

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55731 / May 9, 2007

Admin. Proc. File No. 3-12316

In the Matter of the Application of

HANS N. BEERBAUM and
BEERBAUM & BEERBAUM FINANCIAL AND
INSURANCE SERVICES, INC.
5881 Roblar Rd.
Petaluma, California 94952

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY
PROCEEDINGS

Failure to Comply with Registration Requirements

Conduct Inconsistent with Just and Equitable Principles of Trade

Owner and president of member firm of registered securities association engaged in
conduct requiring registration as a general securities principal without being so registered.
Held, association's findings of violation and sanctions are sustained.

APPEARANCES:

Hans N. Beerbaum, pro se.

Marc Menchel, Alan Lawhead, Carla J. Carloni, and Jennifer C. Brooks, for NASD.

Appeal filed: May 30, 2006

Last brief received: September 5, 2006

I.

Beerbaum & Beerbaum Financial and Insurance Services, Inc., an NASD member firm (the “Firm”), and Hans N. Beerbaum, the Firm’s sole owner, director, and president (collectively with the Firm, “Applicants”), appeal from NASD disciplinary action. NASD found that the Firm and Beerbaum violated NASD Membership and Registration Rule 1021 1/ and NASD Conduct Rule 2110 2/ when Beerbaum, between 2002 and 2004, acted as a general securities principal for the Firm while his principal registration was suspended. NASD barred Beerbaum from associating with any NASD member firm in any capacity, fined the Firm \$15,000, and assessed costs of \$4,141.00. We base our findings on an independent review of the record.

II.

This appeal concerns Applicants’ actions following NASD’s 2002 suspension of Beerbaum as a general securities principal when Beerbaum continued to act in a principal capacity despite the suspension. The facts are as follows.

Beginning in 1986, Beerbaum was registered as a general securities principal with the Firm. On March 4, 1996, Beerbaum registered as a principal and representative with another firm, Walnut Street Securities, Inc. At that time, he withdrew his registrations with the Firm. Beerbaum terminated his registration with Walnut Street in December 1997 and re-registered as a general securities principal and representative with the Firm on January 23, 1998.

In a decision issued on February 15, 2002, NASD found that, between 1996 and 1997, when he was not registered as a principal with the Firm, Beerbaum nonetheless acted in that capacity. He remained the Firm’s president, director, and an owner. NASD found that, during this time, Beerbaum “did the Firm’s day-to-day bookkeeping and wrote checks on its bank account; continued to be solely responsible for [Firm salesperson Gary] Lee’s 3/ supervision; prepared and filed the Firm’s FOCUS reports; filed an Amendment to the Firm’s Form BD on its behalf; and received compensation from the Firm[.]” NASD held that Beerbaum and the Firm violated Registration Rule 1021 and Conduct Rule 2110. NASD fined Beerbaum and the Firm each \$2,500. NASD also required Beerbaum to requalify as a principal within ninety days after

1/ NASD Membership and Registration Rule 1021 requires, among other things, that “[a]ll persons engaged . . . in the . . . securities business of a member who are to function as principals shall be registered as such with NASD” NASD Manual at 3131 (2003).

2/ NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. NASD Manual at 4111.

3/ Lee was registered with the Firm as both a general securities representative and general securities principal.

the decision became final with the proviso that, if Beerbaum was unable to requalify during the ninety-day period, he would be suspended as a principal until he requalified.

Beerbaum did not attempt to requalify within the ninety-day period and, accordingly, his suspension as a general securities principal took effect on approximately July 5, 2002. ^{4/} Beerbaum failed the qualification examination for principals in July 2002. He did not take the examination again until August 2003, failed, and then took the examination a third time in November 2003, failing again. On June 3, 2004, Beerbaum passed the examination and qualified as a principal.

However, between July 5, 2002 and June 3, 2004, Beerbaum acted as a principal of the Firm. Beerbaum continued to supervise Gary Lee. Between July 2002 and August 26, 2003, Lee engaged in approximately 180 transactions. Beerbaum received an override on Lee's commissions. Beerbaum attested, as the Firm's president, to each of the Firm's two annual audit reports filed during the period at issue. ^{5/} Beerbaum also submitted, as the Firm's principal, all seven of the Firm's FOCUS reports that were due during that period. He filed, in his capacity as Firm president, a partial Form BDW regarding the Firm's withdrawal from registration in Utah. In February 2003, he filed, as Firm president, an amendment to the Firm's Form BD to reflect the disciplinary action to which he and the Firm were subject as a result of the February 2002 NASD proceeding. On February 4, 2003, Beerbaum updated the NASD Central Registration Depository ("CRD") contact report for the Firm, which listed him as the Firm's chief executive officer, executive representative, chief financial officer, and contact for compliance issues and for the training of registered representatives. ^{6/} On April 24, 2003, Beerbaum signed and approved, as president, the Firm's anti-money laundering ("AML") program—compliance and supervisory procedures. The Firm's AML procedures designated Beerbaum as its AML program compliance officer with full responsibility for the Firm's AML program.

^{4/} Beerbaum testified that he did not take the principal examination for the first time until July 31, 2002 because he "realized [he] was probably not going to pass based on the [practice] test results."

^{5/} Rule 17a-5(e)(2) of the Securities Exchange Act of 1934, 17 C.F.R. § 240.17a-5(e)(2), requires that a broker-dealer's annual audited report be accompanied by an oath or affirmation by a duly authorized officer that, to the best of the attester's knowledge, the financial statements and schedules are true and correct and neither the broker-dealer nor a principal has a proprietary interest in any customer account.

^{6/} Article IV, Section 3 of NASD's By-laws provides that "[e]ach member shall appoint and certify to the Secretary of the NASD one 'executive representative' who shall represent, vote, and act for the member in all the affairs of the NASD. . . . An executive representative of a member or a substitute shall be a member of senior management and registered principal of the member." NASD Manual at 1309.

In this proceeding, NASD concluded that Beerbaum's conduct between July 5, 2002 and June 3, 2004 violated Rules 1021 and 2110.

III.

Rule 1021(a) requires that all persons who act as a principal of an NASD member firm be properly registered as a principal with NASD. Rule 1021(b) defines a "principal" to include an officer or director of an NASD member firm who is "actively engaged in the management of the [member firm's] investment banking or securities business, including supervision, solicitation, conduct of business, or the training of persons associated" with the member. ^{7/}

The evidence establishes that, while suspended as a principal of the Firm, Beerbaum was actively engaged in the management of the Firm's securities business. He supervised at least one Firm employee. ^{8/} He attested as president to the Firm's annual audit reports. He prepared and filed FOCUS reports as Firm "principal." He filed a partial Form BDW and an amendment to the Firm's Form BD in his capacity as Firm president, and approved, signed and filed anti-money laundering compliance and supervisory procedures. ^{9/} Supervision of firm personnel and approving, signing, and filing required periodic financial reports, required disclosure forms, and required compliance and supervisory procedures on behalf of a member firm come within those management responsibilities enumerated in Rule 1021(b) that are to be performed by a principal. ^{10/}

^{7/} E.g., L.H. Alton & Co., 53 S.E.C. 1118, 1124 (1998) (citing NASD Rule 1021(b)).

^{8/} Beerbaum claimed, in testimony before NASD, that Gary Lee supervised himself. We have held, however, that a salesperson cannot supervise himself. See Kirk Montgomery, 55 S.E.C. 485, 504 & n.43 (2001) (finding that "[i]t is unreasonable to expect a salesperson to supervise himself") (citations omitted); Bradford John Titus, 52 S.E.C. 1154, 1158 (1996) (finding that salesperson could not supervise himself); see also Stuart K. Patrick, 51 S.E.C. 419, 422 (1993) (finding, in appeal of NYSE action, that "[s]upervision, by its very nature, cannot be performed by the employee himself"), aff'd, 19 F.3d 66 (2d Cir. 1994).

^{9/} Beerbaum notes that CRD identified Lee as the Firm's anti-money laundering compliance contact. The Firm's April 2003 AML procedures, however, were signed solely by Beerbaum as "President" and designated Beerbaum as the AML compliance officer.

^{10/} See, e.g., Gordon Kerr, 54 S.E.C. 930, 938 (2000) ("[A] person acting in a supervisory capacity must be registered as a general securities principal."); Exchange Act Rule 17a-5(e)(2), 17 C.F.R. § 240.17a-5(e)(2) (requiring that individual who attests annual audited report be duly authorized officer); Exchange Act Form X-17A-5 (requiring that individual who signs and submits FOCUS Report be principal); NASD Conduct Rule 3011

(continued...)

Moreover, Beerbaum held himself out to regulators as the Firm's principal. He executed numerous reports and forms, throughout this period, on the Firm's behalf as its president or its principal. Beerbaum also updated an NASD contact report in the first half of 2003 stating that he was the Firm's chief executive officer, executive representative, and chief financial officer, as well as the contact for compliance issues and for training registered representatives. 11/

Applicants claim that they believed, based on an inquiry to "the local [NASD] office," that Gary Lee, who had passed the Series 24 principal examination, became the Firm's managing general principal once Beerbaum's suspension took effect. However, even if Lee were the Firm's managing principal, Applicants would remain liable under Rule 1021. The fact that a member firm properly registers one principal who exercises managerial authority does not mean that other associated persons who act as principals need not be registered as principals. Rule 1021 requires that every associated person who holds one of the enumerated positions and who has managerial responsibilities must be registered as a principal. 12/

Moreover, Beerbaum did not effectively delegate his executive and supervisory duties to anyone else. Beerbaum admittedly failed to amend the Firm's Form BD or supervisory procedures to reflect a change in managing principals. He further admitted that he failed to show copies to Lee of the Firm's regulatory reports, such as its FOCUS reports, before filing.

Applicants assert that NASD granted Beerbaum an extension of time to pass the principal examination. In a letter dated August 22, 2003, NASD observed that Beerbaum remained an officer and sole owner of the Firm, and that he was designated "Executive Representative of [the Firm], a position that can only be held by a principal." The letter further informed Applicants that NASD would "take steps to cancel the membership of [the Firm] due to its failure to meet membership requirements if [Beerbaum was] not registered as a principal by September 25,

10/ (...continued)
(requiring approval by member of senior management of firm's anti-money laundering program); cf. L.H. Alton & Co., 53 S.E.C. at 1125-26 (finding that the completion and execution of documents "obligating the firm to participate in a securities underwriting are clearly among those duties to be performed by a 'principal'").

11/ See L.H. Alton & Co., 53 S.E.C. at 1125 n.21 ("The fact that [one] held himself out to be a partner in the firm [was] additional relevant evidence of his [principal] status in the firm.") (citation omitted); see also William Jackson Blalock, 52 S.E.C. 77, 84 (1994) (finding a violation of the requirement that NASD members observe high standards of commercial honor and just and equitable principles of trade where person acted and held himself out as president of firm despite being unregistered because of his failure to pass an NASD qualification examination), aff'd, 96 F.3d 1475 (11th Cir. 1996) (Table).

12/ See L.H. Alton & Co., 53 S.E.C. at 1125-27.

2003.” ^{13/} The letter also stated that NASD was not precluded from “taking any disciplinary action for violations of the rules and regulations that may have occurred prior to the issuance of [the] letter.” As noted above, Beerbaum did not qualify until June 2004.

We believe that this letter in fact warned Applicants that, because Beerbaum had not requalified as a principal, the Firm’s registration was subject to cancellation. NASD’s statement that it would postpone action to cancel the Firm’s membership did not authorize or ratify Beerbaum’s acting as a principal and expressly did not preclude disciplinary proceedings against Beerbaum. Moreover, by the time NASD sent this letter, Beerbaum already had engaged in many of the management activities at issue.

The Firm also bears responsibility for Beerbaum’s failure to qualify as a principal because he was the Firm’s sole owner, president, and director. ^{14/} Based on the foregoing, we find that Beerbaum and the Firm violated Rule 1021 when Beerbaum acted as a principal of the Firm without being so registered. NASD further determined that Beerbaum’s and the Firm’s violation of Rule 1021 also constituted a violation of Rule 2110, which requires adherence to high standards of commercial honor and just and equitable principles of trade. It is well settled that a violation of a rule promulgated by the Commission or by NASD also violates Rule 2110. ^{15/} We accordingly sustain NASD’s findings of violation.

IV.

Exchange Act Section 19(e)(2) directs us to sustain NASD’s sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are

^{13/} NASD subsequently extended this date to October 10, 2003.

^{14/} See, e.g., Gallagher & Co., 50 S.E.C. 557, 564 & n.18 (1991) (citing A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir.) (“A firm . . . can act only through its agents, and is accountable for the actions of its responsible officers.”), cert. denied, 434 U.S. 969 (1977)), aff’d, 963 F.2d 385 (11th Cir. 1992) (Table); C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1435 (10th Cir. 1988) (citing A.J. White & Co., 556 F.2d at 624); see also R.B. Marich, Inc., 49 S.E.C. 991, 992-93 (1988) (finding that firm “must bear a measure of responsibility for its principals’ failure to comply with NASD registration requirements” where firm permitted president, as well as executive vice president and operations manager, “to serve as officers and individuals actively engaged in management without registering them as principals”) (emphasis in original).

^{15/} E.g., E. Magnus Oppenheim & Co., Inc., Securities Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 478 n.11 (citations omitted).

excessive or oppressive or impose an unnecessary or inappropriate burden on competition. ^{16/} Applicants argue that there are various mitigating circumstances that justify a reduction in the sanctions imposed by NASD. Although they claim that no sanction is necessary, Applicants suggest, as an alternative to the sanctions imposed by NASD, that Beerbaum be given “a short suspension” or merely a bar from acting as a principal.

As we previously have observed, “NASD’s registration requirement ‘provides an important safeguard in protecting public investors,’ and ‘strict adherence’ to that requirement is ‘essential’” because it “serves a significant purpose in the policing of the securities markets” and “in the protection of the public interest . . .” ^{17/} As we also have observed, the “registered principal is the person at a broker-dealer to whom the NASD looks to ensure compliance with regulatory requirements.” ^{18/} Thus, regulatory compliance is dependent, to a significant degree, on the qualifications of the principal, and those qualifications are assessed through the examination process.

We note in this connection that the sanctions imposed are consistent with NASD’s own Sanction Guidelines. For violations of Rule 1021, the Guidelines provide for fines of \$2,500 to \$50,000 on the firm and/or the individual. In “egregious cases,” the Guidelines recommend suspending the firm for up to thirty business days and suspending for up to two years, or barring, the individual in any or all capacities. The Guidelines list, as a “Principal Consideration” in determining the appropriate sanction for registration violations, the nature and extent of the unregistered person’s responsibilities. The Guidelines also list as General Principles in determining the appropriate sanction the consideration of any relevant disciplinary history and whether the respondent’s misconduct was the result of an intentional act.

The record amply establishes the seriousness of Beerbaum’s and the Firm’s misconduct. For almost two years, Beerbaum performed executive and supervisory responsibilities on behalf of the Firm despite Beerbaum’s suspension as a principal. Beerbaum knew that he could not act in these management capacities unless he was registered as a principal. Many of Beerbaum’s actions that are the basis of this proceeding are the same activities found in NASD’s 2002

^{16/} 15 U.S.C. § 78s(e)(2). Beerbaum does not claim, and the record does not show, that NASD’s action imposed an undue burden on competition.

^{17/} Michael F. Flannigan, 56 S.E.C. 8, 17 (2003) (finding that individuals engaged in conduct requiring registration as representatives of an NASD member firm without being so registered) (citations omitted). As we have held, the registration requirements are intended to ensure that principals “maintain the requisite levels of knowledge and competence.” Jon G. Symon, 54 S.E.C. 102, 110 (1999) (ordering the requalification by examination of a former registered securities principal, whose registrations as a general securities principal and a financial and operations principal had lapsed).

^{18/} Douglas Conrad Black, 51 S.E.C. 791, 794 (1993).

proceeding. In 2002, NASD found that Beerbaum and the Firm violated Rules 1021 and 2110, the same rules at issue here. Notwithstanding this knowledge, Beerbaum made no attempt to requalify as a principal within the prescribed ninety-day time period, as ordered in that earlier proceeding. Although he eventually sought to requalify by taking the principal exam, he failed the exam on his first three attempts spread over seventeen months, and did not successfully qualify as a principal until the middle of 2004. Despite his repeated failures to requalify, however, Beerbaum continued to run the Firm as an unregistered principal.

Applicants contend that Beerbaum's "multiple efforts to pass the [principal examination] showed a good faith attempt to comply with [NASD's] requirement." According to Applicants, the general principal examination was more difficult than Beerbaum expected, has "little training value" and "no relevance to the kind of business [the Firm] conduct[s]" and, therefore, "some consideration should be accorded for the problem it caused," in being so difficult for Beerbaum to pass. Beerbaum's personal opinion about the merits of NASD's examination program did not allow Applicants to disregard the results of that program when they were adverse to their plans. As we have held, "[w]hatever negative opinion [applicant] has of the rule does not obviate the need to comply with it." 19/

Beerbaum's statements throughout these proceedings further evidence Beerbaum's lack of understanding of the requirements of the securities business. 20/ For example, Beerbaum justified his failure to update properly the NASD contact report, arguing that "it's just a form that we haven't looked at in years and years . . . since we are on dial-up [internet access], changing

19/ See E. Magnus Oppenheim & Co., 85 SEC Docket at 483.

20/ Applicants complain that NASD "misused" an "IRS story . . . as proof that Beerbaum would violate rules if he needed to." Beerbaum volunteered at the NASD hearing that he falsified income information on a mortgage application in 1990, insisting that he did so at the behest of the lender who warned him that he would not otherwise qualify for the loan. Beerbaum claims that, upon discovering the inconsistency between the income disclosed in the mortgage application and the income disclosed in his federal income tax return, the "IRS chose to close its investigation without any action" after determining that the tax return was truthful. In Beerbaum's view, this information "adds proof that although a problem occurred at one time, no subsequent attempt to defraud a lender was ever attempted. NASD can be similarly certain . . . that a violation such as the one [at issue] is not likely to [re]cur [because t]he reason to attempt such a violation will not recur" In our view, Beerbaum cannot complain that NASD considered information that he voluntarily gave them.

anything is so time consuming we don't even think of doing it." 21/ Beerbaum's conduct and statements raise significant uncertainty about his willingness to comply with registration and other regulatory requirements in the future.

Applicants contend that, "while [Beerbaum] knew that a violation had occurred, mitigating circumstances would demonstrate that he had no choice but to file appropriate compliance reports." Applicants also argue that they sought to remain in compliance but that NASD "failed to suggest a practical way that [Beerbaum] could have met the firm's compliance responsibilities other than by filing the reports that only he had the power to file."

The appropriate answer to this is that, once Beerbaum was suspended, it was Applicants' obligation to cause these management responsibilities to be carried out by a properly registered principal. He and the Firm had an obligation to comply with all applicable rules. Applicants deliberately ignored the requirements of the registration rule and the suspension NASD imposed on Beerbaum as a result of similar misconduct. 22/

Beerbaum contends that he will face great economic hardship as a result of the bar and that it is unfair to apply sanctions to both him and the Firm because "Beerbaum is the [F]irm." Beerbaum asserts that no member of the public has ever complained about him or suffered any harm at his hand and that the fate of his "small clients" "is of no concern to [NASD]." We

21/ He also stated that NASD made "a big deal that the anti-money laundering report was filed by [him] while the Series 24 was suspended" and that "the NASD is over the top in a prosecution like this[.]"

22/ Applicants further complain that NASD failed to devise a way in which the Firm could remain in business, and in compliance, despite Beerbaum's suspension. We have repeatedly held that members and their associated persons "cannot shift their burden of compliance to the NASD." B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994). We noted in Stickle that "industry professionals are not released from their obligations" even when they receive "erroneous advice from NASD." Id.; see also Michael G. Keselica, 52 S.E.C. 33, 37 (1994) (stating that "attempts to blame others for his misconduct . . . demonstrate that [respondent] fails to understand the seriousness of . . . violations"); Kirk A. Knapp, 50 S.E.C. 858, 862 & n.15 (1992) (stating that applicant "cannot shift his responsibility for compliance with regulatory requirements to . . . NASD)" (internal citations omitted).

disagree with Applicants' view that allowing Beerbaum to remain in the industry would serve the interest of investors, small or otherwise. His actions evidenced a lack of appreciation for the requirements he was subject to as an associated person of an NASD member firm. Those requirements, which are intended to protect investors, are rendered meaningless if aspects of them are, as here, disregarded. Under the circumstances, therefore, we see no basis for concluding that the sanctions imposed by NASD are excessive or oppressive. 23/

An appropriate order will issue. 24/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY).

Nancy M. Morris
Secretary

23/ See, e.g., Gordon Kerr, 54 S.E.C. 930 (2000) (sustaining bar in all capacities of registered representative who acted as principal without being registered).

24/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
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For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Hans N. Beerbaum and Beerbaum & Beerbaum Financial and Insurance Services, Inc., and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary