

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 05-106

September 19, 2005

MITCHELL ALLAN ROMANO
NON-REGISTERED EMPLOYEE

* * *

Violated Exchange Rule 472(a) by posting communications on the Internet without the knowledge and approval of his employer; engaged in conduct inconsistent with just and equitable principles of trade by posting without approval on the Internet speculative statements which might reasonably be expected to affect market conditions of securities in which he held an interest and by making false statements in his compliance certifications to his employer—Consent to censure and one-month suspension.

Appearances:

For the Division of Enforcement
Richard Chin, Esq.
Josefina Martinez, Esq.
Gerard Murphy, Esq.

For the Respondent
Mitchell Allan Romano, *pro se*

* * *

A Hearing Panel of the New York Stock Exchange, Inc. (“Exchange”) met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange’s Division of Enforcement (“Enforcement”) and Mitchell Allan Romano (“Respondent”), a former non-registered wire operator with the Miami, Florida office of UBS PaineWebber, Inc. (the “Firm”) and a current non-registered fingerprint person with a different member organization. Without admitting or denying guilt, Respondent consented to a finding by the Hearing Panel that he:

- I. Violated Exchange Rule 472(a) by posting electronic communications concerning securities on Internet chat rooms without the knowledge and approval of his member firm employer; and
- II. Engaged in conduct inconsistent with just and equitable principles of trade by:
 - A. Posting on Internet chat rooms, without the knowledge or approval of his member firm employer, electronic communications containing speculative statements concerning securities that might reasonably be expected to affect investor interest; and
 - B. Making misrepresentations on his electronic Compliance Certifications to the Firm.

For the sole purpose of settling this disciplinary proceeding, Enforcement and Respondent stipulate to certain facts, the substance of which follows:

Background and Jurisdiction

1. Respondent was born in July 1977. He entered the securities industry in February 2000 as a non-registered wire operator with the Miami, Florida office of the Firm and remained in that position until his discharge in May 2002.
2. On or about June 6, 2002, the Firm filed a Form RE-3 with the Exchange reporting the termination of Respondent's employment for violating Firm policies regarding electronic communications by posting messages on electronic message boards without obtaining the Firm's approval.
3. By letter dated January 17, 2003, which Respondent received, Enforcement advised him of its investigation and requested that he provide a written explanation to Enforcement.
4. Respondent joined a different member organization as a non-registered fingerprint person in July 2002, and he remains in that position to date.

Overview

5. During the period August 2000 through May 2002 (the "Relevant Period"), on one or more occasions, Respondent violated Exchange Rule 472(a) by posting communications on Internet message boards without the knowledge and approval of his member firm employer. In addition, several of these communications contained speculative statements regarding securities which could reasonably be expected to affect investor interest. Additionally, Respondent made misrepresentations on his Compliance Certifications to the Firm.

Unapproved Communications With the Public in Internet Chat Rooms

6. Exchange Rule 472(a) requires that "[e]ach advertisement, market letter, sales literature or other similar type of communication which is generally distributed or made available by a member or member organization to customers or the public must be approved in advance by a member, allied member, supervisory analyst or person designated under the provisions of [Exchange] Rule 342(b)(1)." Exchange Rule 472.10 defines "communication" as including, among other things, "electronic communications . . . which are shown or distributed to customers or the public."
7. In or about August 2000, Respondent began posting electronic communications devoted to the securities industry in chat rooms maintained by Internet service providers Yahoo!, Lycos, Stockhouse and Agoracom. The Internet chat rooms were organized by particular security and allowed an individual identified by a screen name to post messages that could be read by any person who viewed the Internet

message boards, thus making the communication available to the general public. Respondent was able to access these chat rooms through his computer terminal at the Firm and via his home computer. He used various screen names in such chat rooms.

8. During the Relevant Period, Respondent posted more than 1,000 electronic communications in the aforementioned Internet chat rooms, without the Firm's knowledge or approval.
9. Respondent's postings contained, among other things, his opinion of NASDAQ-listed securities of WXYZ, ABCD, EFGH, and IJKL, as well as MNO— a company listed on the TSX Venture Exchange.
10. Respondent identified himself as an employee of the Firm in several postings and misrepresented himself as a trader with the Firm on at least one occasion. Respondent, who maintained a securities account at the Firm, purchased shares in some of the securities that were the subject of his postings.¹

Communications Which Contained Speculative Statements

11. On several occasions, Respondent went beyond providing basic information about a particular stock and used optimistic language to predict a positive future for the company and the price of its stock.
12. Those postings included language such as, “[t]ake advantage of the situation. WXYZ is a great company . . . BUY NOW . . .” and, in a different posting, “[o]nce again it makes no sense to sell NOW . . . They (stock symbol MNO) may sell a portion of the company (Russia) IMO. But I still see a merger and I also see the BOD being very open with investors.”
13. The above-mentioned statements, as well as other statements contained in the postings made by Respondent, were speculative and could reasonably be expected to affect investor interest.

Misrepresentations to the Firm

13. During the period of Respondent's employment with the Firm, he electronically completed an Annual Employee Certification of Compliance (“Compliance Certification”) for the years 2000 and 2001.
14. The 2000 and 2001 Compliance Certifications attached the Firm's Code of Conduct and Guide to Electronic Communications for employee reference and required employees to attest that they were in compliance with the policies contained therein.

¹ A review and comparison of Respondent's monthly account statements and a sampling of the Internet communications posted in the above-listed securities revealed no apparent attempt by Respondent to influence the price of the securities or to benefit himself.

15. The Firm's Code of Conduct provided, among other things, that e-mail and the Internet were to be used primarily for business purposes. The Firm's Electronic Communications Guide prohibited participation in chat rooms in connection with Firm business or through Firm systems without prior Firm authorization and prohibited the use of the Firm name on personal home pages, web sites or in chat rooms.
16. A section of the 2000 and 2001 Compliance Certifications required employees to attest that they "... [had] not participate[d] in any 'chat room,' 'on-line forum,' 'bulletin board' or similar environment for reasons related directly or indirectly, to [Firm] business."
17. On or about January 4, 2001, Respondent made misrepresentations to the Firm by submitting an electronic Compliance Certification to the Firm certifying that he was in compliance with the Firm's Code of Conduct and Guide to Electronic Communications and had not participated in any chat room, on-line forum or bulletin board during the previous year, which was untrue.
18. On or about January 31, 2002, Respondent made misrepresentations to the Firm by submitting an electronic Compliance Certification to the Firm certifying that he was in compliance with the Firm's Code of Conduct and Guide to Electronic Communications and had not participated in any chat room, on-line forum or bulletin board during the previous year, which was untrue.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Respondent guilty as set forth above by unanimous vote.

PENALTY

In support of the penalty consented to by the parties, Enforcement highlighted several relevant precedents. In each of those cases, the respondent was found guilty of violating Exchange Rule 472(a) and of engaging in conduct inconsistent with just and equitable principles of trade on the basis of having posted unapproved securities-related communications on the Internet. The resulting penalty was a censure and a bar or suspension ranging from one to two months, depending on: (1) whether the respondent had consented to or contested the charges; (2) his level of sophistication; (3) his status within the industry and whether he made representations about that status in his communications; and (4) the degree to which the respondent personally benefited—or ostensibly intended to benefit—himself or family members. See In re William R Emmert Vahrenkamp, Jr., Decision 02-188 (N.Y.S.E. Hearing Panel Sept. 25, 2002) (consent to censure and two-month bar for relatively inexperienced registered representative who posted 20 messages regarding various securities and represented himself as a registered representative in those messages); In re William Edward Evans II, Decision 02-166 (N.Y.S.E. Hearing Panel Aug. 20, 2002) (consent to censure and two-month bar where respondent, a former registered representative, and several of his customers held shares of the stock to which the speculative

communications related and where Respondent had referred to his firm by name in some communications); In re Stuart Leslie Weisbrot, Decision 02-84 (N.Y.S.E. Hearing Panel Apr. 11, 2002) (consent to censure and two-month bar where respondent, who had almost 25 years of experience at time of violations, had personally held positions of up to 5,000 shares of the security to which the speculative communications related and where one of his customers had held as many as 84,000 shares); In re Charles Francis Smithers III, Decision 01-16 (N.Y.S.E. Hearing Panel Jan. 25, 2001) (consent to censure and one-month suspension where respondent had posted messages regarding shares on which he conducted hundreds of customer trades as well as several trades on behalf of his wife, mother and sister); see also In re Louis Michael Olerio, Jr., Decision 02-41, ¶13 (N.Y.S.E. Hearing Panel Apr. 15, 2002) (after contested hearing, respondent, a registered representative, was found guilty and sentenced to censure and one-month suspension where firm's compliance policies on electronic communications were unclear, respondent was inexperienced with such policies, and his postings "often had the nature and substance of playground bragging," even though he had identified himself as a financial advisor and made reference to his firm in his postings).

In this case, a number of mitigating factors weighed in favor of a penalty in the lower end of the range. First, at the time of the violations, Respondent was very young (only 22 years old) and inexperienced. As pointed out orally by Enforcement at the Hearing, his choice of screen-names—"zombiedude" and "moonshine69"—further demonstrated his immaturity. Like the respondent in Olerio, Respondent lacked experience and familiarity with his firm's policies at the time of the violations; this was his first job in the industry and, indeed, his first job after college. Unlike the respondent in Olerio, however, Respondent never purported to be conveying the views of his Firm. He also cooperated fully with Enforcement's investigation, turning over hard copies of the postings at issue, which comprised a large portion of the evidence that Enforcement reviewed. Moreover, Respondent was a non-registered employee and was, therefore, unable to affect customers' accounts. There was also no evidence that Respondent's postings affected the price of the stock or that he intended to benefit—let alone, actually benefited—from his unapproved communications; rather, Enforcement acknowledged at the Hearing that Respondent had made very few trades in the relevant securities, that the value of the assets in Respondent's account had never amounted to more than \$5,000 at any given point during the Relevant Period, and that he had actually lost money over the course of that period. Cf. In re Smithers, Decision 01-16, ¶12 (hundreds of customer trades in posted-about securities, in addition to several trades on behalf of respondent's wife, mother and sister). Rather, Respondent's trades were consistent with his comments, and only a small proportion of those comments could reasonably be considered speculative in any event. Finally, Enforcement noted that Respondent is currently employed in the industry and would, therefore, be sufficiently penalized by a suspension of one month, since he would be without income during that time, unlike someone who is no longer employed in the industry. Cf. In re Vahrenkamp, Decision 02-188, ¶2 (respondent no longer employed in the industry in a registered capacity); In re Evans, Decision 02-166, ¶3 (same); In re Weisbrot, Decision 02-84, ¶3 (same).

In view of the above findings, the Hearing Panel, by majority vote, imposed the penalty consented to by Respondent of a censure and a suspension for the period of one month from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

One member of the Hearing Panel dissented from the penalty decision. That member would have modified the penalty such that the censure and one-month suspension be treated as already having been served during the approximately two months between May and July 2002 when Respondent was unemployed. The reason for this proposed modification was a concern that a prospective one-month suspension was too severe, under the facts and circumstances of this case, for a young person who has already been terminated from his previous job and would now be losing a relatively large amount of income, in addition to facing the possibility of losing his current employment.

For the Hearing Panel

Peggy Kuo
Chief Hearing Officer
Panelists:
Anthony Prestia
Larry Youell