

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DAVID NATHANIEL GARCIA
(CRD No. 1335400),

Respondent.

Disciplinary Proceeding
No. 2005000551401

Hearing Officer – DRP

DEFAULT DECISION

June 12, 2006

Respondent is barred from associating with any NASD member firm in any capacity for improper use of customer funds, in violation of NASD Conduct Rule 2110, and for failing to respond to NASD staff requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Appearances

Jacqueline D. Whelan, Regional Counsel, San Francisco, CA (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

No appearance by or for David Nathaniel Garcia.

DECISION

I. Procedural History

On October 28, 2005, the Department of Enforcement filed a two-count Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent David Nathaniel Garcia (Respondent or Garcia) misused and mishandled insurance customer funds, in violation of NASD Conduct Rule 2110, and failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Respondent did not file an Answer to the Complaint.

Accordingly, on January 20, 2006, Enforcement filed a motion for entry of default decision, supported by the declaration of Jacqueline D. Whelan and four exhibits. Garcia did not file a response to the motion. For the reasons set forth below, Enforcement's motion is granted.¹

II. Respondent's Default

On or about October 27, 2005, Enforcement served the Complaint and Notice of Complaint on Respondent by first class and certified mail sent to Respondent's last known residential address, as reflected in the Central Registration Depository (CRD address),² and to a variation on the CRD address, which Garcia had provided to his employer (alternate address).³ Respondent did not file an Answer.⁴

On or about November 29, 2005, Enforcement served the Complaint and Second Notice of Complaint on Respondent by first class and certified mail at both addresses. Respondent failed to file an Answer or otherwise respond to the Complaint.⁵

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby providing constructive notice of

¹ The factual determinations in this Decision are based on the allegations of the attached Complaint, which are deemed admitted, and the declaration and exhibits filed by Enforcement.

² Respondent's [REDACTED]

³ The alternate address is [REDACTED] Garcia gave this address to Allstate Financial Services, LLC (AFS), when interviewed about the circumstances that gave rise to this disciplinary proceeding.

⁴ The first-class mailings were not returned to the staff. Enforcement tracked the delivery of the certified mailings using the U.S. Postal Service website, which indicated that the USPS attempted delivery and left notices of attempted delivery. On December 15, 2005, USPS classified the certified mailings as "unclaimed."

⁵ Neither first-class mailing was returned to the staff. Enforcement once again tracked the attempted delivery of the certified mailings using the USPS website, which indicated that the USPS attempted delivery and left notices of attempted delivery.

this proceeding.⁶ By failing to file an Answer or otherwise respond to the Complaint, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

III. Jurisdiction

Respondent was associated with NASD member Allstate Financial Services, LLC (AFS) from January 2001 until February 2005. In January 2001, AFS submitted a Uniform Application for Securities Industry Registration (Form U-4) to register Respondent as an investment company/variable contracts products representative. Respondent applied to sit for the examination to obtain a Series 6 license several times, but either failed the exam or failed to sit for the exam. His employment with AFS was terminated in February 2005. Since then, he has not been associated or registered with any NASD member.

Although he was never registered, Respondent was associated with AFS, because a “person associated with a member” includes “a natural person who . . . has applied for registration”⁷ Respondent is thus subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD’s By-Laws, because the Complaint, which was filed within two years of the termination of Respondent’s association with AFS, alleges misconduct that occurred while he was an associated person, and a failure to comply with requests for information made during the two-year period following the termination.

⁶ It is well settled that NASD Procedural Rule 9134(b)(1) provides for constructive notice by mailing a complaint to the respondent’s most recent address. *See, e.g., Lubeck v. SEC*, 156 F.3d 1237 (9th Cir. 1998) (NASD complied with notice requirements by mailing complaint to respondent’s last known address); *Eric M. Diehm*, 51 S.E.C. 938, 941 n.14 (1994). Furthermore, it was Respondent’s responsibility to provide CRD with any new address, even after he left the industry. *Dep’t of Enforcement v Hodde*, No. C10010005, 2002 NASD Discip LEXIS 4, at *12 (NAC Mar. 27, 2002). In any event, Enforcement also served Respondent at the address he gave AFS.

⁷ NASD By-Laws, Art. I (dd).

IV. Findings of Fact and Conclusions of Law

A. Improper Use of Insurance Customers' Premium Payments

The first cause of the Complaint charges that Respondent violated NASD Conduct Rule 2110 by improperly using \$14,729.61 in insurance premium payments. More specifically, the Complaint alleges that Respondent retained checks and cash payments of insurance premiums from customers of an insurance affiliate of his employer. Rather than depositing the funds into an account established by the insurance affiliate, as required, Respondent retained the checks in a desk drawer and utilized \$4,624.09 in cash for office expenses.

NASD Conduct Rule 2110 states a broad ethical principle that members "shall observe high standards of commercial honor and just and equitable principles of trade." Rule 115 extends this requirement to persons associated and registered with members. The ethical and legal obligations set forth in Rule 2110 are not limited to the sale of securities but encompass a wide variety of unethical business-related conduct.⁸ Failing to use funds as intended by a customer constitutes "improper use" and is a violation of Rule 2110.⁹

Accordingly, the allegations in the first cause of Complaint, which are deemed admitted, are sufficient to establish for the purposes of this default decision that Respondent violated NASD Conduct Rule 2110.

⁸ See *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (citations omitted); *Daniel J. Alderman*, Exchange Act Release No. 35,997, 1995 SEC LEXIS 1823, at *7 (July 20, 1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997); *Dep't of Enforcement v. Bendtsen*, No. C01020025, 2004 NASD Discip. LEXIS 13, at *16 (NAC Aug. 9, 2004) ("[W]e have determined that disciplinary hearings under Rule 2110 are 'ethical proceedings, and one may find a violation of the ethical requirements where no legally cognizable wrong occurred [and that] NASD has authority to impose sanctions for violations of 'moral standards' even if there was no 'unlawful' conduct,'" quoting *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000)).

⁹ *Dep't of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49 at *6 (OHO June 30, 2004) (citations omitted).

B. Failure to Respond to Requests for Information

The second cause of the Complaint alleges that Respondent violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to the staff's requests for information. The Complaint alleges that on or about March 9, 2005, the staff sent Respondent a request for information pursuant to Rule 8210, related to its investigation of Respondent's misuse and mishandling of insurance customer funds. The request was sent by first class and certified mail to Respondent's CRD address. He did not respond in any manner to the request.¹⁰

The Complaint further alleges that on or about March 29, 2005, the staff sent a request for information to Respondent at his alternate address. The request was sent by first class and certified mail. He did not respond to the request.¹¹

Finally, the Complaint alleges that on or about May 13, 2005, the staff sent another Rule 8210 request for information by first class and certified mail to Respondent's CRD and alternate addresses. The staff received signed certified mail delivery receipts for the two certified mailings, each bearing the name "Corrine Garcia." Neither first-class mailing was returned. To date, Garcia has not responded in any manner to any of the staff's requests.¹²

Procedural Rule 8210 provides that NASD "staff shall have the right to require a member . . . to provide information . . . with respect to any matter involved in [an] investigation" Rule 8210 further states that "no . . . person shall fail to provide information . . . pursuant to this Rule." Rule 8210 imposes an absolute obligation on members and associated persons to

¹⁰ The first-class mailing was not returned. The certified mailing was returned marked "unclaimed."

¹¹ Once again, the first-class mailing was not returned. The certified mailing was not returned, nor did the staff receive a signed delivery receipt.

¹² There is a discrepancy between the Complaint and the declaration, which states that the original request for information was sent to both the CRD and the alternate address on March 9, 2005. In either case, Enforcement twice sent the request for information to Respondent's CRD and alternate addresses, and Respondent failed to respond to any of the requests.

cooperate in NASD investigations. When an associated person fails to cooperate fully and promptly with NASD staff requests for documents and information, he undermines NASD's ability to carry out its regulatory responsibilities.¹³

By mailing the requests to Respondent at his last known residential address as reflected in CRD, the staff complied with Rule 8210(d), and pursuant to that rule, Respondent is deemed to have received them.¹⁴ Thus, the allegations in the second cause of the Complaint, which are deemed admitted, are sufficient to establish for purposes of this default decision that Respondent failed to respond to the staff's requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

V. Sanctions

For improper use of funds, NASD Sanction Guidelines recommend a fine of \$2,500 to \$50,000 and a bar, absent mitigating factors such as evidence of a misunderstanding regarding the customer's intentions.¹⁵ Here, there is no evidence of a misunderstanding or other mitigating factors that would warrant a lesser sanction. Indeed, the circumstances support the conclusion that Respondent knowingly acted contrary to the customers' wishes, and having spent cash payments on office supplies, converted a portion of the funds to his own use. Accordingly, a bar is warranted and imposed for this violation.

A bar is also standard for failure to respond to requests for information.¹⁶ There is no evidence of any mitigating circumstances that would warrant any sanction less than a bar. Accordingly, Respondent will also be barred in all capacities for this violation.

¹³ *Toni Valentino*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330, at *14 (Feb. 13, 2004).

¹⁴ Though not required to do so, the staff also mailed both the first and second requests to the alternate address obtained from AFS.

¹⁵ *Guidelines* at 38 (2006 ed.).

¹⁶ *Id.* at 35.

VI. Conclusion

Respondent David Nathaniel Garcia is barred from association with any member firm in any capacity for improper use of funds, in violation of NASD Conduct Rule 2110, and for failure to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.



Dana R. Pisarelli
Hearing Officer

Dated: June 12, 2006
Washington, DC

Copies to: David Nathaniel Garcia (*via overnight and first class mail*)
Jacqueline D. Whelan, Esq. (*via electronic and first class mail*)
Mark P. Dauer, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

EXHIBIT A

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

David N. Garcia,
CRD No. 1335400,

Respondent.

Disciplinary Proceeding
No. 2005000551401

Hearing Officer:

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent David N. Garcia ("Garcia" or "Respondent") was associated with a member of NASD from January 2001 until at least December 19, 2004. Respondent became associated as a result of the submission of a Uniform Application for Securities Industry Registration or Transfer ("Form U-4") and remained associated as a result of subsequent amendments to his Form U-4 to establish qualifications examination "windows." The last such window ended on December 19, 2004. Respondent's employer-member submitted a Uniform Termination Notice for Securities Industry Registration ("Form U-5") on or about February 8, 2005. Respondent is not currently associated with an NASD member; however, NASD has jurisdiction to issue this Complaint pursuant to Article V, Section 4 of its By-laws.

CAUSE ONE OF COMPLAINT

NASD Conduct Rule 2110, Misuse and Mishandling of Insurance Customer Funds, by Respondent Garcia

2. Paragraph number 1, above, is realleged and incorporated herein by reference.
3. Between November 16, 2004 and December 4, 2004, Respondent received cash and checks from customers of an insurance affiliate of his employer-member that were intended to be applied to the payment of insurance premiums. Schedule A hereto, incorporated herein by this reference, sets forth by date the amounts received by Respondent. Respondent was required to deposit the funds into an account established by the insurance affiliate for the receipt of premium payments; however, he instead used the cash payments, which amounted to \$4,624.09, for personal expenses and retained the checks in his desk drawer. On or about December 9, 2004, Respondent was directed by the insurance affiliate to deposit the funds into the premium account. On or about December 10, 2004, Respondent deposited the checks and, on or about December 15, 2004, he deposited \$4,624.09 into the premium account.
4. Applying cash received in payment of insurance premiums to personal expenses, as described in paragraph 3 above, constituted the improper use of those funds, in that they were intended for the payment of insurance premiums, not for Respondent's personal use. Retaining possession of checks received for the purpose of paying insurance premiums, as described in paragraph 3 above, was contrary to the intent and expectations of his insurance customers that the checks be timely submitted for payment of insurance premiums. Together, these acts constituted conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and separate and distinct violations of NASD Conduct Rule 2110.

CAUSE TWO OF COMPLAINT

NASD Procedural Rule 8210 and NASD Conduct Rule 2110, Failure to Provide Information, by Respondent Garcia

5. The allegations of paragraphs 1,3 and 4, above, are realleged and incorporated herein by this reference.
6. On or about March 9, 2005, NASD staff sent to Respondent, by first class and certified mail, a written request for information pursuant to NASD Procedural Rule 8210. The request was sent to Respondent's most current residential address according to Central Registration Depository ("CRD") records, which was [REDACTED] (the "CRD address"). The requested information was to be provided on or before March 23, 2005. The certified mailing was returned to the staff marked "unclaimed" and the first-class mailing was not returned. No information was received in response to the request.
7. On or about March 29, 2005, the request for information sent to the CRD address on March 9, 2005, was sent by first-class and certified mail to a variant of the CRD address that Respondent provided to his employer-member at the time of his termination. That address is [REDACTED] (the "variant address"). The requested information was to be provided on or before April 12, 2005. Neither the first-class nor the certified mailing was returned to the staff and the staff did not receive a signed certified mail delivery receipt. No information was received in response to that request.
8. On or about May 13, 2005, the staff sent a second written request for information to Respondent at the CRD address and the variant address. Each request was sent by first-class and certified mail. The requested information was to be provided on or before May 27, 2005.

The staff received signed certified mail delivery receipts for the two certified mailings, each bearing the name "Corrine Garcia." Neither first-class mailing was returned. No information was provided in response to the May 13, 2005, requests.

9. Each failure to provide information in response to a request made pursuant to Procedural Rule 8210, as described in paragraphs 6-8 above, constituted a separate and distinct violation of NASD Procedural Rule 8210 by Respondent Garcia. Further, such conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110 by Respondent Garcia.

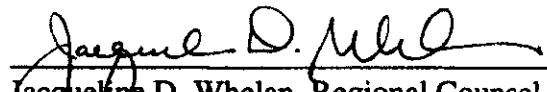
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310.
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- D. An order imposing any other fitting sanction.

NASD DEPARTMENT OF ENFORCEMENT

Date: October 27, 2005


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Department of Enforcement v. David Garcia

Disciplinary Proceeding No. 2005000551401

Schedule A – Summary of Funds Misused

DATE	CHECKS RECEIVED	CASH RECEIVED	TOTAL FUNDS RECEIVED
11/16/04	-0-	\$681.93	\$681.93
11/18/04	\$2,234.81	\$450.00	\$2,684.81
11/19/04	\$368.60	\$617.00	\$985.60
11/23/04	\$46.00	\$295.00	\$341.00
11/24/04	\$1,166.45	\$735.00	\$1,901.45
12/01/04	\$2,319.66	\$502.61	\$2,822.27
12/02/04	\$863.87	\$120.00	\$983.87
12/03/04	\$1,937.72	\$720.60	\$2,658.32
12/06/04	\$1,119.25	\$501.95	\$1,621.20
TOTALS	\$10,056.36	\$4,624.09	\$14,680.45