

NEW YORK STOCK EXCHANGE LLC

NYSE HEARING BOARD DECISION 07-159

November 15, 2007

RICHARD WENDELL BABICH

FORMER REGISTERED REPRESENTATIVE

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Violated NYSE Rule 476(a)(6) by failing to follow customer’s instructions; caused violation of NYSE Rule 351(d) by failing to notify Firm of customer complaint; caused violation of Section 17(a) of Securities Exchange Act, Rules 17a-3 and 17a-4 thereunder, and NYSE Rule 440 by making or causing to be made false entry in books and records of member firm employer; violated NYSE Rules 476(a)(11) and 477 by failing to timely comply with written requests for information – Censure and one-year bar.

Appearances:

For the Division of Enforcement
Anthony J. Cavallaro, Esq.
Scott M. Andersen, Esq.
Chun F. Li, Esq.

For Respondent
Richard Wendell Babich, pro se

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A Hearing Panel on behalf of the New York Stock Exchange LLC (“NYSE”) considered a Charge Memorandum issued by NYSE Regulation, Inc.’s Division of Enforcement (“Enforcement”) charging Richard Wendell Babich (“Respondent”), a registered representative formerly with UBS Financial Services (“UBS” or the “Firm”), a member organization, with having:

- I. Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade in that he failed to follow a customer’s instructions.
- II. Caused a violation of NYSE Rule 351(d) by failing to notify the Firm of a customer complaint.
- III. Caused a violation of Section 17(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), Rules 17a-3 and 17a-4 thereunder, and NYSE Rule 440, in that he made, or caused to be made, a false entry in the books and records of his member firm employer.

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- IV. Violated NYSE Rules 476(a)(11) and 477 in that he failed to timely comply with one or more written requests by Enforcement for information concerning a matter that occurred prior to the termination of his employment with his member firm employer.

Respondent filed an Answer to the Charges in which he did not expressly deny any of the allegations made in the Charge Memorandum, but rather, attempted to provide explanations and context for the conduct at issue.

Based on the pleadings and the evidence and argument presented at the hearing, the Hearing Panel made the following findings:

Background and Jurisdiction

1. Respondent was born in 1962. He was hired by UBS on December 16, 2002 as a trainee and, subsequently, as a registered representative in the San Francisco, California branch office. On June 30, 2006, UBS terminated Respondent's employment.
2. Respondent is currently employed as a registered representative in the Folsom, California branch office of a non-member organization.
3. On July 31, 2006, Enforcement received a Form U-5 from UBS which reported that Respondent's employment was terminated on June 30, 2006 because he "failed to follow client instructions to exercise options, failed to report [a] client complaint to management, and provided misleading information during [an] internal review."
4. By letter dated December 13, 2006, which Respondent received, Enforcement notified Respondent that it was investigating this matter.

Failure to Follow Customer Instructions and Report Customer Complaint

5. During a meeting with Respondent in or about February 2006, Respondent's customer ("Customer") instructed Respondent to exercise 1,322 shares of XYZ options on margin. The XYZ options were scheduled to expire on February 28, 2006.
6. Thereafter, Customer made subsequent attempts to contact Respondent, both by telephone and email, concerning the status of Customer's order to exercise the XYZ stock options.
7. On or about February 22, 2006, Customer sent an email (the "February 22, 2006 Email") to Respondent, stating, "I hadn't heard from you about exercising the shares (main thing) and all the other stuff we talked about (getting the remaining shares out of the other two houses, and getting the CHiPs, or DOrkS, whatever they're called). Please confirm that you exercised the remaining 1322 shares of [XYZ] on margin."
8. On or about February 28, 2006, the XYZ options expired.

9. On or about March 1, 2006, Customer re-forwarded the February 22, 2006 Email (the "March 1, 2006 Email") to Respondent stating, "Please respond."
10. On or about March 24, 2006, Customer re-forwarded the March 1, 2006 Email to Respondent, stating, "Please respond via e-mail. If you have tried my voice mail, it is intermittently on the fritz. I need to know that you exercised those options. My wife tells me it was not on the last statement I got."
11. On or about May 28, 2006, Customer sent an email (the "May 28, 2006 Email" or the "Complaint") to Respondent, stating, "I had asked you to exercise the [XYZ] options last February in our face-to-face meeting, and according to the UBS statements received since, that was not done. The options have since expired. Please call me so we can discuss."
12. Despite the initial meeting with Respondent, subsequent email communications, and other communications, Respondent failed to follow Customer's instructions to exercise the XYZ options, thereby causing a loss to Customer of approximately \$39,000.
13. Firm policy defines a customer complaint as any communication received by an employee or the Firm that expresses dissatisfaction or grievance and requires registered representatives to report customer complaints immediately. However, Respondent did not report the Complaint to the Firm.
14. NYSE Rule 351(d) requires member organizations to report certain statistical information to the NYSE regarding customer complaints as specified by the NYSE. A failure of a registered representative to report a customer complaint will cause a member firm to fail to properly report this statistical data.
15. Since Respondent failed to report the May 28, 2006 Email to the Firm, the Firm did not accurately report its complaint information pursuant to NYSE Rule 351(d).
16. NYSE Rule 440 requires that every member and member organization make and preserve books and records as the NYSE may prescribe and as prescribed by Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder.
17. On June 19, 2006, branch management notified Respondent of his failure to follow Customer's instructions and report the Complaint. Respondent did not initially acknowledge the existence of a complaint concerning his failure to follow Customer's instructions to exercise the options.
18. Subsequently, in the course of the Firm's internal review, Respondent provided to branch management in late June 2006 a printout of a computer entry that Respondent created in the Firm's computer system on or about June 20, 2006, indicating a date of February 22, 2006, and a subject line of, "Order Entered." This entry purported to reflect that, on February 22, 2006, Respondent had entered an order to purchase XYZ incentive stock options on Customer's behalf "after hours," but that was not accurate.

Respondent submitted this document to the Firm on or about June 20, 2006 to provide support for his purported belief that he had executed the XYZ options.

Failure to Timely Cooperate

19. By letter dated August 10, 2006, sent to Respondent's last known address as reflected in NYSE records, by certified mail and first-class mail, Enforcement sought details concerning Respondent's employment termination. In particular, Enforcement requested that Respondent explain the facts concerning the allegations that he failed to follow customer instructions, failed to report a customer complaint, and provided misleading information to the Firm. The letter informed Respondent that a failure to comply with Enforcement's request on or before the due date might result in the institution of a formal disciplinary proceeding against him and a sanction permanently barring him from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. The letter indicated a response due date of September 11, 2006.
20. Despite admitting that he had received Enforcement's inquiry, Respondent did not respond to this request.
21. Thereafter, on September 20, 2006, Enforcement sent a second request to Respondent at the same address by certified and first-class mail, notifying him of Enforcement's inquiry and affording him another opportunity to provide the same requested information. Enforcement again informed Respondent that a failure to comply with Enforcement's request on or before the due date might result in a permanent bar or suspension. The letter indicated a response due date of October 5, 2006.
22. Respondent admitted receiving this second request and not responding.
23. By letter dated December 13, 2006, having received no reply from Respondent, Enforcement sent another request by certified mail and first-class mail to Respondent's place of employment at his non-member firm. The letter specifically requested that Respondent explain the circumstances of any failure to follow customer instructions and report customer complaints. The letter informed Respondent that a failure to respond to Enforcement's request might result in the institution of formal disciplinary proceedings against him and a permanent bar or suspension. The letter indicated a response due date of December 28, 2006.
24. Respondent admitted receiving this third request and not responding.
25. On February 28, 2007, Enforcement staff attempted to contact Respondent by telephone and left a voicemail (the "February 28, 2007 Voicemail") on Respondent's direct office extension at his place of employment regarding Enforcement's outstanding information requests.
26. On March 14, 2007, Respondent contacted Enforcement by telephone in response to Enforcement's February 28, 2007 Voicemail. Respondent confirmed to Enforcement

staff that he had received Enforcement's previous written requests and indicated that he did not respond because he was in the process of setting up a "virtual office." Enforcement orally renewed its request for a written statement from Respondent with a response due no later than March 16, 2007.

27. On or about March 16, 2007, Enforcement received a written statement from Respondent. Respondent provided no written explanation for his failure to respond in a timely manner to Enforcement's previous requests for information.

DECISION

At the hearing, Respondent expressly conceded the accuracy of all of the allegations in the Charge Memorandum. Tr. at 80. In addition, he specifically acknowledged that he received an order from Customer to exercise the XYZ options and that he, "[i]n fact, did not" do so. Id. at 44. He also testified that he was certain he had received the May 28, 2006 Email, i.e., the Complaint, id. at 51-52, yet the evidence established that he never reported it to the Firm. Moreover, Respondent effectively admitted that the computer entry he created on June 20, 2006, using the date of February 22, 2006, was inaccurate, since the options were in fact never exercised. Finally, Respondent did not dispute that he failed to timely respond in writing to Enforcement's multiple requests for information. Accordingly, the Hearing Panel unanimously found Respondent guilty of Charges I, II, III and IV.

PENALTY

Enforcement argued in favor of a censure and two-year bar. In support of this penalty, Enforcement emphasized the serious nature of the conduct, the deception in which Respondent engaged, and the harm caused to the customer. In addition, it cited two NYSE Hearing Board cases as precedent. In Aaron Boland Osier, Decision 06-207 (NYSE Hearing Board Dec. 1, 2006) and Maxim Dolgosheev, Decision 06-221 (NYSE Hearing Board Jan. 4, 2007), the Hearing Board imposed the penalty agreed upon by the parties of a censure and two-year bar. Both cases involved a failure to disclose a criminal record on an employment application, as well as a failure to cooperate in a timely manner.

Respondent contends that he did not act deliberately, but rather, as a result of being overwhelmed with emails, frequent work-related travel, and family obligations. He has now accepted responsibility for his misconduct, stating, "I am not in any way exonerating myself saying anything other than I did screw up. It was an error, a big error on my side, my mistake." Tr. at 154. Respondent also states that he is closely supervised in his current position and will continue to be closely supervised for 18 months.

The Hearing Panel accepts Respondent's contention that he did not act deliberately in failing to exercise the customer's options as instructed. The Panel also accepts that Respondent "panicked" when he created the false computer entry to substantiate his belief that he had entered the order. Tr. at 99. He testified that the entry was supposed to reflect his belief, in the early morning of June 20, 2006, that he had exercised the options on February 22, 2006 because, in his written notes, he observed a "tick mark" next to the item concerning the XYZ options and that

this “[u]sually” meant that he had taken care of the item. Id. at 100. However, although the entry was purportedly dated February 22, 2006, it was ineffective on its face, since it clearly indicated that it was last amended on June 20, 2006, during the internal investigation.

Although not cited by either party, the Hearing Panel finds that Gregory Stephen Kroning, Decision 95-112 (NYSE Hearing Board Aug. 24, 1995) more closely parallels the type of conduct involved in the present case than Osier or Dolgosheev. In Kroning, the respondent failed to follow customer instructions, made misstatements to those customers, his supervisor, and the NYSE, and prepared bogus trade confirmations to cover up his error. The respondent in that case consented to a penalty of a censure and one-year bar.

In light of the penalty imposed in Kroning, the Hearing Panel finds the two-year bar proposed by Enforcement to be unreasonable and inappropriate for the present case. Respondent in the instant case failed to follow a customer’s instruction on a single occasion, did not make a misrepresentation to the customer, but rather, failed to respond to that customer’s inquiries, and made a clumsy effort to disguise his initial error. He also purposely delayed giving a written statement to Enforcement during its investigation, but Enforcement has not alleged that he made any misstatements when he eventually submitted a written statement. The Hearing Panel notes in addition that Respondent failed to reach a settlement with Enforcement, necessitating a hearing in this case.

In view of the above findings, the Hearing Panel imposed the penalty of a censure and a one-year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

For the Hearing Board

Peggy Kuo - Chief Hearing Officer
Panelists:
Lawrence Stanton
Lisa Waters