

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

ROGER A. KAPSALIS
(CRD No. 2159293),

Respondent.

Disciplinary Proceeding
No. 20060053714-01

Hearing Officer – SNB

DEFAULT DECISION

December 1, 2006

Respondent failed to respond to requests for information, in violation of Rules 8210 and 2110, and engaged in a private securities transaction, in violation Rules 3040 and 2110. For these violations, Respondent is barred from associating with any NASD member in any capacity.

Appearances

Julie K. Glynn, Esq., and David Jaffe, Esq., New York, NY, (Rory C. Flynn, Esq., Washington, DC, of Counsel), for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

I. Background

On July 13, 2006, the Department of Enforcement (“Enforcement”) filed a two-cause Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent Roger A. Kapsalis (“Respondent”) violated NASD Rules 3040 and 2110 by soliciting sales of securities outside the scope of his employment without notifying or receiving authorization from the firm with which he was registered. The Complaint also alleges that Respondent violated NASD Rules 8210 and 2110 by failing to respond to NASD Staff requests for information. Respondent did not file an

Answer to the Complaint. On October 5, 2006, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, supported by the declaration of Julie K. Glynn and 11 exhibits. Respondent did not reply to the Motion. For the reasons set forth below, the Motion is granted.¹

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on July 13, 2006, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address"). In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to the same address on August 11, 2006. Respondent did not file an Answer to the Complaint.

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

III. Jurisdiction

Respondent first became registered with NASD as a General Securities Representative in 1991. He was subsequently registered with 21 other NASD member firms before registering with Westrock Advisors, Inc. ("Westrock"), an NASD member firm, in June 2003. On July 15, 2004, Westrock filed a Uniform Termination Notice for Securities Industry Registration ("U-5"), indicating that Respondent was no longer employed at Westrock as of that date. Respondent has not been registered with NASD

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 with its motion.

since that U-5 was filed. On July 10, 2006, Westrock filed an amendment of Respondent's U-5, which reported a customer complaint.

Although Respondent is not currently associated with a member firm, NASD has jurisdiction to bring this proceeding, pursuant to Art. V, § 4 of NASD's By-Laws, because (1) the Complaint charges Respondent with misconduct while he was registered and with failing to comply with requests for information made during the two-year period following termination of his last association, and (2) the Complaint was filed within that two-year period.

IV. Violations

A. Private Securities Transactions of an Associated Person

Rule 3040 requires that an associated person who intends to participate² in any private securities transaction,³ must, prior to the transaction, "provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction..."

The Complaint alleges that, in December 2003, customer JS opened an account at Westrock through Respondent. In July 2004, Respondent solicited JS to sell existing securities in his Westrock account and wire \$20,000 in funds to a company called Greenmill Services Inc., in order to purchase shares in TurboScan. JS sold the securities and wired the funds, but never received any documentation of the TurboScan purchase, and never received his money back. Westrock did not authorize Respondent to sell

² *Dep't. of Enforcement v. Abbondante*, 2003 NASD Discip. LEXIS 50 at *26 (OHO Nov. 7, 2003) ("even very limited involvement by an associated person is sufficient to trigger the requirement that the person give notice to the employer.").

³ Rule 3040 defines a private securities transaction as "any securities transaction outside the regular course or scope of an associated person's employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission..."

shares of TurboScan, and prior to participating in this private security transaction,

Respondent failed to provide written notification to Westrock.

Rule 3040 is intended to protect both the investing public and NASD members.

The purpose of NASD Rule 3040 is to ensure that a member firm adequately supervises the suitability and due diligence responsibilities of its associated persons. ... The rule also serves to protect employers against investor claims arising from an associated person's private transactions and to prevent customers from being misled as to the employing firms' sponsorship of their associated person's transactions.⁴

Based upon the allegations in the Complaint, JS's investment in TurboScan constituted investment in a security for purposes of Rule 3040. In determining whether an investment is a security, it is appropriate to consider whether the customer was led to believe that he was purchasing a security. In *SEC v. D.M. Joiner Leasing Corp.*, the Supreme Court held that offerings can "be judged as being what they were represented to be."⁵ When a customer transmits funds based on a representation that the funds will be used to purchase a security, the customer's investment is considered a security, even if the funds are converted or otherwise not actually used to purchase a security.⁶ Here, Respondent solicited JS to purchase stock in TurboScan, and JS transmitted funds for that purpose. Under these circumstances, JS's \$20,000 investment in TurboScan was a "securities transaction" for purposes of Rule 3040.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this proceeding, that Respondent violated Conduct Rule 3040. It is well-established that a violation of one NASD rule also constitutes a violation of Rule 2110,

⁴ *Dep't. of Enforcement v. Carcaterra*, No. C10000165, 2001 NASD Discip. LEXIS 39, at *8-9 (NAC Dec. 13, 2001) (citations omitted).

⁵ 320 U.S. 344, 353 (1943).

⁶ *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) ("it is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security)").

which provides that, "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."⁷ The Hearing Officer therefore finds that Respondent violated Rules 3040 and 2110.

B. Failure to Respond

The Complaint also alleges that on June 9 and 27, 2006, NASD Staff sent Respondent requests for information concerning the securities transactions alleged in Count 1 of the Complaint. The Staff sent the requests to Respondent at his CRD address by first class and certified mail, pursuant to NASD Procedural Rule 8210. The Staff served the requests in accordance with Rule 8210(d), and therefore Respondent is deemed to have received them. Respondent did not respond.

Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power.⁸ Here, although Respondent received valid constructive notice of the Staff's requests,⁹ he failed to respond to them. Respondent thereby violated Rules 8210 and 2110.

⁷ See, e.g., *E. Magnus Oppenheim & Co., Inc.*, Exch. Act Rel. No. 51479, 2005 SEC LEXIS 764, at *7 (Apr. 6, 2005); *Jim Newcomb*, Exch. Act Rel. No. 44945, 2001 SEC LEXIS 2172, at n1 (Oct. 18, 2001), *Stephen J. Gluckman*, Exch. Act Rel. No. 41628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

⁸ 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*, Exch. Act Rel. No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

⁹ See, *David I. Cassuto*, Exch. Act Rel. No. 48,087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

V. Sanctions

For failing to respond to Staff requests for information made pursuant to Rule 8210, the NASD Sanction Guidelines (“Guidelines”) recommend a bar as the standard sanction.¹⁰ There is no evidence of any mitigating circumstances that would justify a lesser sanction for the violation. Therefore, Respondent is barred for failing to respond to Staff requests for information.

For engaging in a private securities transaction in violation of Rules 3040 and 2110, the Guidelines recommend a fine of \$5,000 to \$50,000, and escalating sanctions.¹¹ Many of the factors set forth in the Guideline’s principal considerations cannot be evaluated, because Respondent did not provide any information in response to Staff requests. However, in light of Respondent’s disciplinary history, which includes discipline for engaging in private securities transactions in the past,¹² as well as the suspicious nature of the transaction and customer JS’s loss on the transaction, a bar is appropriate for this violation as well.

VI. Conclusion

Respondent failed to respond to requests for information, in violation of Rules 8210 and 2110; and engaged in a private securities transaction, in violation Rules 3040 and 2110. For these violations, Respondent is barred from associating with any NASD member in any capacity. The bar shall become effective

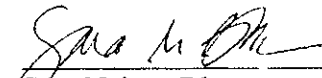
¹⁰ NASD Sanction Guidelines at p. 35 (2006 ed.).

¹¹ Guidelines at 15, 16.

¹² In April 2005, Respondent was suspended for nine months and fined \$10,000 for engaging in a private securities transaction without prior notice to his firm, and for U-4 non-disclosures. In February 2004, Respondent was suspended for two months for failing to disclose materially adverse information to investors in connection with the sale of stock, in violation of SEC Rule 10b-5 and Rules 2110 and 2120.

immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Sara Nelson Bloom
Hearing Officer

Copies to:

Roger A. Kapsalis (*via overnight and first class mail*)
Julie K. Glynn, Esq. (*via electronic and first class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
Rory C. Flynn, Esq. (*via electronic mail*)

**NASD
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

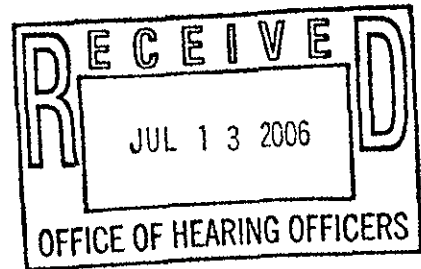
v.

ROGER A. KAPSALIS
(CRD No. 2159293),

Respondent.

**Disciplinary Proceeding
No.**

COMPLAINT



The Department of Enforcement alleges as follows:

JURISDICTION

1. From in or about June 1991 to July 2004, Respondent Roger A. Kapsalis ("Respondent") was registered with NASD as a General Securities Representative ("GSR") through his association with various NASD member firms.
2. On or about June 13, 2003, Respondent became registered as an GSR through his association with NASD member firm Westrock Advisors, Inc. (BD No. 114338) ("Westrock").
3. On July 15, 2004, Westrock filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") stating that Respondent was voluntarily terminated.
4. On July 10, 2006, Westrock filed an amendment to Respondent's Form U-5, disclosing that the firm received a customer complaint on June 29, 2006, from customer JS, alleging that in July 2004, prior to leaving Westrock, Respondent solicited an investment of \$20,000 for a private securities transaction that had not been approved by Westrock.

5. Although Respondent is not currently registered with NASD, he remains subject to the jurisdiction of NASD pursuant to Article V, Section 4, of the Association's By-Laws.

**FIRST CAUSE OF ACTION
Private Securities Transaction
(NASD Conduct Rules 3040 and 2110)**

6. Paragraphs one through five are re-alleged and incorporated herein by reference.
7. In or about July 2004, and prior to his departure from Westrock, Respondent participated in a private securities transaction away from Westrock. Respondent solicited Westrock customer JS to purchase shares in a company Respondent called "TurboScan."
8. Specifically, Respondent solicited JS to (i) sell existing securities in his Westrock account, and (ii) wire \$20,000 in funds from his Westrock account to a company called Greenmill Services Inc. ("Greenmill") so that JS could purchase shares in TurboScan.
9. JS did sell the securities and wire \$20,000 from his Westrock account to Greenmill.
10. Greenmill is not an NASD member firm.
11. Westrock did not authorize its brokers to sell shares of TurboScan.
12. Prior to participating in this private securities transaction, Respondent failed to provide written notification to Westrock.
13. While JS believed that he was investing his \$20,000 in a security – shares of TurboScan, his funds were not used to make any legitimate investment. After the funds were wired, JS received several calls from a person claiming to be associated with Greenmill soliciting additional investments in "TurboScan." This person told JS that the shares had doubled in value, from the \$1.00 per share price paid by JS to \$2.00. JS declined further investment.
14. JS told the person that contacted him from Greenmill that he needed to liquidate some of his "TurboScan" shares to cover an expense and was told that a check would be sent to him

by overnight delivery. When JS received no check and tried to contact Greenmill at the telephone number he had been provided for Greenmill, he learned that the number was disconnected.

15. JS never received any documentation of his purported purchase of "TurboScan" shares, and never received his money back.

By reason of the foregoing, Respondent violated NASD Conduct Rules 3040 and 2110.

**SECOND CAUSE OF ACTION
Failure to Respond
NASD Procedural Rule 8210 and Conduct Rule 2110**

16. Paragraphs one through fifteen are re-alleged and incorporated herein by reference.

First Request

17. On June 9, 2006, the Staff of NASD District 10 (the "Staff") sent Respondent a letter (the "June 9th Letter") requesting that he provide information in response to the complaint written by customer JS.

18. This request was made pursuant to, and in accordance with, Rule 8210 and required a response by June 16, 2006. The letter was sent by regular mail to Respondent's current residential address as reflected in the records of the Central Registration Depository, [REDACTED] (the "CRD Address").

19. The letter sent to the CRD Address was not returned to the Staff.

Second Request

20. On June 27, 2006, the Staff again requested that Respondent provide the same information requested in the June 9th Letter (the "June 27 Letter"). This request was made pursuant to, and in accordance with, Rule 8210 and required a response by July 7, 2006. This letter was sent by certified mail and regular mail to Respondent's CRD Address.

21. Neither copy of the June 27th Letter sent to the CRD Address was returned to the Staff.

22. The Staff did not receive a response from Respondent to either of the letter requests.

By reason of the foregoing, Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

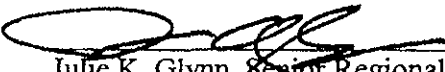
PRAYER

WHEREFORE, the Department respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations alleged within this Complaint;
- 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: July 13, 2006


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