

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

GARY ALLEN MITCHELL
(CRD No. 1617340)

Respondent.

Disciplinary Proceeding
No. 2007009077401

Hearing Officer – RSH

DEFAULT DECISION

June 15, 2009

For violating Conduct Rules 3040 and 2110, the Respondent was suspended from associating with any member firm for one year, fined \$20,400, and ordered to pay restitution of \$95,000.

Appearances

William Brice La Hue, Senior Regional Counsel, Atlanta, GA and Andrew A. Favret, Regional Chief Counsel, New Orleans, LA for the Department of Enforcement.

No appearance by or for Gary A. Mitchell.

DECISION

I. Introduction

The Department of Enforcement (“Enforcement”) charged Gary A. Mitchell (“Mitchell”) with participating in three sales of promissory notes to a customer, without providing prior written notice to his FINRA member firm, in violation of NASD Conduct Rules 3040 and 2110.¹

Enforcement filed the Complaint with the Office of Hearing Officers on January 12, 2009. Mitchell did not answer or otherwise respond to the Complaint. Consequently,

¹ The FINRA Rules, which include NASD Procedural and Conduct Rules, are at www.finra.org/Rules.

on April 15, 2009, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of William Brice La Hue ("La Hue Decl.") and four exhibits. Mitchell did not reply to the motion.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Mitchell first became registered as a General Securities Representative with a FINRA member firm in March 1987. He became associated in the same capacity with SunAmerica Securities, Inc. ("SunAmerica") in October 1995 and became registered as a General Securities Principal in March 1996. Mitchell remained with SunAmerica until October 2005, when his registration was transferred to AIG Financial Advisors, Inc. ("AIG") as a result of a merger. Mitchell remained with AIG until his termination in May 2007. He was registered through another FINRA member firm until his termination on July 17, 2007. Mitchell has not been associated with a FINRA member firm since then.²

Although Mitchell is not currently registered with FINRA, FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's Bylaws, because (1) the Complaint was filed within two years following the termination of his registration with FINRA and (2) the Complaint charges him with misconduct that occurred while he was associated with a FINRA member firm.³

² Complainant's Exhibit (CX)-2; La Hue Decl., ¶ 5.

³ See Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: Bylaws").

B. Origin of Underlying Investigation

FINRA commenced the investigation that led to the Complaint in this proceeding in May 2007, following FINRA's receipt of a Uniform Termination Notice for Securities Industry Registration ("Form U5") filed by AIG. The Form U5 reported that AIG had discharged Mitchell on May 21, 2007, because of "selling away in the form of promissory notes." FINRA staff investigated Mitchell's conduct to determine if he had violated NASD Conduct Rules.⁴

C. Respondent's Default

On January 12, 2009, Enforcement sent the Notice of Complaint and Complaint to Mitchell by first-class and certified mail (return receipt requested) at his residential address recorded in the Central Registration Depository ("CRD Address"). The first-class mailing was not returned; however, the certified mailing was returned marked "refused." Mitchell did not respond to the Complaint by February 9, 2009, the deadline specified in the Notice of Complaint.⁵

On February 10, 2009, Enforcement served Mitchell with the Second Notice of Complaint and Complaint, by first-class and certified mail, to his CRD Address. A receipt for the Second Notice sent by certified mail was returned signed by Mitchell, indicating that it was delivered on February 12, 2009. The Second Notice sent by first-class mail was not returned. The Second Notice of Complaint required Mitchell to file an

⁴ La Hue Decl., ¶ 4; CX-1.

⁵ CX-3; La Hue Decl., ¶¶ 7, 8.

answer to the Complaint by February 27, 2009. To date, Mitchell has not filed an answer with the Office of Hearing Officers or otherwise responded to the Complaint.⁶

Mitchell defaulted by failing to answer the Complaint.⁷ Accordingly, pursuant to Procedural Rules 9215(f) and 9269(a)(2), the Hearing Officer deems the allegations in the attached Complaint admitted and grants Enforcement's motion for entry of a default decision.

D. Private Securities Transactions

The Complaint alleges that Mitchell violated Conduct Rules 3040 and 2110 by participating, for compensation, in the sale of promissory notes to a SunAmerica customer without giving written notice to or receiving written approval from SunAmerica prior to engaging in the sales.

According to the Complaint, in September 2004, Mitchell entered into consulting agreements with GG Consulting International, LLC ("GG") and Action Testing Consulting, Inc. ("Action"). Both consulting agreements required Mitchell to procure short-term financing for GG and Action. The consulting agreement with GG indicated that Mitchell would receive compensation of \$25,500 for his services, and provided for the forgiveness of a \$100,000 pre-existing debt. The agreement with Action required Mitchell to secure \$50,000 in short-term funding and provided that he would receive \$20,000 in compensation. GG was offering investors promissory notes paying a monthly

⁶ CX-4; La Hue Decl., ¶¶ 8-10.

⁷ *Department of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003) (NASD Procedural Rule 9134(b)(1) allows for constructive notice by mailing a complaint to the respondent's most recent CRD address) (quoting *Lubeck v. SEC*, 1998 U.S. App. LEXIS 18849, at *20 (9th Cir. Aug. 12, 1998)).

interest rate of 10 percent, to finance real estate projects. Action was offering investors promissory notes paying a semi-annual interest rate of 10 percent, to finance research and development products pertaining to the petroleum industry.

In June 2003, D.G. opened two accounts at SunAmerica with Mitchell serving as the registered representative for both accounts. In September 2004, while associated with SunAmerica, Mitchell recommended and sold to D.G. two promissory notes issued by GG—one for \$30,000 and one for \$15,000. In October 2004, Mitchell recommended and sold to customer D.G. a promissory note issued by Action in the amount of \$50,000. D.G. purchased all of the notes for his self-directed IRA, which had been opened through Mitchell at PENSCO, a trust company that provides IRA custodial services. Mitchell received \$9,000 in compensation from GG, and an additional \$1,200 from D.G. in connection with his sales of the GG and Action promissory notes. D.G. has not received the return of his principal or any interest payments from GG, Action, or any other person or entity.

Conduct Rule 3040 requires an associated person to provide his employer with written notice of private securities transactions before the transactions take place.⁸ 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 [that] are not registered with the Commission.” The Securities and Exchange Commission has held that the written notice must describe in detail the proposed transactions and the associated person’s proposed role in the transactions, and state whether the associated person has received or may

⁸ See NASD Conduct Rule 3040(b).

receive selling compensation in connection with the transactions.⁹ The purpose of Conduct Rule 3040 is to ensure that FINRA members can adequately supervise the suitability and due diligence responsibilities of their registered persons.¹⁰ The Rule also serves to “protect employers against investor claims arising from associated persons’ private transactions and to prevent customers from being misled as to the employing firms’ sponsorship of the transactions.”¹¹

As Enforcement argued in its motion, the GG and Action notes are securities according to the “family resemblance” test enunciated in *Reves v. Ernst & Young*.¹² D.G. was motivated to purchase the notes, at least in part, because of the high interest rate offered by the issuers, who wanted to raise capital for their businesses. The notes were distributed by a sales agent who received a commission. D.G. reasonably expected that the notes were investment securities. Finally, there was not an alternative scheme besides the securities laws to regulate the notes.

Mitchell participated in each of the three private securities transactions by recommending and selling the investments, totaling \$95,000, to his customer. He received over \$10,000 in compensation for the sales. None of the transactions was effected through SunAmerica, and Mitchell failed to notify or receive permission from SunAmerica prior to participating in the transactions.

⁹ *Anthony H. Barkate*, Exchange Act Release No. 49542, 2004 SEC LEXIS 806, at *2 (Apr. 8, 2004), *aff’d*, 125 Fed. Appx. 892 (9th Cir. 2005).

¹⁰ See *Department of Enforcement v. Carcaterra*, No. C10000165, 2001 NASD Discip. LEXIS 39 (N.A.C. Dec. 13, 2001).

¹¹ *Id.* at *8 -*9.

¹² *Reves v. Ernst & Young*, 494 U.S. 56, 66-67 (1990). Under *Reves*, a note is presumed to be a security unless, based on a consideration of four factors, it bears a strong resemblance to the types of notes recognized as excluded from the definition of a security. The four factors to be considered are: 1) the motivations of the buyer and the seller to enter into the transaction; 2) the plan of distribution of the notes; 3) the expectations of the investors as to whether the instruments are securities; and 4) the presence of any alternative scheme of regulation.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent participated in private securities transactions without providing prior written notice to his firm, in violation of Conduct Rules 3040 and 2110.¹³

III. Sanctions

For private securities transactions, the FINRA Sanction Guidelines recommend a fine of \$5,000 to \$50,000, and, where the dollar amount of sales is under \$100,000, a suspension of ten business days to three months. The presence of one or more aggravating factors may raise the recommended sanctions.¹⁴

Here, while the aggregate sales were under \$100,000 and involved only one customer, there are a number of aggravating factors. Mitchell was affiliated, through consulting agreements, with both GG and Action and received compensation for selling the promissory notes. He also received additional compensation from D.G. in connection with the sales. D.G. has lost all of his principal investment and has not received any interest payments. There do not appear to be any mitigating factors.

After consideration of these factors, the Hearing Officer finds that Mitchell should be suspended in all capacities for one year and fined \$20,400, which is twice the amount of the compensation he received for the sales. In addition, he should be required to pay restitution to D.G. in the amount of \$95,000, plus 10 percent interest until paid.

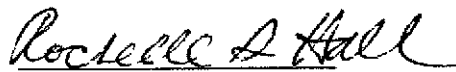
¹³ A violation of Conduct Rule 3040 also constitutes a violation of Conduct Rule 2110. *Department of Enforcement v. Dana N. Frankfort Marina Del Rey, CA*, No. C02040032, 2007 NASD Discip. LEXIS 16, at *39 n.25 (N.A.C. May 24, 2007) (citation omitted).

¹⁴ FINRA SANCTION GUIDELINES, 15-16 (2007 ed.).

IV. Order

For violating Conduct Rules 3040 and 2110, Gary A. Mitchell is suspended from association with any member firm in any capacity for one year, fined \$20,400 and ordered to pay restitution to customer D.G. in the amount of \$95,000, plus 10 percent interest until paid. The sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this decision become FINRA's final disciplinary action in this matter, except that if this decision becomes FINRA's final disciplinary action, Mitchell's suspension shall begin on July 20, 2009, and end on July 19, 2010.

SO ORDERED.


Rochelle S. Hall
Hearing Officer

Copies to: Gary A. Mitchell (*via overnight courier and first-class mail*)
Andrew A. Favret, Esq. (*via electronic and first-class mail*)
William Brice La Hue, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

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COMPLAINT

The Department of Enforcement alleges:

RESPONDENT AND JURISDICTION

1. Gary Allen Mitchell ("Mitchell") entered the securities industry in January 1987, when he was employed by a FINRA member. Mitchell was first registered as a general securities representative with FINRA in March 1987. Mitchell was subsequently employed by SunAmerica Securities, Inc. ("SunAmerica") in October 1995, and later became registered as a general securities principal in March 1996. Mitchell remained with SunAmerica until October 2005, when his registration was transferred to AIG Financial Advisors, Inc. ("AIG/SunAmerica"), as a result of a merger. Mitchell remained with AIG/SunAmerica until May 2007. Mitchell was last employed by a FINRA member in July 2007. Mitchell is not currently employed by a FINRA member, but remains subject to FINRA's jurisdiction pursuant to Article V, Section 4 of FINRA's By-Laws.

SUMMARY

2. During 2004, Mitchell participated in three private securities transactions involving the sale of promissory notes to a SunAmerica customer, without providing prior written

notice of his intention to engage in such activities to FINRA member SunAmerica, in violation of NASD Conduct Rules 3040 and 2110.

CAUSE OF ACTION

NASD Conduct Rules 3040 and 2110

(Private Securities Transactions)

3. The Department realleges and incorporates by reference paragraphs 1 and 2 above.
4. In June 2003, D.G. opened two securities accounts at SunAmerica with Mitchell serving as the account executive for both accounts. D.G. continued to maintain these accounts after SunAmerica merged to become AIG/SunAmerica.
5. In September 2004, Mitchell entered into consulting agreements with GG Consulting International, LLC ("GG") and Action Testing Consulting, Inc. ("Action"). Both consulting agreements indicated that Mitchell, acting through The Financial Centre, LLC,¹ would procure short term financing for those entities. The consulting agreement with GG indicated that Mitchell would receive compensation of \$25,500 for his services, and provided for the forgiveness of a \$100,000 pre-existing debt. The agreement with Action required Mitchell to secure \$50,000 in short term funding, and in exchange, provided that he would receive \$20,000 in compensation.
6. GG was offering investors promissory notes paying a monthly rate of 10 percent with one-month maturities, to finance real estate projects. Action was offering investors promissory notes paying a semi-annual interest rate of 10 percent with six-month maturities, to finance research and development of products pertaining to the petroleum industry.
7. During September and October 2004, while associated with SunAmerica, Mitchell introduced customer D.G. to the promissory notes offered by GG and Action, drafted the

¹ The Financial Centre, LLC is a limited liability company owned and controlled by Mitchell.

promissory notes, advised and assisted D.G. in opening an IRA account with Pensco Trust Company ("PENSCO"),² controlled an entity listed as the "loan servicer" for the notes, and was personally listed on PENSCO documents as the "Designated Representative/Investment Advisor" for the GG and Action notes.

8. In September 2004, Mitchell, while associated with SunAmerica, recommended and sold customer D.G. two promissory notes issued by GG in the aggregate amount of \$45,000. The first note was in the amount of \$30,000 (#GGCI-1), and the second note was in the amount of \$15,000 (GGCI-2). Both notes are dated September 8, 2004.
9. In October 2004, Mitchell recommended and sold customer D.G. a promissory note issued by Action. The Action note purchased by customer D.G. was dated October 15, 2004 and was in the amount of \$50,000. It had a maturity date of April 15, 2005.
10. Both of the GG notes and the Action note were purchased by customer D.G. through the self-directed IRA account opened for D.G. by Mitchell.
11. The GG and Action promissory notes sold to customer D.G. by Mitchell are securities as defined in the Securities and Exchange Act of 1934. Mitchell recommended the promissory notes to D.G. based upon the high rates of return and represented that the funds were for investment in business ventures, but gave little information about the ventures. Additionally, there was not a sufficient regulatory scheme to protect D.G. other than the federal securities laws.
12. During 2004, while registered with FINRA member SunAmerica, Mitchell engaged in private securities transactions by participating in the sale of promissory notes to customer D.G., as described in paragraphs 8 through 11 above.

² PENSCO is a trust company that provides IRA custodial services for individuals desiring to invest in IRA-approved investments, such as promissory notes.

13. Mitchell received \$9,000 in compensation from GG, and an additional \$1,200 from customer D.G. in connection with his sales of the GG and Action promissory notes.
14. Mitchell failed to give written notice of his intention to participate in the sale of the GG and Action promissory notes to SunAmerica, and further failed to obtain written approval from SunAmerica, prior to engaging in such activities.
15. Customer D.G. has not received the return of his principal or any interest payments from GG, Action or any other party.
16. Such acts, practices and conduct described above constitute separate and distinct violations of NASD Conduct Rules 3040 and 2110 by Respondent Mitchell.

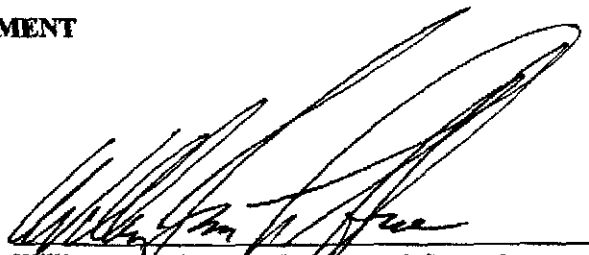
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. Order that one or more of the sanctions provided under FINRA 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.
- B. Order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: 1-12-09



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