

**Disciplinary Panel  
American Stock Exchange LLC**

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IN THE MATTER  
OF  
JOHN E. WHEELER

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Case No. 03-05  
Hearing Officer – RSH  
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Default Decision  
August 30, 2005  
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**Digest**

**A former registered representative violated Exchange Rule 345(a)(4) by personally reimbursing a customer for losses in his options account; Exchange Rule 341.08 by leading the customer to believe he would not suffer losses in his account; and Exchange Rule 924(a) by exercising discretion in a customer’s options account without prior written discretionary authority. Respondent is fined \$15,000 and suspended in all capacities for 15 business days.**

**Appearances**

Jeffrey L. Brandt, Staff Attorney, NASD Amex Regulation Department, New York, NY and David Rosenstein, Chief Counsel, NASD Amex Regulation Department, New York, NY for the Enforcement Department.

No appearance by or for John E. Wheeler.

**DECISION**

**I. Procedural Background**

On December 20, 2004, the American Stock Exchange (“Exchange”) issued a Statement of Charges alleging that John E. Wheeler, a former registered representative of A.G. Edwards & Sons, Inc. (“A.G. Edwards”), violated Exchange Rule 341.08(5)(3) by leading a customer to believe he would not suffer any loss in his account and Exchange Rule 924(a) by exercising discretion in several customers’ options accounts without prior written discretionary authority. The Exchange alleged that Wheeler’s conduct also violated Exchange Rule 345(a)(4), which

prohibits Exchange employees from engaging in conduct inconsistent with just and equitable principles of trade. Wheeler did not file an answer to the Statement of Charges.

On February 14, 2005, the Exchange's Department of Enforcement filed a motion for a default hearing and decision. Respondent did not file a response to the motion. The Panel Chair, presiding without convening a full Disciplinary Panel, pursuant to Article V, Section 1(b)(1) of the Exchange Constitution, held a hearing on July 22, 2005. Wheeler did not appear at the hearing and was not represented. To establish an evidentiary basis for the charges,<sup>1</sup> and to demonstrate its efforts to serve Wheeler, the Exchange submitted a Statement of Affirmation from Jeffrey L. Brandt, Staff Attorney for the Exchange ("Aff."), a Pre-Hearing Submission ("Sub."), and fourteen supporting documents. For the reasons set forth below, the Exchange's motion is granted.

## **II. Jurisdiction**

Under Exchange Rule 345(c), the Exchange may retain jurisdiction over a formerly registered employee if, within one year of receipt of a notice of termination, it gives written notice to the person that the Exchange is investigating any specified matter that occurred prior to termination.

Respondent was employed as a registered representative of A.G. Edwards between April 1995 and March 1998.<sup>2</sup> He was terminated from A.G. Edwards on or about March 5, 1998 and has not worked in the securities industry since.<sup>3</sup> On or about November 17, 1998, the Exchange's Sales Practice Regulation Department ("SPR") opened an investigation of

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<sup>1</sup> See *James R. Russen, Jr.*, 1993 LEXIS 2339, 51 S.E.C. 675, n. 12 (Sept. 14, 1993), where the SEC noted that because the NASD's disciplinary decision was based on record evidence rather than simply the complaint's allegations, the Commission had a basis for discharging its review function under Section 19 of the Securities Exchange Act.

<sup>2</sup> Aff. ¶ 1.

<sup>3</sup> Aff. ¶ 2.

Respondent's conduct at A.G. Edwards after it received a Uniform Termination Notice for Securities Industry Registration ("Form U-5") filed by the firm. The Form U-5 stated that Respondent had guaranteed a customer against loss and had effected unauthorized and unsuitable options transactions in other customers' accounts.<sup>4</sup> On December 7, 1998, the Exchange sent Respondent a letter by certified mail to his Central Registration Depository ("CRD") home address notifying him that it was retaining jurisdiction over him in connection with its investigation of the allegations made against him in the Form U-5.<sup>5</sup> The certified letter was signed for on December 14, 1998.<sup>6</sup> The Exchange sent additional jurisdictional letters to Respondent on October 12, 2000 and January 29, 2001, both of which were acknowledged.<sup>7</sup> The Exchange thus has jurisdiction over Respondent.

### **III. Respondent's Default**

The Exchange sent the Statement of Charges to Respondent on December 20, 2004, by both certified and first class mail to his CRD residential address. The certified letter was returned and marked, "Unclaimed, return to sender"; however, the first class mailing was not returned.<sup>8</sup> Respondent did not file an answer to the Statement of Charges and on February 14, 2005, the Exchange filed a Request for Default Hearing. On the same date, a copy was sent to Respondent at his CRD address by certified and first class mail.<sup>9</sup> On February 23, 2005, Respondent sent an email to Exchange Enforcement attorney Jeffrey L. Brandt ("Brandt") confirming that he had received and signed for the Request for Default Hearing.<sup>10</sup> On February 25, 2005, Respondent called Brandt and confirmed that he had received the Statement of

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<sup>4</sup> Aff. ¶ 3.

<sup>5</sup> Aff. ¶ 4, Exh. 1.

<sup>6</sup> Aff. ¶ 5; Exh. 2.

<sup>7</sup> Aff. ¶ 6; Exhs. 4, 5, 6, 7.

<sup>8</sup> Aff. ¶ 8, 9; Exh. 8.

<sup>9</sup> Aff. ¶ 11.

<sup>10</sup> Aff. ¶ 12, Exhibit 9.

Charges.<sup>11</sup> During this February 25<sup>th</sup> telephone call, Respondent told Brandt that he did not intend to return to the securities industry or to contest the charges against him.<sup>12</sup> Respondent did not respond to the Request for Default and did not participate in the default hearing that was held on July 22, 2005.

The Exchange's mailing of the Statement of Charges to Respondent's CRD address constitutes proper service under Article V, Section 1(b)(6) of the Exchange Constitution.<sup>13</sup> By failing to answer or otherwise respond to the Statement of Charges, Respondent defaulted.

#### **IV. Findings of Fact and Conclusions of Law**

##### **A. Reimbursing Losses in a Customer's Account**

In or around July 1996, Respondent opened an options account at A.G. Edwards for MSP.<sup>14</sup> In August 1996, Respondent forgot to close an option position in MSP's account, resulting in a realized loss of \$3,900 to MSP.<sup>15</sup> To make MSP whole, Respondent wrote him a check in the amount of \$3,900.<sup>16</sup> In October 1996, MSP incurred additional losses of approximately \$1,876 in his options account, presumably caused by Respondent. Respondent again wrote MSP a personal check to reimburse him for his trading losses.<sup>17</sup>

The Panel Chair finds that Enforcement has shown that Respondent violated the provisions of Exchange Rule 341.08, which prohibit an employee from leading any customer to believe that he would not "suffer any losses in connection with opening an account or with any dealings therewith." The Panel Chair further finds that Respondent's conduct violated Exchange

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<sup>11</sup> Aff. ¶ 13.

<sup>12</sup> Aff. ¶ 14.

<sup>13</sup> Under Article V, Section 1(b)(6), the Exchange may properly serve a Statement of Charges on a member "by mailing it to such member...at his...office address or place of residence."

<sup>14</sup> Statement of Charges ¶ 2.0.

<sup>15</sup> Sub. Exh. 1, letter from Respondent to his A.G. Edwards' Branch Manager concerning the MSP account; Statement of Charges ¶ 2.1.

<sup>16</sup> Id.; Sub. Exh. 2, copy of check.

<sup>17</sup> Sub. Exhs. 3, 4; Statement of Charges ¶ 2.2.

Rule 345(a)(4), which prohibits conduct that is “inconsistent with just and equitable principles of trade.”

**B. Exercise of Discretion Without Prior Written Authority**

During testimony to Enforcement investigators on April 6, 2001, Respondent admitted that he had traded options in customer AA’s account without obtaining prior written discretionary authority to do so.<sup>18</sup> The Exchange alleged that Respondent also exercised discretion in the options accounts of four other customers; however, it did not present any evidentiary support for those allegations. Consequently, the Panel Chair makes no findings as to those allegations.

The Panel Chair finds that Enforcement has shown that Respondent’s use of discretion in AA’s options account violated Exchange Rule 924(a), which prohibits an employee from exercising discretion in a customer’s options account without obtaining prior written discretionary authority from the customer.

**V. Sanctions and Publicity**

While the Exchange has no sanction guidelines applicable to the violations in this case, the Panel Chair may appropriately consider the NASD Sanction Guidelines (“Guidelines”).<sup>19</sup> For guaranteeing a customer against loss, the Guidelines recommend a fine of \$2,500 to \$25,000 and a possible suspension for 30 days. For egregious cases, the recommendation is a suspension of up to two years or a bar.<sup>20</sup> According to the Guidelines, the principal considerations in determining the appropriate sanction are (1) the purpose and timing of the guarantee and (2)

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<sup>18</sup> Sub. ¶ 7, excerpt from transcript of testimony tape; Statement of Charges ¶¶ 4.0, 4.1; Wheeler Disciplinary Hearing Transcript, pgs. 11, 12.

<sup>19</sup> *David Wong*, Exchange Act Release No. 45,426, 2002 SEC LEXIS 339, at \*22 (Feb. 8, 2002).

<sup>20</sup> NASD Sanction Guidelines, p. 91 (2005).

whether the respondent received a financial benefit from the guaranteed transactions.<sup>21</sup> It appears that Respondent's purpose in guaranteeing the customer's account was to reimburse him for losses incurred because of Respondent's error, and for trading losses for which Respondent felt responsible.<sup>22</sup> In both instances, Respondent reimbursed the customer immediately after the losses. Furthermore, the record does not indicate that Respondent received any direct financial benefit from the guarantee. The Panel Chair thus concludes that Respondent's conduct in guaranteeing a customer against loss was not egregious. Nevertheless, it does display a disregard for industry rules and practice. Although Respondent held a Series 7 license and should have known better, he claimed not to have been aware of the rule against guaranteeing a customer against loss. For this misconduct, the Panel Chair finds that a fine of \$10,000 and a suspension of 15 business days are the appropriate sanctions.

For use of discretion without a customer's written authority, the Guidelines recommend a fine of \$2,500 to \$10,000 and for egregious cases, a suspension for 10 to 30 business days.<sup>23</sup> The principal considerations in determining the appropriate sanction are (1) whether the customer's grant of discretion was express or implied and (2) whether the firm's policies and/or procedures prohibited discretionary trading.<sup>24</sup> It appears from the record that Respondent had verbal discretionary authority from his client.<sup>25</sup> It also appears that A.G. Edwards had policies and procedures prohibiting Respondent's conduct; however, he either was unaware of or disregarded those policies. For this misconduct, the Panel Chair finds that a fine of \$5,000 is appropriate.

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<sup>21</sup> Id.

<sup>22</sup> Sub. Exh. 1

<sup>23</sup> NASD Sanction Guidelines, pg. 90 (2005).

<sup>24</sup> Id.

<sup>25</sup> Sub. ¶ 7, Exhs. 1, 5.

The Chair further finds that the results of this disciplinary proceeding should be publicly disclosed, as provided in Rule 12 of the Exchange Rules on Disciplinary Proceedings.<sup>26</sup>

**VI. Conclusion**

Wheeler violated Exchange Rule 345(a)(4) by personally reimbursing a customer for losses in his options account; Exchange Rule 341.08 by leading the customer to believe he would not suffer losses in his account; and Exchange Rule 924(a) by exercising discretion in a customer's options account without prior written discretionary authority. For this misconduct, Respondent is fined \$15,000 and suspended in all capacities for 15 business days.

**FOR THE DISCIPLINARY PANEL**

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Rochelle S. Hall, Chair

Copies to: John E. Wheeler (*via overnight and first class mail*)  
Jeffrey L. Brandt, Esq. (*via facsimile and first class mail*)  
Arlene Collins-Day (*via first class mail*)

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<sup>26</sup> Rule 12 exempts from publicity those cases in which the Panel finds that the offense “related solely to minor administrative requirements of the Exchange and does not materially affect the public interest or the interest of investors.” That exemption does not apply to the facts of this case.