001 to November 27, 2001. Respondent has not been associated with any NASD member since then, but in March 2003, L.H. Ross filed an amended Form U-5 Uniform Termination Notice for Securities Industry Registration regarding Respondent.

Article V, Section 4 of NASD's By-Laws provides that a person whose association with a member has been terminated remains subject to the filing of a Complaint based on conduct that commenced prior to the termination, provided that the Complaint is filed within two years of the effective date of the termination of the person's registration. But if the member files an amended Form U-5 within the two-year period

² If Enforcement had merely re-served the original Complaint, rather than an Amended Complaint, it could have relied on the earlier mailings to the more recent address, and sent the new mailings only to the CRD address. *Cf. Dep't of Enforcement v. Rondez*, 2000 NASD Discip. LEXIS 4 (NAC Apr. 10, 2000). However, when Enforcement amended the Complaint, under Rule 9134 it was required to send that new pleading to both the CRD address and the more recent address in order to effect valid service.

that discloses that the person may have engaged in conduct actionable under any applicable statute, rule or regulation, the amended Form U-5 operates to re-commence the two-year period for filing a Complaint.

The Complaint, which charges Respondent with misconduct while he was registered, was filed on November 14, 2003, which was less than two years after the effective date of termination of Respondent's registration with Berry-Shino. The Amended Complaint was not filed until more than two years had elapsed after the termination of Respondent's registration with Berry-Shino, but the Amended Complaint does not set forth any charges not included in the original Complaint; therefore, its filing relates back to the filing of the original Complaint. Cf. Fed. R. Civ. P. 15(c). In any event, the Amended Complaint was filed within two years after L.H. Ross filed the amended Form U-5, which disclosed that Respondent might have violated NASD Rules. Therefore, NASD has jurisdiction over this proceeding.

IV. Violations

The Amended Complaint alleges, first, that during the period May 2001 through June 2001, while he was registered with L.H. Ross, Respondent effected unauthorized securities transactions in the accounts of three L.H. Ross customers. The Complaint charges that through this unauthorized trading, Respondent violated Section 10(b) of the Securities Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110.

Specifically, in June 2001, Respondent effected the unauthorized sale of Cisco Systems and Wendy's stock and the unauthorized purchase of Trident Systems International, Inc., an OTC Bulletin Board stock, in the account of RZ. During the same month, Respondent also effected 27 unauthorized trades in LH's individual retirement

account, for a total dollar value of over \$550,000.00, at the end of which the only holding in the account was an unauthorized Trident purchase. Finally, again during June 2001, Respondent effected eight unauthorized transactions in a trust account that BP opened for her minor son, at the end of which the only holding in the account was an unauthorized purchase of Trident. Trident stock is essentially worthless today.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent effected unauthorized trades in customer accounts. Unauthorized trading in a customer's account violates Rule 2110's requirement that NASD members and associated persons observe high standards of commercial honor and just and equitable principles of trade. See, e.g., DOE v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3 (NAC Apr. 19, 2000).

Whether, in addition, such trading violates the antifraud provisions of the securities laws and SEC and NASD rules turns on the facts and circumstances presented. As the National Adjudicatory Council has explained:

Unauthorized trades, without more, do not constitute fraudulent activity under Rule 2120. Cf. Brophy v. Redivo, 725 F.2d 1218, 1220 (9th Cir. 1984) (analyzing trading and claims for fraud under SEC Rule, Rule 2120's counterpart under the federal securities laws). A finding of fraud requires a showing that the respondent acted with scienter. Scienter is defined as the mental state of knowingly intending to deceive, manipulate, or defraud. See Aaron v. SEC, 446 U.S. 680, 686-87 n.5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Scienter is also established by a showing that a respondent acted with severe recklessness, or conduct defined as highly unreasonable involving not merely simple or excusable negligence, but an extreme departure from the standards of ordinary care. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (citing cases from 11 circuit

courts of appeals holding that recklessness suffices to show scienter); In re Martin Herber Engelman, Exchange Act Rel. No. 35729 n.43 (May 18, 1995).

NBCC No. 2 v. Granath, No. C02970007, 1998 NASD Discip. LEXIS 19 (NAC Mar. 6, 1998).

In this case, Respondent effected a large number of unauthorized trades in three customer accounts during a single month, in each case leaving the customer invested in Trident, a Bulletin Board stock. For purposes of this default decision, these facts are sufficient to support a finding that Respondent acted with scienter, and, therefore, that his unauthorized trades were fraudulent, in violation of Section 10(b), Rule 10b-5 and Rule 2120, as well as Rule 2110.

The Complaint also alleges that Respondent failed to execute customer orders, and thereby violated NASD Rule 2110. Specifically, the Complaint alleges that customers LH and BP gave Respondent orders to sell the Trident stock that he had purchased, without authorization, for their accounts, and that Respondent failed to sell the stock as directed.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent failed to execute customer orders, in violation of Rule 2110. See, e.g., DOE v. Cardia, No. C9B000007, 2000 NASD Discip. LEXIS 24 (OHO Dec. 27, 2000).

V. Sanctions

The Guidelines for unauthorized transactions recommend a suspension of up to two years or a bar in egregious cases. Unauthorized trading may be found egregious based, inter alia, on the sheer number of trades. NASD Sanction Guidelines at 100 & n. 2 (2004). The Respondent effected approximately 38 unauthorized trades in three customer

accounts during a single month. The Hearing Officer finds Respondent's actions were highly egregious, and concludes that he should be barred. In light of the bar, the Hearing Officer will not impose a fine.

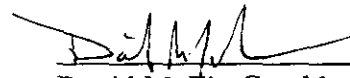
Enforcement also requests that Respondent be ordered to pay restitution to two of the injured customers. On December 17, 2004, Enforcement filed a supplement to its motion for a default decision setting forth in detail the basis for such relief. With respect to customer RZ, Enforcement seeks restitution in the principal amount of \$22,898.00, which represents the amount derived from the last unauthorized trade in RZ's account, the purchase of Trident stock, which subsequently became worthless. With respect to customer BP, Enforcement seeks restitution in the principal amount of \$11,934.98, which represents the proceeds of two unauthorized sales in BP's account that, after intervening unauthorized trades, were used for the unauthorized purchase of Trident stock. In addition, Enforcement requests that Respondent be ordered to pay interest on the customers' losses, calculated from June 29, 2001, the date of the Trident purchase, as to RZ and from June 4, 2001, the date of the two unauthorized sales that led eventually to the unauthorized Trident purchase, for BP. The Hearing Officer agrees that restitution to RZ and BP is appropriate under the circumstances presented. With respect to customer LH, Enforcement does not seek restitution because an NASD arbitration panel has already ordered Respondent to pay her the amount of her losses.

The Guidelines for unauthorized trades also apply to failures to execute customer orders. Sanction Guidelines at 100 (2004). Enforcement does not, however, seek additional sanctions for this violation, in light of the bar imposed on Respondent for his unauthorized trading. Therefore, no additional sanctions will be imposed on Respondent for his failure to execute customer orders.

VI. Conclusion

Respondent Barry A. Kaufman effected unauthorized trades in customer accounts, in violation of NASD Rule 2110, for which he is barred from associating with any NASD member in any capacity and is ordered to pay restitution to customer RZ in the amount of \$22,898.00, together with interest from June 29, 2001 until the date of payment, and to customer BP in the amount of \$11,934.98, together with interest from June 4, 2001 until the date of payment. Interest shall be calculated pursuant to 26 U.S.C.S. § 6621(b)(2).³ Respondent also failed to execute customer orders, in violation of Rule 2110, but in light of the bar, no additional sanctions are imposed for that violation. The bar shall become effective immediately if this decision becomes NASD's final disciplinary action in this proceeding.

SO ORDERED.



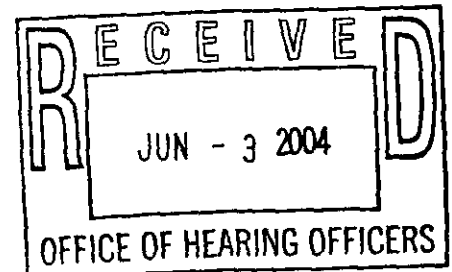
David M. FitzGerald
Hearing Officer

Copies to: Barry A. Kaufman (*via overnight courier and first class mail*)
Paul D. Taberner, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

³ The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. The customers are specifically identified in an Addendum to this decision which is served only on the parties.

EXHIBIT A

**NASD
OFFICE OF HEARING OFFICERS**



**Department of Enforcement,
Complainant,**

v.

**Barry A. Kaufman,
CRD No. 2774898,**

Respondent.

**Disciplinary Proceeding
No. CAF030061**

Hearing Officer - DMF

AMENDED COMPLAINT

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

1. Respondent Barry Kaufman first became registered with NASD as a Corporate Securities Representative in October 1996. From November 2000 to July 2001, he was associated with L. H. Ross & Company, Inc. ("LHR"). Respondent was last registered with an NASD member firm on November 27, 2001. On March 24, 2003, LHR filed a Form U-5 amendment to Respondent's Central Registration Depository record, indicating that Kaufman may have engaged in conduct actionable under the federal securities laws. Accordingly, NASD maintains jurisdiction over Respondent Kaufman pursuant to Article V, §4 of the NASD Bylaws.

2. In March 2002, the NASD accepted a letter of Acceptance, Waiver and Consent from Respondent Kaufman for executing unauthorized trades in a customer account in violation of NASD Conduct Rule 2110. For this violation, Respondent

Kaufman was fined \$5,000 and suspended from association with any NASD member firm in any capacity for 10 business days.

3. In January, 2003, the NASD accepted an Offer of Settlement from Respondent Kaufman for executing unauthorized trades in an LHR customer account and failing to respond to NASD requests for documents and a written statement in violation of Conduct Rule 2110 and Procedural Rule 8210. For these violations, Respondent Kaufman was fined \$2,500 and suspended from associating with any NASD member firm in any capacity for six months.

4. During the period May, 2001 through July 2001 Respondent Kaufman executed numerous fraudulent unauthorized trades in the accounts of three LHR customers and failed to execute sell orders in the account of two customers, all as described below.

Customer RZ

5. In or about mid-May, 2001, Respondent solicited Customer RZ to open an account with him at LHR. As an initial transaction, Kaufman recommended that RZ purchase Wendy's stock. On or about May 18, 2001, RZ sent a check in the amount of \$5,100 to LHR. On May 21, 2001, Kaufman purchased 200 shares of Wendy's common stock for RZ's account.

6. Shortly after this, Customer RZ informed Kaufman that he wished to purchase some Cisco stock. On or about May 31, 2001, RZ sent a check in the amount of \$20,000 to LHR. On the same day, Respondent Kaufman purchased 1,000 shares of Cisco common stock for RZ's account.

7. On June 5, 2001, Respondent Kaufman sold the 1,000 shares of Cisco stock from RZ's LHR account without RZ's authorization. When Kaufman later informed RZ that he had sold the 1,000 shares of Cisco, RZ directed Respondent Kaufman to repurchase the Cisco stock in his account. On June 8, 2001, Kaufman repurchased the 1,000 shares of Cisco for RZ's account.

8. On June 26, 2001, Respondent Kaufman sold the 200 shares of Wendy's stock and the 1,000 shares of Cisco stock in RZ's LHR account. On the same day, Respondent Kaufman also purchased 4,085 shares of Trident Systems International, Inc. ("TDNT"), an OTC Bulletin Board stock, for \$22,898.00. None of these three trades was authorized by RZ. In fact, the first time RZ ever heard of TDNT was when he reviewed his account statement and saw that Kaufman had purchased the TDNT stock.

9. When RZ attempted to contact Kaufman to complain about the unauthorized trades, he discovered that the LHR branch office Respondent Kaufman had been working at had closed, and that Kaufman was no longer associated with LHR. As a result of Respondent Kaufman's unauthorized trading, Customer RZ lost over \$20,000.

Customer LH

10. Customer LH is a registered nurse in her early sixties who lived in the same apartment building as Kaufman in 2001. In or about June 2001 Respondent Kaufman convinced LH to transfer her IRA account from Merrill Lynch and open an account with him at LHR. At the time LH transferred her IRA account from Merrill Lynch to LHR, the assets in the account were worth approximately \$60,000.

11. Almost immediately following the transfer of LH's IRA account to LHR, Kaufman began engaging in unauthorized trades. During June 2001, Kaufman placed 27

unauthorized trades in LH's LHR IRA account. The total dollar value of these 27 unauthorized trades was over \$550,000. Respondent Kaufman never informed LH that he was placing any of these 27 unauthorized trades.

12. By the end of June 2001, the only holding in LH's account was 8,385 shares of TDNT. At that time, the TDNT stock was worth approximately \$37,000.

13. During July 2001, LH repeatedly requested that Respondent Kaufman liquidate the TDNT position. Kaufman failed to sell the TDNT stock as instructed, resulting in additional losses to LH. Specifically, by the end of July 2001, the TDNT stock in LH's account was worth only \$6,540, and worth only \$712 by the end of August 2001. The TDNT stock in LH's account is essentially worthless today.

Customer BP

14. Customer BP is a real estate agent in her early forties who met Respondent Kaufman in or about April 2001, when Kaufman asked her to help him find a house to purchase. In or about May, 2001 Kaufman convinced BP to transfer her accounts from Merrill Lynch and Smith Barney and open accounts with him at LHR, including a trust account for BP's minor son.

15. As with Customer LH, once BP's securities accounts were transferred to LHR from the other firms, Respondent Kaufman began placing numerous unauthorized trades. For example, during June 2001, Respondent Kaufman placed eight unauthorized trades in the trust account for BP's son. Respondent Kaufman never informed BP that he was placing any of these eight unauthorized trades in her son's trust account.

16. The last of these eight unauthorized trades was a purchase of 1,055 shares of TDNT on June 29, 2001. After Kaufman placed these unauthorized trades in her son's trust account, BP instructed Kaufman to sell the TDNT stock and restore the account to its original holdings. Despite BP's request, Respondent Kaufman refused to sell the TDNT position or restore the account to its original holdings.

17. As a result of Kaufman's unauthorized trades and failure to execute the TDNT sell order, the trust account lost over \$8,000.

FIRST CAUSE OF ACTION

UNAUTHORIZED TRADING: VIOLATIONS OF SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 10B-5 PROMULGATED THEREUNDER AND NASD CONDUCT RULES 2110 AND 2120

18. The allegations set forth above in paragraphs 1 through 17 are realleged and incorporated herein by reference.

19. During the period May 2001 through June 2001, as described above, Respondent Kaufman effected, or caused to be effected, purchases in the LHR accounts of customers RZ, LH and BP, without the knowledge or authorization of the customers. These accounts were not discretionary accounts, and Kaufman had no written authority to trade on discretion in these accounts.

20. The acts, practices and conduct by Respondent Kaufman, alleged with respect to the unauthorized transactions alleged above constitute separate and distinct violations of NASD Conduct Rules 2110 and 2120.

21. The acts, practices and conduct by Respondent Kaufman, alleged with respect to the unauthorized transactions alleged above constitute separate and distinct violations of Section

10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, as well as NASD Conduct Rule 2110.

SECOND CAUSE OF ACTION

**FAILURE TO EXECUTE CUSTOMER ORDERS: VIOLATIONS OF
NASD CONDUCT RULE 2110**

22. The allegations set forth above in paragraphs 1 through 21 are realleged and incorporated herein by reference.

23. During the relevant period, as described above, Respondent Kaufman failed to execute customer orders given to him by customers LH and BP. By failing to execute these orders, Respondent Kaufman failed to uphold his obligation to customers to ensure that trades were effected in accordance with customer instructions.

24. As a result of this conduct Respondent Kaufman committed separate and distinct violations of NASD Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, the Complainant respectfully requests:

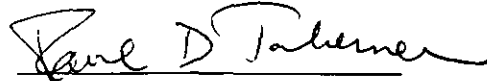
A. Findings of fact and conclusions of law that the Respondent committed the violations charged and alleged herein;

B. An order imposing fitting sanctions upon the Respondent in accordance with NASD Procedural Rule 8310, including disgorgement;

C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330;
and

D. An order imposing any other appropriate sanction.

Dated: June 3, 2004



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