

FINANCIAL INDUSTRY REGULATORY AUTHORITY¹
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

JOSE R. MIRABAL
(CRD No. 4042589)

Respondent.

Disciplinary Proceeding
No.2005002701701

Hearing Officer – AWH

DEFAULT DECISION

August 24, 2007

Formerly registered representative barred from association with any member firm in any capacity for failing to respond to Staff requests for information and testimony, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

Appearances:

William Brice La Hue, Esq., for the Department of Enforcement.

No appearance by or for Jose R. Mirabal.

DECISION

Background

On March 27, 2007, the Department of Enforcement ("Enforcement") filed the Complaint in this proceeding, alleging that Jose R. Mirabal failed to respond to FINRA Staff requests for written information and oral testimony, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Mirabal failed to answer the Complaint. He also failed to file an Answer to the Second Notice of Complaint and Complaint that Enforcement filed on April 30, 2007. As a result, on June 22, 2007, Enforcement filed a

¹ Effective July 30, 2007, the corporate successor to NASD is the Financial Industry Regulatory Authority (FINRA). The Rules at issue continue to be designated as NASD Rules.

Motion for Entry of Default Decision. Mirabal did not respond to that Motion. Pursuant to NASD Procedural Rules 9215(f) and 9269, the Motion will be granted, and the allegations in the Complaint, which is attached to this decision, will be deemed admitted.

Findings of Fact²

The Respondent

Mirabal first entered the securities industry in September 1999. From October 1999 through January 24, 2006, Mirabal was registered as a General Securities Representative through six different FINRA member firms. As pertinent to the Complaint, from October 30, 2003, until September 29, 2005, he was registered as a General Securities Representative through Wallstreet Electronica, Inc. ("WEI"). From November 14, 2005, until January 24, 2006, he was registered through another firm. Mirabal is not currently associated with any FINRA member firm.

Failure to Respond to Requests for Information and Testimony

On September 29, 2005, Mirabal resigned his employment with WEI. At the time of his resignation, he was under internal review as a result of a customer complaint alleging that Mirabal sold the customer investments that were not associated with, or approved by, WEI. The customer complaint, which is still pending, alleged compensatory damages in the amount \$80,000.

After reviewing the Form U5, terminating his registration through WEI, FINRA Staff began an investigation into the reason for his termination. The Staff determined that it required a statement from Mirabal identifying, among other things, the entities that

² All findings of fact are based on the admitted allegations in the Complaint, the Affidavit in Support of the Motion for Entry of Default Decision, and the exhibits attached thereto.

he controlled, the proposed investments he recommended to the customer, and his disposition of the customer's funds.

Pursuant to NASD Procedural Rule 8210, in the course of its investigation, the Staff sent Mirabal three letters requesting him to submit a written statement, and one letter requesting that he appear for an on-the-record interview ("OTR"). In each case, the letters were sent to Mirabal at his last known residential address listed in the Central Registration Depository ("CRD address"), via first class and certified mail. The letters sent by first class mail were not returned. The receipts for the letters sent by certified mail were returned to the Staff with what appeared to be Mirabal's signature.

Mirabal did not respond to the three requests for a written statement. However, on March 9, 2006, Mirabal's attorney called FINRA. He indicated that Mirabal had recently retained him, and he requested an extension for Mirabal to respond to the outstanding requests for information. The Staff granted Mirabal's counsel an extension until March 30, 2006, to respond to the requests for a written statement. However, on March 29, 2006, Mirabal's counsel informed FINRA that Mirabal would not submit a written statement. As a result, on March 31, 2006, the Staff sent Mirabal a request that he appear at an OTR to provide sworn testimony on May 4, 2006. As noted above, the request was sent by first class and certified mail to Mirabal's CRD address. A copy was also sent to his counsel. On May 2, 2006, Mirabal's counsel telephoned FINRA, stating that Mirabal would not attend the OTR. On the next day, FINRA received written confirmation from Mirabal's counsel that his client would not appear for testimony as requested. Mirabal did not appear for testimony on May 4, 2006.

Service of the Complaint

On March 27, 2007, Enforcement served the Complaint and Notice of Complaint on Mirabal via first class and certified mail sent to his CRD address. On April 30, 2007, Enforcement served the Second Notice of Complaint and Complaint on Mirabal in the same manner. In both cases, the first class mailings were not returned, and the certified mailings were returned, unclaimed. Mirabal failed to file an Answer to the Complaint.

Discussions and Conclusions

Jurisdiction

Article V, Section 4 of the FINRA By-Laws provides for a two-year period of retained jurisdiction over a formerly registered person after the effective date of the individual's termination of registration. During this period of retained jurisdiction, FINRA may file a complaint based upon conduct that occurred while the individual was registered through a member firm, or based upon such person's failure to provide information requested pursuant to NASD Procedural Rule 8210, if the request was made, and the complaint is filed, during the foregoing period of retained jurisdiction.

Enforcement filed the Complaint on March 27, 2007, within two years of the termination of Mirabal's registration. The Complaint is based upon his failure to respond to requests for information during the period of retained jurisdiction. Therefore, FINRA has jurisdiction over this proceeding.

Respondent's Default

Enforcement properly served the Complaint on Mirabal by sending it via first class and certified mail to his CRD address. Pursuant to NASD Procedural Rule 9134,

the mailings establish that he had valid constructive notice of the Complaint. Because Mirabal failed to respond to the Complaint, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint are deemed admitted.

Failure to Respond to FINRA Requests for Information

Procedural Rule 8210 authorizes FINRA to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in FINRA's oversight function and allows FINRA to carry out its regulatory functions without subpoena power.³ When an individual fails to respond to information requests, FINRA's ability to perform its regulatory responsibilities is subverted.⁴

Pursuant to Procedural Rule 8210, notice of a request for information is considered received if the request is mailed or otherwise transmitted to the person's last known CRD address. Enforcement mailed three requests for written statements and one for his testimony to Mirabal at his last known CRD address. Accordingly, Mirabal received constructive notice of the requests for information. By signing the receipts for delivery of the requests sent by certified mail, Mirabal demonstrated that he had actual

³ See, e.g., *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the FINRA effectively to conduct its investigations, and emphasizing that FINRA members and associated persons must fully cooperate with requests for information).

⁴ *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998). Further, a violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110, contravening "high standards of commercial honor." *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC Apr. 19, 2000).

notice of those requests. His failures to respond in any way to those requests for information violated Procedural Rule 8210 and Conduct Rule 2110.

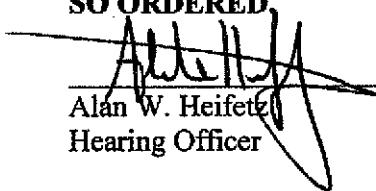
Sanctions

For failing to respond in any way to requests for information made pursuant to Rule 8210, FINRA Sanction Guidelines provide that a bar is standard.⁵ Here, his failure to respond was intentional and frustrated the Staff's ability to determine the full extent of his involvement in the sale of products that were unapproved by his employer firm. There are no mitigating circumstances that would warrant a lesser sanction. Accordingly, Mirabal will be barred in all capacities for failing to respond to requests for written information and sworn testimony, made pursuant to Procedural Rule 8210.

Conclusion

Jose R. Mirabal is barred from association with any member firm in any capacity for failing to respond to requests for written information and oral testimony, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. The bar shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.

SO ORDERED,


Alan W. Heifetz
Hearing Officer

Copies to:

Jose R. Mirabal (*via first class mail & overnight courier*)
William Brice La Hue, Esq. (*via first class & electronic mail*)
Mark P. Dauer, Esq. (*via first class & electronic mail*)
Rory C. Flynn, Esq. (*via first class & electronic mail*)

⁵ FINRA SANCTION GUIDELINES, at 35 (2007 ed.).

COPY

NASD
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

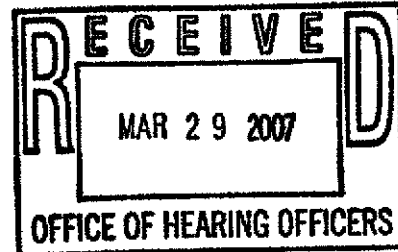
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JOSE R. MIRABAL
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COMPLAINT

The Department of Enforcement alleges as follows:

1. Respondent Jose R. Mirabal ("Mirabal") was first registered as a general securities representative when he entered the securities industry in 1999. He was employed by Wallstreet Electronica, Inc. ("WEI") from March 2003 through September 2005. Mirabal was last employed by a NASD member in January 2006. Mirabal is not currently employed by a member; however, he remains subject to the jurisdiction of the NASD pursuant to Article V, Section 4 of the NASD Bylaws until January 24, 2008.

CAUSE OF ACTION

NASD Conduct Rule 2110 and Procedural Rule 8210

(Failure to Respond)

2. The allegations contained in paragraph 1 above, are hereby re-alleged and incorporated herein by reference.
3. The NASD received a Uniform Termination Notice for Securities Industry Registration ("Form U-5") from WEI regarding Mirabal. The Form U-5 indicates that Mirabal had been under internal review when he resigned, based upon a customer complaint alleging an investment in an unapproved product. The NASD opened an investigation into the allegations on the Form U-5.

4. During the course of the NASD's investigation, the NASD determined that it needed a statement from Mirabal regarding, among other things, various entities that he controlled, the proposed investment that he recommended to a customer and the disposition of the customer's funds.
5. Therefore, on December 16, 2005, the NASD sent a letter to Mirabal addressed to his CRD home address. The letter was sent via first class and certified mail and requested, pursuant to Procedural Rule 8210, a written statement responding to several specific questions. The letter set a deadline of December 30, 2005, for the submission of the requested statement.
6. The December 16, 2005 letter sent by first class mail was not returned. A receipt for the December 16, 2005 letter, sent by certified mail, was returned with what appears to be Mirabal's signature indicating delivery. Mirabal did not submit the requested written statement by December 30, 2005.
7. The NASD sent another letter to Mirabal dated January 9, 2006, in which it requested that, pursuant to Procedural Rule 8210, he respond to the December 16, 2005 request. This letter was sent to Mirabal at his CRD home address by first class and certified mail and set another deadline of January 17, 2006.
8. The January 9, 2006 letter sent by first class mail was not returned. A receipt for the January 9, 2006 letter sent by certified mail was returned with what appears to be Mirabal's signature. Mirabal did not respond by the January 17, 2006 deadline.
9. The NASD sent a third letter to Mirabal dated February 13, 2006. This letter once again requested that Mirabal submit a written statement as requested in the previous two letters. The February 13, 2006 letter was sent via first class and certified mail and requested, pursuant to Rule 8210, that the requested written statement be submitted by February 27, 2006.
10. The February 13, 2006 letter sent by first class mail was not returned. A receipt for the February 13, 2006 letter sent by certified mail was returned with what appears to be Mirabal's signature. Mirabal did not respond by the February 27, 2006 deadline.

11. On March 9, 2006, the NASD received a telephone call from an attorney who indicated that he had recently been retained by Mirabal. Counsel for Mirabal requested an extension of time to respond to the outstanding requests for information. The Staff granted counsel's request and indicated that Mirabal had until March 30, 2006 to submit the requested written statement. This extension was confirmed in a letter dated March 10, 2006 submitted by counsel for Mirabal.
12. However, on March 29, 2006, counsel for Mirabal sent a letter to the NASD indicating that Mirabal declined to provide the requested written statement. Mirabal did not submit the requested written statement by March 30, 2006.
13. Thereafter, the NASD requested, pursuant to Procedural Rule 8210 that Mirabal appear and provide a sworn on-the-record ("OTR") statement. This request was sent on March 31, 2006 via first class and certified mail to Mirabal at his CRD address with a copy sent to his counsel.
14. The requested OTR was scheduled for May 4, 2006. On May 2, 2006, the NASD received a telephone call from Mirabal's counsel. During this telephone conversation, Mirabal's counsel indicated that Mirabal would not appear for the OTR. On May 3, 2006, the NASD received a written confirmation from Mirabal's counsel indicating that Mirabal would not appear for the OTR.
15. Mirabal failed to appear and testify as requested on May 4, 2006. Mirabal's failure to provide information and testify prevented the NASD from completing its investigation and, therefore, impeded its ability to carry out its regulatory mandate.
16. Such failures to submit a written statement and appear and testify as requested by the December 16, 2005, January 9, February 13 and March 31, 2006 request letters constitute separate and distinct violations of NASD Conduct Rule 2110 and Procedural Rule 8210 by Respondent Mirabal.

PRAYER

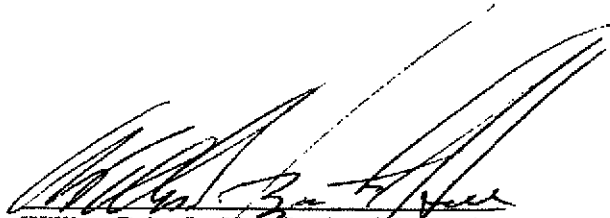
WHEREFORE, the Department respectfully requests that the Panel:

- A. Make findings of fact and conclusions of law that Respondent committed the violations alleged within this Complaint.
- B. Order that one or more of the sanctions provided under NASD Rule 8310(a) be imposed, including that the Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest.
- C. Order that the Respondent bear such costs of this proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330.

NASD DEPARTMENT OF ENFORCEMENT

Date:

5/27/2007


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