

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52600 / October 13, 2005

Admin. Proc. File No. 3-11806

In the Matter of the Application of

MARK F. MIZENKO

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Rules of Fair Practice

Forgery of Member Firm Officer’s Signature on Corporate Resolution

Registered representative of member firm of registered securities association forged signature of executive of member firm on a corporate resolution. Held, association’s finding of violation and imposition of sanctions are sustained.

APPEARANCES:

Mark F. Mizenko, pro se.

Marc Menchel, Alan Lawhead, Carla J. Carloni, and Vickie R. Olafson, for NASD.

Appeal filed: February 2, 2005
Last brief received: April 19, 2005

Mark F. Mizenko, formerly associated with American Express Financial Advisors, Inc. (“AEFA”), an NASD member firm, appeals from NASD disciplinary action. 1/ NASD found that Mizenko violated NASD Conduct Rule 2110 when he forged the signature of an AEFA executive vice president on a corporate resolution obligating AEFA to guarantee certain car loans and leases for potential customers who were college athletes. 2/ NASD barred Mizenko in all capacities. We base our findings on an independent review of the record.

II.

The facts of this case are largely undisputed. In 1988, Mizenko became registered as a general securities representative and an investment company/variable contracts representative and began working for AEFA at an office in Hudson, Ohio. He advised primarily individuals, but also some small companies, on financial matters. 3/ Mizenko consistently received positive reviews from his clients and from AEFA on the quality of his financial planning services.

In the fall of 2000, Damon Tyson, a former professional athlete, located AEFA’s Hudson office in the telephone book and called to propose an idea for marketing AEFA’s services to college athletes who would soon be starting their professional careers. Tyson’s call was directed to Darrell DeMarco, a registered representative who had been a colleague of Mizenko’s for ten years. 4/ Both DeMarco and Mizenko met with Tyson. At the meeting, Tyson offered to use his contacts with professional athletes to “help [AEFA] enter into that market.” AEFA would serve as guarantor for would-be professional athletes’ car leases and loans to show AEFA’s support for the athletes and, hopefully, gain them as clients. Mizenko understood that AEFA would guarantee car loans for college athletes only until the athletes were drafted by a professional

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- 1/ During Mizenko’s early association with the company, AEFA was known as IDS Financial Services; we refer to both entities in this opinion as “AEFA.”
- 2/ Conduct Rule 2110 requires that members “observe high standards of commercial honor and just and equitable principles of trade.” NASD General Rule 115 provides that persons associated with a member have the same duties and obligations as a member.
- 3/ Mizenko was a salaried employee of AEFA for one year, after which time he was an independent contractor compensated solely through commissions. Mizenko grossed as much as \$155,000 in income in his last, most successful year with AEFA; he netted about \$80,000 of that amount after ordinary business expenses were subtracted.
- 4/ NASD brought disciplinary action against DeMarco for his role in these events. DeMarco settled with NASD, consented to a permanent bar, and did not testify during these proceedings. DeMarco was interviewed by AEFA investigators in August 2001 for about half an hour, during which DeMarco denied involvement in the forgery at issue.

team – normally within four or five months – at which time the athlete would refinance the loan in his own name. ^{5/}

According to Mizenko, DeMarco initially took the lead in developing the car loan guarantee program. Mizenko was aware that DeMarco, with Tyson’s help, met with a salesperson at a car dealership, Ryan Wolkov, to set up the program. Mizenko did not know what arrangements DeMarco was making to secure AEFA’s approval of the program. Ted Jenkin, who supervised Mizenko and DeMarco (as well as more than 300 other advisors), testified that he was never informed about the car loan guarantee program, but he did know about, and worked with Mizenko to market, another aspect of the athlete program in which AEFA backed small lines of credit for athletes through its Membership Banking division.

At the end of 2000, DeMarco showed Mizenko a blank corporate resolution form that the car dealership needed signed to demonstrate AEFA’s approval to guarantee car loans. Several days later, DeMarco told Mizenko that he had obtained a signature on the form; the document now bore the purported signature of a “Thomas Shick, Executive Vice-President.” ^{6/} At DeMarco’s request, Mizenko signed the form as a “local contact” and returned the form to DeMarco. Mizenko testified that, because he had a ten-year professional relationship with DeMarco, he had no reason to doubt that DeMarco had obtained an authentic signature.

In the first half of 2001, ^{7/} Mizenko assumed the lead in running the athlete car loan program because DeMarco moved to AEFA’s Tallmadge, Ohio office. Although he served as the primary contact for the athlete program, Mizenko testified that he did not himself refer any athletes to the dealership for car financing.

At about this time, Mizenko received a call from Wolkov informing Mizenko that he had begun working for a new dealership and would therefore need a new corporate resolution signed in order to continue the program. Mizenko testified that he immediately called DeMarco, who told Mizenko to keep the form while DeMarco “found out what we need[ed] to do.” Several days later, DeMarco told Mizenko that he had spoken to someone (Mizenko understood it to be

^{5/} Although it is unclear from the record whether Tyson discussed at this meeting how he expected to benefit by referring athletes to AEFA, Tyson was brought into AEFA’s pre-licensing program sometime in 2001 at the suggestion of Mizenko’s supervisor.

^{6/} Thomas Schick (spelled with two “c’s”) was an executive vice president for corporate affairs at AEFA.

^{7/} Although the Department of Enforcement made several attempts during the hearing to elicit specific dates from Mizenko regarding his role in leading the athlete car loan program, Mizenko could recall only that the events surrounding the forgery occurred in “late first quarterish,” 2001.

Thomas Schick) in AEFA's corporate office in New York and that DeMarco had been given "permission to transfer the signature from the existing form onto the new one." Mizenko testified that, for the sake of expediency, he did not fax the form to Schick for his signature: "I just had no idea how quickly he would get to them [sic]. With a fax machine, I know some companies – you know, although they're pretty prolific, not everyone has a fax machine by their office." Mizenko also testified that he did not consult with Ted Jenkin, his supervisor, concerning his authority to sign Schick's name even though Mizenko testified that he had "been working with Ted the entire time."

Mizenko printed some information on the corporate resolution, including the name of the corporate secretary who would execute the document ("Thomas Schick"), ^{8/} the name of the company ("American Express"), the place of incorporation ("Delawar" [sic]), and the date ("twenty-eighth day of December, 2000"). ^{9/} Mizenko then transferred Schick's signature onto the resolution by placing the new form on top of the old one, holding both up against a window, and tracing the signature onto the new form. Mizenko faxed a copy of the new resolution to the auto dealership on June 6, 2001 and placed the original in the mail.

A few days later, Wolkov called Mizenko and told him the document required a corporate seal and that Tyson would deliver the document back to Mizenko so that he could affix one. Mizenko testified that, although he did "not even know what a corporate seal [was]," the salesperson assured him that "any seal [would] do." Having previously served as a notary public, Mizenko used his old notary embosser to crimp the document a few times at different angles to blur the resulting seal. Mizenko then gave the document back to Tyson, who returned it to the dealership. Mizenko testified that, although he read the form before executing it, he never noticed that the form contained a blank line on which the maximum dollar amount of AEFA's obligation was to be filled in. The form he signed contained no limitation and exposed AEFA to potentially unlimited liability.

On August 21, 2001, an employee of Toyota Motor Credit Corporation faxed a note to Thomas Schick asking Schick to confirm that AEFA intended to guarantee car loans for the "high net worth individuals" with whom Tyson was working, before the employee wrote a loan that obligated AEFA. Schick had no knowledge of the document and made inquiries at AEFA about its origin.

^{8/} Mizenko has no explanation for how he correctly spelled Schick's name when he printed it despite the fact that the first resolution, which Mizenko used as a template, bore the misspelled "Shick." Mizenko testified that he "just wrote Schick" without looking at the misspelled name on the first form.

^{9/} Mizenko testified that he simply copied the date from the first resolution onto the second.

AEFA launched an investigation of the matter. On August 28, 2001, AEFA investigators interviewed Mizenko in AEFA's offices in Independence, Ohio. Mizenko cooperated with the AEFA investigation, "readily admitted" that he traced Schick's signature onto the corporate resolution, and informed the investigators of the existence of the original resolution from which Mizenko traced Schick's name. Mizenko testified that he did not realize that Schick had not signed the original form nor given DeMarco permission to reproduce Schick's signature on the second form until Mizenko met with AEFA investigators. ^{10/} Mizenko expressed contrition during the AEFA interview and drafted a written statement addressed to Jenkin in which he admitted his wrongdoing and apologized for his "lack of judgment and for all of the embarrassment." AEFA suspended Mizenko immediately after the interview concluded, and, one month later, filed with NASD a Form U5 termination notice alleging that Mizenko had forged a corporate resolution, prompting the proceedings culminating here. Mizenko is not currently working in the securities industry.

The corporate resolution filled out by Mizenko ultimately was used to guarantee two car loans and one lease for would-be professional athletes, and one car lease for Tyson himself. ^{11/} The total value of all four cars was \$243,560. Of these four transactions, one resulted in liability to AEFA in the amount of \$10,000, which AEFA paid without seeking indemnity from Mizenko. Mizenko testified that he received no financial benefit from his role in administering the loan program. However, he also testified that his compensation consisted exclusively of commissions and that he hoped the loan guarantee program would induce the athletes to become AEFA clients.

III.

^{10/} One of the two AEFA investigators testified that Mizenko admitted during the August 28, 2001 interview that Mizenko knew when he signed the form that he did not have Schick's permission to sign it. The second investigator could not recall whether Mizenko made this admission. The Hearing Panel concluded that the two guarantees at issue during the investigation likely created confusion, and credited Mizenko's testimony that he did not know that Schick had not signed the first guarantee. Credibility determinations by the fact-finder are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. Leslie A. Arouh, Exchange Act Rel. No. 50889 (Dec. 20, 2004), 84 SEC Docket 1880, 1893 n.40; see also Anthony Tricario, 51 S.E.C. 457, 460 (1993). We see no reason to disturb NASD's determination here that Mizenko believed Schick's signature on the first resolution was genuine until AEFA investigators met with him.

^{11/} According to an AEFA investigator's report, Tyson resigned from AEFA after his role in these events became known. He was not disciplined by NASD.

Mizenko has admitted throughout these proceedings that he signed another person's name on a document without permission or authority to do so. We have previously held that commission of forgery is inconsistent with just and equitable principles of trade, and we have sustained NASD findings of forgery where the forged documents defrauded another person or otherwise resulted in a benefit to the forger. ^{12/} The corporate resolution Mizenko forged exposed AEFA to liability for car loans and leases in a potentially unlimited amount. When the forgery was discovered, AEFA stood to lose a potential \$243,560, and actually lost at least \$10,000. Further, Mizenko hoped to eventually receive the benefit of athletes becoming his clients and therefore supported the lease guarantees through the forgeries. We therefore sustain NASD's finding that Mizenko violated NASD Rule 2110.

IV.

The only point of contention in this case is the bar imposed on Mizenko. Under Exchange Act Section 19(e)(2) and applicable precedent, the Commission may reduce or set aside sanctions imposed by NASD if we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary burden on competition. ^{13/}

For violations of NASD Conduct Rule 2110 involving forgery, NASD Sanction Guidelines suggest a fine of \$5,000 to \$100,000 and recommend a bar in "egregious cases"; where mitigating factors exist, the Guidelines recommend considering a suspension of up to two years. ^{14/} The Guidelines list as Principal Considerations in determining the appropriate sanction for forgery (1) the nature of the document forged, and (2) whether Respondent had a good-faith, but mistaken, belief of express or implied authority.

The Hearing Panel found that certain mitigating factors existed. It fined Mizenko \$5,000, suspended him in all capacities for eighteen months, ordered him to requalify in all capacities, and imposed hearing costs of \$1,004.50. The NASD National Adjudicatory Council ("NAC")

^{12/} See Eliezer Gurfel, 54 S.E.C. 56 (1999), pet. denied, 205 F.3d 400 (D.C. Cir. 2000) (applicant, who forged or caused forgery of commission checks and deposited them into his account for his own benefit despite agreement with firm to split commissions, violated Conduct Rule 2110); compare Rooney A. Sahai, Exchange Act Rel. No. 51549 (Apr. 15, 2005), ___ SEC Docket ___ (forgery that defrauds another or otherwise benefits the forger is inconsistent with just and equitable principles of trade).

^{13/} 15 U.S.C. § 78s(e)(2); see also Paul Joseph Benz, Exchange Act Rel. No. 51046 (Jan. 14, 2005), 84 SEC Docket 2631, 2636. Mizenko does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

^{14/} NASD Sanction Guidelines (2001 ed.) at 43.

called Mizenko's case for review to examine the level of the sanctions imposed by the Hearing Panel. Finding that there were "numerous, significant aggravating factors," the NAC concluded that Mizenko's misconduct was egregious. In so finding, the NAC carefully considered each of the factors identified by the Hearing Panel as mitigating, and explained why in its view these factors did not mitigate Mizenko's wrongful conduct. The NAC therefore determined that a bar in all capacities was the appropriate sanction. 15/

Upon review, we find that the bar that NASD imposed on Mizenko is neither excessive nor oppressive. We agree with the NASD that the significant aggravating factors detailed in the NAC opinion support the conclusion that Mizenko's conduct was egregious and the mitigating factors that Mizenko noted are insufficient to warrant a lesser sanction than a bar. In reaching this conclusion, we note that the document Mizenko forged purported to certify a corporate resolution that exposed AEFA to potentially unlimited liability under loan guarantees to young athletes who were not even AEFA's clients. Mizenko's forgery could have resulted in significant financial losses for the company if the athlete program had grown to greater proportions before Mizenko's wrongdoing was discovered.

Moreover, although Mizenko testified that he believed that he had the authority to trace Schick's name onto the resolution, we conclude that, under the circumstances, Mizenko could not have held that belief in good faith. We support the NASD's conclusion that Mizenko acted recklessly in accepting DeMarco's representations. Given Mizenko's prior responsibilities as a notary public, he should have been aware of the impropriety of copying another person's signature. Nevertheless, he accepted the representations of DeMarco, an employee at the same level within the company as himself, that he was authorized to copy a signature that bound the corporation. Mizenko testified that he kept his supervisor, Jenkin, apprised of developments with the athlete program yet, inexplicably, he did not consult with Jenkin to confirm his authority to copy Schick's signature.

Mizenko's effort to conceal his wrongdoing further belies his good faith claim. Mizenko testified that he held the resolution up to the light and traced it for the very purpose of avoiding detection. When asked why he traced Schick's signature instead of signing it, he answered, "because I was told it had to be his signature. I knew other people would be looking at it, and if it was in my handwriting, they're going to say 'well, this Thomas Schick signature doesn't look like this Thomas Schick signature.'" It should also have been obvious to Mizenko that he did not have permission to manufacture a false imprimatur of authenticity for the document by affixing a blurred "corporate seal" with his own notary embosser. As did NASD, we find these facts to be significantly aggravating, marking this case of forgery as egregious.

15/ In light of the bar imposed on Mizenko, the NAC vacated the suspension, fine, and order to requalify; it upheld the imposition of hearing costs.

Mizenko offers several factors in mitigation that he believes weigh against imposition of a bar. Mizenko contends that he should be credited with having accepted responsibility for and having acknowledged his misconduct. NASD's Sanction Guidelines recommend crediting an individual's acknowledgment of misconduct "prior to detection and intervention by the firm." Here, Mizenko's confession to having copied the signature carries little weight because it came only after he was confronted by his employer with his wrongdoing. Mizenko also argues that his conduct was aberrant and not part of a pattern of conduct intended to deceive his employer. Although we recognize that Mizenko has no prior disciplinary history, his unauthorized copying of Schick's signature was a wrongdoing that was compounded by the deliberate misuse of his notary seal. These were acts of deception, and we therefore reject this mitigation argument.

Mizenko argues that he received no personal benefit from his actions. As NASD correctly observed, its Sanction Guidelines look not to whether Mizenko actually reaped personal benefits from his misconduct but whether his misconduct resulted in the potential for monetary or other gain. The evidence in the record indicates that Mizenko was compensated solely through commissions. The purpose of the loan guarantee program was to induce young athletes to become clients of Mizenko, DeMarco, and AEFA. Therefore, Mizenko's forgery did result in the potential for monetary gain to him.

The record indicates that Mizenko cooperated with the AEFA investigation, expressed contrition, and harmed no customers. These factors, although relevant to the determination of what sanctions are appropriate, do not counterbalance the egregiousness of Mizenko's conduct.

Mizenko's conduct underscores the appropriateness of NASD's imposition of a bar to protect the investing public from the potential harm that may result from Mizenko's serious and troubling lack of judgment. In considering Mizenko's double wrongdoing – the forgery and the subsequent misuse of his notary seal on the forged document – NASD had ample justification to conclude that Mizenko presents an unacceptable risk to customers and to member firms where he might be employed in the future. Barring Mizenko also will serve to deter others in the industry who might otherwise engage in similar misconduct. ^{16/} It will encourage other associated persons in similar situations to seek confirmation or guidance from a member when faced with clearly suspicious circumstances surrounding member approval of business activities.

^{16/} In its General Principles Applicable to All Sanction Determinations, the NASD Sanction Guidelines state that, in seeking to "remediate misconduct and to protect the investing public," adjudicators should "design sanctions to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, and to improve overall business standards in the securities industry." NASD Sanction Guidelines (2001 ed.) at 3.

Under the circumstances of this case, we find that the sanctions imposed on Mizenko by NASD were neither excessive nor oppressive. 17/ We therefore sustain NASD's finding of violation and its order imposing on Mizenko a bar in all capacities and an assessment of hearing costs in the amount of \$1,004.50. 18/ An appropriate order will issue.

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

Jonathan G. Katz
Secretary

17/ Although Mizenko directs our attention to two NASD disciplinary actions involving forgeries of purportedly greater seriousness that resulted in lesser sanctions, we note that appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the actions taken in other proceedings. See Davrey Financial Services, Inc., Exchange Act Rel. No. 51780 (June 2, 2005), ___ SEC Docket ___, citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973).

18/ We have considered all of the arguments of the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

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Washington, D.C.

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Rel. No. 52600 / October 13, 2005

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In the Matter of the Application of

MARK F. MIZENKO

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 Mark F. Mizenko be, and
NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary