

NASD OFFICE OF HEARING OFFICERS

MARKET REGULATION DEPARTMENT

Complainant,

v.

BARRY SCHWARTZ
(CRD No. 1034556),



Respondent.

Disciplinary Proceeding
No. CMS040104

Hearing Officer – SNB

DEFAULT DECISION

January 18, 2005

Respondent failed to appear for on-the-record testimony, in violation of Rules 8210 and 2110. For failing to appear, he is barred from associating with any NASD member in any capacity.

Appearances

Matthew Campbell and Jeffrey K. Stith, Rockville, Maryland for Complainant.

No appearance by or for Respondent.

DECISION

I. Background

On July 14, 2004, the Department of Market Regulation (“Market Regulation”) filed a one-cause Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent Barry Schwartz (“Respondent”) failed to appear for an on-the-record interview, in violation of Rules 8210 and 2110. Respondent did not file an Answer to the Complaint. On September 27, 2004, Market Regulation filed a Motion for Entry of Default Decision, supported by the declaration of Matthew Campbell and ten exhibits. Respondent did not reply to the Motion. On November 26, 2004, pursuant to the Hearing Officer’s request for

additional information, Market Regulation filed an additional 28 exhibits in support of its Motion. For the reasons set forth below, the Motion is granted.¹

II. Respondent's Default

Market Regulation sent the Complaint and Notice of Complaint to Respondent on July 14, 2004, by first class certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address") and to the main office address of Delta Asset Management Company, LLC. (the "Delta address"). Market Regulation sent the Complaint and Second Notice of Complaint to Respondent on August 17, 2004, by first class certified mail to the CRD address and the Delta address. The U.S. Postal Service Certified Mail Receipt for the Complaint sent to Respondent's home address was returned to NASD bearing the signature "B. Schwartz" and the date "7/17." Respondent did not file an Answer to the Complaint.

Market Regulation 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.

III. Jurisdiction

A. Respondent's Relationship to Member Firm Delta Asset Management LLC

Respondent first became registered with NASD in approximately February 1982 and was last registered in approximately March 1995. Respondent is currently listed as a "non-registered fingerprint person" with member firm Delta Asset Management Company LLC ("Delta Asset").

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 Market Regulation with its motion.

Respondent owns 93.7% of Delta Capital Holding Corporation ("Delta Capital"), which in turn owns 20% of Delta Asset as listed in Schedule A of Delta Asset's Form BD and Delta Asset's 1017 Notification of change in ownership.

B. Respondent's Status as an "Associated Person" of Delta Asset²

Pursuant to relevant portions of Article 1 Section (dd) of the NASD By-Laws,³ Respondent is considered a "person associated with" a member firm, and thus subject to NASD jurisdiction for purposes of Rule 8210, if he owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of 5% or more of a class of voting securities of the member firm.

As applied to this case, because Respondent owns 93.7% of Delta Capital, and Delta Capital owns 20% of the voting stock of Delta Asset, Respondent effectively has the right to vote or the power to sell or direct the sale of more than 5% of the voting securities in Delta Asset. Thus, Respondent is a direct owner of Delta Asset required to be listed on Schedule A of Form BD, and is subject to NASD jurisdiction for purposes of Rule 8210.⁴

IV. Violation

The Complaint alleges that on October 21, 2003, NASD staff sent Respondent a request to appear for an on-the-record interview on November 11 and 12, 2003, pursuant to NASD Procedural Rule 8210. The staff sent the request to Respondent at his CRD address by first class

² Market Regulation also argued that jurisdiction is established based upon Respondent's activities in the investment banking or securities business, coupled with his control position with Delta Asset. Because jurisdiction has been established based upon Respondent's ability to vote more than 5% of Delta Asset's securities and the underlying claim relates to Rule 8210, the Hearing Officer is not required to reach this second basis for jurisdiction.

³ Article 1 Section (dd) provides in part: "person associated with a member" or "associated person of a member" means: . . . (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member."

⁴ Although Respondent is not listed in Delta Asset's Schedule A, based on his ability to vote, sell or direct the sale of more than 5% of the firm's voting securities, he should have been listed.

certified mail and sent the letter via facsimile to Delta Asset's compliance officer. Delta Asset's compliance officer informed NASD staff that he personally delivered the letter to Respondent. The staff served the requests in accordance with Rule 8210(d), and therefore Respondent is deemed to have received them. Nevertheless, Respondent did not respond to the request. The allegation, which is deemed admitted, is sufficient to establish, for purposes of this default decision, that Respondent failed to appear for an on-the-record interview, in violation of Rules 8210 and 2110.

V. Sanctions

For failing to appear, the Sanction Guidelines recommend a bar as standard. NASD Sanction Guidelines, at 37 (2004 ed.). There is no evidence of any mitigating circumstances that would justify a lesser sanction for the violation. Therefore, Respondent will be barred for failing to appear for the on-the-record interview.

VI. Conclusion

Respondent Barry Schwartz is barred from associating with any NASD member in any capacity for failing to appear for an on-the-record interview, in violation of Rules 8210 and 2110. The bar will become effective immediately if this decision becomes NASD's final disciplinary action.

SO ORDERED.



Sara Nelson Bloom
Hearing Officer

Dated: January 18, 2005

Copies to: Barry Schwartz (via overnight and first class mail)
Jeffrey K. Stith, Esq. (via electronic and first class mail)
Matthew Campbell, Esq. (via electronic and first class mail)

**NASD
OFFICE OF HEARING OFFICERS**

Market Regulation Department,

Complainant,

v.

Barry Schwartz (CRD No. 1034556)

[REDACTED]

[REDACTED]

Respondent.

Disciplinary Proceeding
No. CMS040104

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COMPLAINT

Upon information and belief, Complainant, the Market Regulation Department of NASD, alleges as follows:

Summary

1. Respondent Barry Schwartz ("Schwartz"), age 57, became employed in the securities business on or about February 2, 1982. He was subsequently registered with five different firms until approximately March 1995. Since then, he has not been registered with an NASD member firm.

2. Delta Asset Management Company LLC ("Delta Asset") is an NASD member firm. Delta Asset paid Schwartz \$758,481 in 2001 and \$706,000 in 2002 through Delta Asset Holding Corp. ("Asset Holding") for "consulting services." Schwartz is the sole stockholder and

officer of Asset Holding. These sums comprised approximately half of the annual revenues of Delta Asset for these two years.

2. Schwartz currently owns approximately 93.7% of the outstanding shares of a company called Delta Capital Holding Company ("Delta Capital"). Delta Capital has no employees.

3. On or about October 15, 2001, when Schwartz was its sole shareholder and officer, Delta Capital purchased 20% of the outstanding stock of Delta Asset.

4. Schwartz, through Delta Capital therefore currently owns significantly more than five percent of the stock of Delta Asset.

5. In addition, Schwartz has engaged in virtually every aspect of the securities business activities of Delta Asset.

6. Schwartz's engagement in the investment banking and securities business of Delta Asset circumstantially demonstrates that he controls Delta Asset, a member of the Association. In addition, he owns more than five percent of Delta Asset. For these reasons, he is an "associated person," under the jurisdiction of NASD and subject to the requirements of Rule 8210.

CAUSE ONE

Schwartz Failed to Appear for an On-the-Record Interview

(Violations of NASD Conduct Rule 2110 and Procedural Rule 8210)

7. The allegations set forth above in paragraphs one through six are re-alleged and incorporated by reference.

8. On October 21, 2003, the staff mailed a request pursuant to NASD Procedural Rule 8210 requiring Schwartz to appear for an on-the-record interview on November 11 and 12, 2003, in the NASD's Rockville, Maryland, offices. The request letter was sent by certified mail to

Schwartz's last known home address as reflected in the Central Registration Depository ("CRD").

9. Carl Cirillo, Schwartz's stepson who resides with Schwartz at his home, signed the receipt for the letter.

10. The staff also sent the letter by facsimile to the attention of Anthony Donnadio ("Donnadio"), Delta Asset's compliance officer, at the Mineola, NY office of the firm.

11. Donnadio informed the staff in a telephone conversation on November 3, 2003, that he delivered the letter to Schwartz personally; thus, Schwartz was personally served with the letter.

12. After November 3, 2003, the staff attempted repeatedly but unsuccessfully to contact Schwartz by telephone and left messages with the office staff of Delta Asset; Schwartz did not respond to the staff's messages.

13. Schwartz failed to appear on November 11 and 12, 2003, as required.

14. By reason of the foregoing, Schwartz violated NASD Conduct Rule 2110 and Procedural Rule 8210.

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 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.

Signed by authority delegated by the
Director of the Office of Disciplinary
Affairs:

Date: July 14, 2004



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