BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 7, Complainant, vs. Steven A. Kirschbaum Coral Strings, Florida and Coral Springs, Florida and c/o Preferred Securities Group, Inc. Boca Raton, Florida, Respondent.	DECISION Complaint No. C07960069 District No. 7 (ATL) Dated: August 25, 1998

Pursuant to Procedural Rule 9310, Steven A. Kirschbaum ("Kirschbaum") has appealed the November 25, 1997 decision of the District Business Conduct Committee for District No. 7 ("DBCC"). This matter also was called for review

pursuant to NASD Procedural Rule 9312.[1] After a review of the entire record in this matter, we affirm the findings of the DBCC that Kirschbaum forged the signatures of 10 customers in violation of Conduct Rule 2110. We increase the sanctions imposed on Kirschbaum by eliminating from his bar the provision that he have a right to reapply in three years. We affirm the DBCC's sanctions of a censure, a $50,000 fine, and the imposition of costs.

Background

Kirschbaum entered the securities industry in 1981 as a municipal securities representative and became qualified as a general securities representative in 1983. From July 1993 to August 1994, Kirschbaum was registered with Glenfed Brokerage Services ("Glenfed"), and from September 1994 to October 1995 he was registered with ProEquities, Inc. ("ProEquities"). In October 1995, Kirschbaum became registered with Preferred Securities Group, Inc., where he is still employed.

Facts

Kirschbaum transferred his registrations from Glenfed to ProEquities in September 1994. After he joined ProEquities, Kirschbaum submitted approximately 240 "change of dealer or representative" forms to various mutual fund companies to transfer customer accounts from Glenfed to ProEquities, and designated himself as the registered representative of record. The complaint alleged that Kirschbaum forged the signatures of 10 customers to transfer five accounts that had been his while he was associated with Glenfed. At the DBCC hearing, five customers testified about their accounts.

The first two customers, Mr. and Mrs. P, testified that the two signatures purporting to be theirs on a change of dealer form that transferred their joint account to Kirschbaum at ProEquities were not genuine. Mr. and Mrs. P also testified that they had not given permission to Kirschbaum to sign their names on this form.

The third and fourth customers, Mr. and Mrs. M, submitted affidavits that stated that the signatures purporting to be theirs on a change of dealer form and a new

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[1] The National Business Conduct Committee ("NBCC") of NASD Regulation, Inc. ("NASD Regulation") called this case for review to determine whether the sanctions imposed by the DBCC were appropriate in light of the findings of violation. This matter was decided by the National Adjudicatory Council ("NAC"), which, as approved by the Securities and Exchange Commission, became the successor to the NBCC on January 16, 1998.

account form that established Kirschbaum as their representative at ProEquities were not genuine. Mr. and Mrs. M testified that they had not given Kirschbaum permission to sign their names to these two documents.

The fifth customer, GM, signed an affidavit that stated that the signature purporting to be his on a change of dealer form transferring his joint account to Kirschbaum at ProEquities was not his signature. RM, his wife, signed a similar affidavit. GM testified that he had not given Kirschbaum permission to sign his name to this document. RM's affidavit made a similar statement. GM also testified that in October 1994, he had received a letter from Kirschbaum that asked him and his wife to sign and return a change of dealer form. GM explained that he had not signed this form.

Linda Blest ("Blest"), who was at the time a registered representative with Prudential Securities, testified that in the Summer of 1995, JL Sr. ("JL") complained to her that his account containing Franklin Fund investments incorrectly listed Kirschbaum as the representative. After Blest provided to JL a copy of a change of dealer form she received from Franklin, JL stated that his signature on this form was not genuine. He also stated that the signatures of his wife and son were not genuine.

NASD Regulation Field Supervisor Scott DeArmey ("DeArmey") testified that, during his investigation, he spoke with JL, who verified that he had not signed the change of dealer or the new account form that purported to have his signatures. JL also told DeArmey that he had not given Kirschbaum permission to sign his name, his wife's name, or his son's name to those forms. In addition, Kirschbaum's supervisor at ProEquities, Michael Corrigan, corroborated Blest's and DeArmey's testimony by testifying that JL had told him that he had not signed the change of dealer form.[2]

Customer GB submitted an affidavit regarding a change of dealer form that established Kirschbaum as the representative for his account. In that affidavit, GB

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[2] The complaint in this matter was prompted by NASD Regulation's participation in a joint regulatory program, in which registered representatives were selected for investigation based on their employment histories and record of arbitrations filed. Immediately after selecting Kirschbaum for investigation, DeArmey received an amended Uniform Termination Notice for Securities Industry Registration, a Form U-5, which disclosed that Kirschbaum had been terminated by ProEquities for forging change of dealer forms.

stated that the signature purporting to be his on the change of dealer form was not genuine. He also stated that he had not given Kirschbaum permission to sign his name.

Kirschbaum admitted during his testimony that by submitting the change of dealer forms he had qualified for the trail commissions on the five accounts identified in the complaint. He also testified that the trail commissions he earned from the five accounts amounted to only $80 or $90 dollars.

Discussion

At the DBCC hearing, Kirschbaum, who was represented by counsel, stipulated that he had signed all the customers' names to all the documents alleged in the complaint. Kirschbaum also stipulated that he had signed all the customers' names without their express permission.[3]

Kirschbaum's only defense against the forgery allegation was his assertion that at the time he signed the customers' names to the forms he had an "implied understanding" that his customers wanted him to do so. Initially, we hold that, even if Kirschbaum's assertion were true and unchallenged, which it is not, a respondent's testimony that he believes that a customer wanted him to act as the customer's registered representative does not prove any authorization from the customer for the registered representative to sign documents. Without any evidence that customers had authorized Kirschbaum to sign their names, Kirschbaum has no valid defense to the complaint's allegation of forgery. Specifically as to the new accounts forms that Kirschbaum signed, he offered no evidence that his customers consented to his binding them to the specific terms of these contracts. Accordingly, we find that Kirschbaum's proffered defense to the complaint's allegation of forgery is invalid.

In any event, we reject Kirschbaum's assertion that he had an implied understanding with his customers which allowed him to sign their names. After hearing Kirschbaum's and his customers' testimony on this point, the DBCC found Kirschbaum's assertion not credible. We uphold this credibility finding of the initial finder of fact. See In re Christopher J. Benz, Exchange Act Rel. No. 38440, at 6 (Mar. 26, 1997); In re Frank J. Custable, 51 S.E.C. 643, 648 (1993); In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992). Moreover, the DBCC's finding is well supported in the record. For example, GM testified that although Kirschbaum sent him a change of dealer form, he did not sign and return it. GM also testified that Kirschbaum telephoned him a couple of times about making a change of dealer, but GM did not

[3] Kirschbaum has waived no issues in this appeal.

agree. We find that these events demonstrate an affirmative refusal by GM to choose Kirschbaum as his representative and completely refute Kirschbaum's assertion of an implied understanding with GM.

We affirm the DBCC's finding that Mr. and Mrs. M's denial that they intended to make Kirschbaum their representative was credible and that Kirschbaum's claim to the contrary was not credible. We also affirm the DBCC's finding that Mr. and Mrs. P were more credible witnesses than Kirschbaum. We credit, as did the DBCC, Mrs. P's testimony that she had told Kirschbaum never to sign anything on her behalf. We also note that, as to JL, his wife, and son, Kirschbaum offered no evidence that he ever spoke to Mrs. JL or JL's son.

Considering all the evidence in the record, we uphold the DBCC's finding of a violation and conclude that Kirschbaum violated Conduct Rule 2110 by forging the names of 10 customers on change of dealer and new account forms.

Procedural and Misconduct Arguments

Kirschbaum objects that the DBCC panel who conducted the hearing for his case consisted of only two panelists. Contrary to Kirschbaum's objection, his hearing was conducted in accordance with the applicable rules. The DBCC issued the complaint in this matter on August 27, 1996. The applicable rule at the time, Procedural Rule 9223(a), provided that the DBCC could appoint a hearing panel of two or more persons to hear the case. Consequently, we find no error in the fact that two panelists held the DBCC hearing in this case. See Special NASD Notice to Members 97-55 (August 1997) (explaining that the provisions of the "old" Procedural Rule 9200 series applied to disciplinary proceedings for which the complaint was authorized and the first attempted service occurred prior to August 7, 1997).

Kirschbaum next argues that DeArmey "scared" three of the customers he spoke with during the investigation of this matter and that these customers testified against Kirschbaum because they wanted to preserve their investments. Kirschbaum, however, offers no evidence to support the very serious accusation of witness intimidation. Despite the fact that Kirschbaum's attorney had the opportunity to cross-examine all the witnesses at the hearing, there is absolutely no evidence to support the accusation that any witnesses testified because they were scared by DeArmey or any other NASD Regulation employee. Furthermore, none of the witnesses that testified against Kirschbaum offered testimony that pertained to preserving their investments; rather, their testimony addressed whether their signatures were forged on the documents in question. We find no merit in Kirschbaum's accusation.

Kirschbaum also argues that his selection for investigation based on a profile was tantamount to a defamation of character and factually incorrect. We fail to see

any impropriety in the method by which Kirschbaum was investigated in this case. See In re George H. Rather, Jr., Exchange Act Rel. No. 36688, at 4 & n.5 (Jan. 5, 1996). We find that initiating investigations of registered representatives based on their employment histories showing frequent job changes and large numbers of arbitrations filed against them is a proper method for the NASD to fulfill its statutory duty to protect the public by "prevent[ing] fraudulent and manipulative acts and practices," and "promot[ing] just and equitable principles of trade." Securities Exchange Act of 1934 § 15A(b)(6), 15 U.S.C. § 78o-3(b)(6); see In re Frederick C. Heller, 51 S.E.C. 275, 280 (1993).

Sanctions

Forgery of a customer's signature on a change of dealer form or a new account form is an extremely serious offense. Kirschbaum disregarded his customers' rights by forging their names on important documents. Kirschbaum also jeopardized his firm by creating false records regarding his customers. Absent truly exceptional circumstances, Kirschbaum's actions require us to bar him.

Kirschbaum argues that the implied understanding between himself and his customers is a mitigating circumstance. Because we have found Kirschbaum's assertion of an implied understanding to lack credibility, we do not find any mitigation based on this assertion.

Kirschbaum also argues that his 17-year employment history in the securities industry demonstrates that this episode was an aberration from his normally honest and ethical conduct. To substantiate this point, Kirschbaum introduced the testimony of several witnesses: one of his former supervisors, Julie Buffalino; his supervisor and the Chief Executive Officer of his current employer, Theodore Malacasian; one of his former sales assistants, Patrice Bell; two of his customers, LG and PT; and Linda Kirschbaum, his wife, who is also a registered representative. Although we note Kirschbaum's lack of previous disciplinary history, the testimony of his witnesses that he has been a very responsive registered representative for his customers, and the favorable character testimony from his witnesses, we do not find these facts important

enough to reduce his sanctions in this matter.[4] Given that Kirschbaum forged 10 customers' signatures, we find that Kirschbaum systematically failed to uphold high standards of commercial honor.

Kirschbaum also argues that his conduct did not result in any injury to customers and was not part of a scheme to take money from customers. We find that Kirschbaum's misconduct was not nearly so benign. Part of Kirschbaum's misconduct was forging his customers' names to new account forms, which contained important provisions regarding customers' rights. For example, the new account form for Mr. and Mrs. P established that execution reports "shall be conclusive if not objected to in writing within five days," and acknowledged receipt of a pre-dispute arbitration agreement. In addition, Kirschbaum's forgeries did entitle him to collect trail commissions on these accounts, which would not have been paid to him if he had not committed the forgeries. In sum, we find that Kirschbaum's misconduct did encroach on his customers' rights and we also find that Kirschbaum derived a pecuniary benefit as a result of his forgeries.

We also note that during his DBCC testimony, Kirschbaum voluntarily explained that, separate and apart from the customers identified in the complaint, he had signed the names of 10 additional customers to change of dealer forms. We agree with the DBCC that the complaint did not allege these particular acts of forgery against Kirschbaum and, therefore, we cannot base any finding of a violation on this admission. Based on the narrow circumstances of this case, we have not considered Kirschbaum's admission as an aggravating circumstance for assessing sanctions.

In discussing the sanctions it would impose, the DBCC noted that Kirschbaum had "significant" informal disciplinary history in that he had been named in five arbitrations that appeared on his Central Registration Depository ("CRD") record. We disagree with the DBCC's statement that these arbitrations demonstrate that Kirschbaum misrepresented his disciplinary record when he described it as "clean." The parties settled all five of these arbitrations, and there were no findings made against Kirschbaum. Consequently, we do not consider the arbitrations as an aggravating circumstance for purposes of our sanctions analysis. Rather, our

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[4] On appeal, Kirschbaum argues that the DBCC decision ignored the testimony of his witnesses. This argument is incorrect. The DBCC's decision indicates that the DBCC considered Kirschbaum's testimony about his implied understanding with his customers in evaluating liability and sanctions and that the DBCC also considered the testimony of all of Kirschbaum's other witnesses in evaluating sanctions. We too have considered the testimony of all of Kirschbaum's witnesses and, as discussed above, we have found much of Kirschbaum's testimony not credible, and we have given the appropriate weight to the remaining testimony.

sanctions are based on the fact that Kirschbaum repeatedly forged his customers' signatures.

We affirm the $50,000 fine imposed by the DBCC. Although the DBCC imposed a bar with a right to reapply in three years, we have decided to eliminate the right to reapply provision because we find that Kirschbaum would pose a threat to the investing public if he were again allowed to serve as a registered representative in this industry.[5]

Accordingly, we order that Kirschbaum be censured, barred from associating with any member firm in any capacity, fined $50,000, and ordered to pay $1,563.60 in DBCC costs. The bar is effective immediately upon the service of this decision. [6]

On Behalf of the National Adjudicatory Council,

Alden S. Adkins, Senior Vice President and General Counsel

[5] These sanctions are consistent with the applicable guideline. See NASD Sanction Guidelines ("Guidelines") (1996 ed.) at 26 (Forgery).

[6] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

Alden S. Adkins
Senior Vice President and General Counsel

August 25, 1998

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Steven A. Kirschbaum
CoralSprings,Florida

and
c/o Preferred Securities Group, Inc.
Boca Raton, Florida

and

Coral Springs, Florida

Re: Complaint No. C07960069: Steven A. Kirschbaum

Dear Mr. Kirschbaum:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:

Office of the Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW, Stop 6-9
Washington, DC 20549

The address of NASD Regulation is:

Office of General Counsel
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Alden S. Adkins

Enclosure

cc: Alan M. Wolper, Esq.