

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

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

KEVIN J. MACDONALD
(CRD No. 5357796),

Respondent.

Disciplinary Proceeding
No. 20070103448

Hearing Officer – RSH

Respondent violated NASD Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to requests for information, and violated Conduct Rule 2110 by failing to report on his Form U4 that his law license had been suspended. For these violations, Respondent was barred from associating with any member firm in any capacity.

Appearances

Jessica A. Dennehy, Senior Attorney, Scott M. Andersen, Director, and Suzanne Elovic, Chief Counsel, New York, NY, for the Department of Enforcement.

No appearance by or for the Respondent.

DECISION

I. Introduction

The Department of Enforcement ("Enforcement") for the Financial Industry Regulatory Authority ("FINRA") filed a Complaint (attached to this Decision as Exhibit A) on October 16, 2008. The Complaint alleges that Respondent Kevin J. MacDonald ("MacDonald") violated NASD Membership and Registration Rule Interpretive Material ("IM") 1000-1 and Conduct Rule 2110 by willfully failing to disclose on a Uniform Application for Securities Industry Registration or Transfer ("Form U4") that his license to

practice law had been suspended. The Complaint also alleges that MacDonald subsequently violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to FINRA requests for information.

MacDonald did not answer or otherwise respond to the Complaint. Consequently, on December 30, 2008, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of Jessica A. Dennehy ("Dennehy Decl.") and 19 exhibits. MacDonald did not reply to the motion.¹

II. Findings of Fact and Conclusions of Law

A. Respondent's Default

The Hearing Officer finds that Enforcement properly served MacDonald with the Complaint by mailing the Complaint and the First and Second Notices of Complaint to his last known residential address as shown in FINRA's Central Registration Depository (the "CRD Address"), in accordance with FINRA Procedural Rule 9134(b)(1).

Enforcement mailed the Complaint and First Notice of Complaint by regular first-class and certified mail, on October 16, 2008.² Enforcement served the Complaint and Second Notice of Complaint on MacDonald by regular first-class and certified mail on November 17, 2008.³ Return receipts from the U.S. Postal Service show that both of the certified mailings were received.⁴ None of the regular first-class mailings was returned to FINRA.⁵ The Second Notice of Complaint sent to MacDonald stated that he was required to

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, as well as additional materials filed by Enforcement.

² Dennehy Decl., ¶ 24; Complainant's Exhibit ("CX") 1, 16.

³ Dennehy Decl., ¶ 29; CX-1, 18.

⁴ Dennehy Decl., ¶ 26, 31; CX-17, 19.

⁵ Dennehy Decl., ¶¶ 27, 32.

answer the Complaint by December 4, 2008.⁶ To date, MacDonald has not filed an Answer with the Office of Hearing Officers or otherwise responded to the Complaint.⁷

MacDonald defaulted by failing to answer the Complaint.⁸ 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.⁹

B. Jurisdiction

On June 4, 2007, MacDonald became registered with FINRA as a General Securities Representative through member firm Citigroup Global Markets, Inc. ("Citigroup").¹⁰ He remained continuously associated with Citigroup until on or about August 2, 2007.¹¹

On August 20, 2007, Citigroup filed a Uniform Termination Notice for Securities Industry Registration (Form U5), notifying FINRA that MacDonald's employment had been terminated because he had failed to "provide accurate information on a Form U4."¹²

MacDonald has not been registered with FINRA since August 2, 2007. Nonetheless, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's Bylaws, because (1) the Complaint was filed within two

⁶ Dennehy Decl., ¶ 33; CX-18.

⁷ Dennehy Decl., ¶ 34.

⁸ *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)).

⁹ On December 15, 2008, the first phase of new consolidated FINRA Rules went into effect. See Regulatory Notice 08-57. Pursuant to the consolidation, NASD Rules 9210-9290 were superseded by FINRA Rules 9210-9290. With respect to this decision, unless otherwise noted, the relevant FINRA Rules are identical to the corresponding NASD Rules. The FINRA Rules are at www.finra.org/Rules.

¹⁰ Dennehy Decl. ¶ 4; CX-1.

¹¹ Dennehy Decl. ¶ 5; CX- 2.

¹² *Id.*

years following the termination of his registration with FINRA, and (2) the Complaint charges him with misconduct committed while he was associated with a FINRA member firm and with failing to respond to FINRA's requests for information made during the two-year period following his registration termination.¹³

C. Willful Failure to Disclose Material Information on Form U4

The first cause of action in the Complaint alleges that MacDonald violated NASD Membership and Registration Rule IM-1000-1 and Conduct Rule 2110 by willfully failing to disclose on his Form U4 that his license to practice law in Massachusetts had been suspended.

The Complaint alleges that MacDonald was licensed to practice law in Massachusetts on December 16, 1998. On February 27, 2007, after a hearing, the Massachusetts Supreme Judicial Court ("Court") entered an order suspending MacDonald from practicing law for six months and subjecting him to probation for an additional year. The suspension became effective on March 29, 2007. In explaining its decision, the Court said, "MacDonald failed to make certain filings within their time requirements, causing his clients' matters to be time-barred or dismissed. He also failed to return client telephone calls or respond to written requests for information about the status of these matters. In an effort to reactivate his clients' cases, MacDonald made false statements in affidavits he submitted to the United States District Court and to the Massachusetts Labor Relations Commission (MLRC) and backdated two documents he submitted to the MLRC."¹⁴

¹³ Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: Bylaws").

¹⁴ Dennehy Decl., ¶¶ 7-10; CX-5 (Court's Order).

According to the Complaint, on June 4, 2007, MacDonald signed a Form U4 and submitted it to Citigroup. Question 14F of Form U4 asked: Have you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?" MacDonald falsely answered, "No."¹⁵ MacDonald did not disclose to Citigroup that his license to practice law had been suspended.¹⁶

Applicants for registration with FINRA must fully and accurately disclose all material information in response to questions on Form U4.¹⁷ By failing to disclose that his law license had been suspended, MacDonald violated FINRA's By-Laws, Membership and Registration Rule IM-1000-1 and NASD Conduct Rule 2110.¹⁸

Furthermore, MacDonald's failure to disclose the suspension was willful and material. "Willfulness" is established by a showing that a person "knew or reasonably should have known under the particular facts and circumstances that his conduct was improper."¹⁹ In this case, MacDonald knew that his answer to Form U4 Question 14F was false; he had been suspended just a few months before he filed his Form U4.

MacDonald's suspension was material information. The NAC has determined that information on the Form U4 is material if a reasonable employer reading the Form would "view the disclosure of the omitted information as significantly altering the total mix of information available."²⁰ MacDonald's suspension from practicing law, particularly because

¹⁵ Dennehy Decl., ¶¶ 11-12; CX-1.

¹⁶ Dennehy Decl., ¶ 9.

¹⁷ Article V, Section 2(c) of FINRA's By-Laws.

¹⁸ NASD Conduct Rule 2110 has been superseded by FINRA Conduct Rule 2010, which is substantially identical to its predecessor.

¹⁹ *Christopher LaPorte*, Exchange Act Release No. 39171, 1997 SEC LEXIS 2058, at n. 2 (September 30, 1997).

²⁰ *Department of Enforcement v. Andrew C. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *17 (N.A.C., April 27, 2004), quoting *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997).

it was based partially on his dishonest actions (filing false and backdated documents), would have been significant to Citigroup in deciding whether to hire him. Furthermore, the NAC has made clear that "[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, [it is] presumed that essentially all the information that is reportable on the Form U4 is material."²¹ Citigroup considered the information material; when the firm learned of MacDonald's suspension, it terminated his employment.²²

The Hearing Officer finds that the allegations in the first cause of action are sufficient to establish, for purposes of this default decision, that MacDonald violated NASD Membership and Registration Rule IM-1000-1 and Conduct Rule 2110.

D. Failure to Respond to Information Requests

The second cause of action alleges that MacDonald failed to respond to five written requests that he provide information to FINRA staff concerning his termination from Citigroup and his failure to disclose the Massachusetts suspension on his Form U4. FINRA staff sent each request to the Respondent at his CRD Address pursuant to Procedural Rule 8210. The first three requests, September 17, 2007, October 23, 2007, and December 14, 2007, asked for a written explanation of MacDonald's termination from Citigroup.²³ The fourth and fifth requests, dated March 3, 2008 and March 24, 2008, asked for information concerning both MacDonald's termination by Citigroup and the suspension of his Massachusetts law license.²⁴ FINRA staff sent each request to MacDonald at his CRD Address by first-class mail and by certified mail, return receipt requested, in accordance with

²¹ *Id.* at *13.

²² Dennehy Decl., ¶ 12.

²³ Dennehy Decl., ¶¶ 15-17; CX-6, 8, 10.

²⁴ Dennehy Decl., ¶¶ 18-19; CX-12, 14.

Procedural Rule 8210. The first and third certified mailings were delivered to MacDonald's CRD address; however, the other certified mailings were returned to FINRA, marked "unclaimed."²⁵ None of the first-class mailings was returned to FINRA. To date, MacDonald has not responded to any of the staff's letters.²⁶

On May 22, 2008, Enforcement conducted an Internet search to find a telephone number that corresponds to MacDonald's CRD address. Enforcement called that number and spoke with a man who identified himself as MacDonald. MacDonald stated that he had received all of the letters from Enforcement, but did not respond because he "wanted to put the situation behind him."²⁷

The Hearing Officer finds that the allegations in the second cause of action are sufficient to establish, for purposes of this default decision, that MacDonald violated Procedural Rule 8210 and NASD Conduct Rule 2110.

III. Sanctions

A. Willful Failure to Disclose Material Information on Form U4

For filing a false, misleading or inaccurate Form U4, FINRA Sanction Guidelines ("Guidelines") recommend that an individual be fined from \$2,500 to \$50,000. In egregious cases, the Guidelines call for consideration of a suspension in any or all capacities of up to two years or a bar.²⁸

The Guideline governing sanctions for filing false and misleading Forms U4 direct adjudicators to consider: (1) the nature and significance of the information at issue; and (2) whether [the] failure resulted in a statutorily disqualified individual becoming or remaining

²⁵ Dennehy Decl., ¶¶ 15-19; CX-7, 9, 11, 13, 15.

²⁶ Dennehy Decl., ¶¶ 15-20.

²⁷ Dennehy Decl., ¶ 20.

²⁸ *FINRA Sanction Guidelines* p. 73-74 (2007 ed.).

associated with a firm.²⁹ MacDonald's suspension from practicing law, particularly since it involved dishonest acts, would have been highly significant to regulators, broker-dealers and public customers relying on the information in his Form U4. MacDonald is subject to statutory disqualification if he willfully made a false or misleading statement with respect to any material fact on his Form U4.³⁰ The Hearing Officer finds that the suspension of his law license was material information and that MacDonald willfully failed to disclose the information on his Form U4.

For these reasons, the Hearing Officer finds that MacDonald should be barred from associating with any member firm in any capacity.

B. Failure to Respond to Requests for Information

The Guidelines recommend a bar where a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210.³¹ Here, MacDonald failed to respond in any manner to five written requests that he provide information in connection with the staff's investigation of his termination from Citigroup and his failure to disclose the suspension of his law license on his Form U4. There are no mitigating factors that would justify a sanction less than a bar. Accordingly, the Hearing Officer will bar MacDonald from associating with any FINRA member in any capacity for violating Procedural Rule 8210 and Conduct Rule 2110.

IV. Order

Kevin J. MacDonald is barred from association with any member firm in any capacity for willfully failing to disclose material information on his Form U4 in violation of FINRA's

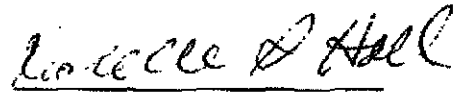
²⁹ *Id.*

³⁰ *Id.*

³¹ *Sanction Guidelines* at 35.

By-Laws, Membership and Registration Rule IM-1000-1 and NASD Conduct Rule 2110, and for failing to respond to requests for information, in violation of NASD Conduct Rule 2110 and Procedural Rule 8210. The bars will become effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.

SO ORDERED.



Rochelle S. Hall
Hearing Officer

Copies to:

Kevin J. MacDonald (*via overnight courier and first class mail*)
Jessica A. Dennehy, Esq. (*via electronic mail and first class mail*)
Suzanne Elovic, Esq. (*via electronic mail and first class mail*)
Scott M. Andersen, Esq. (*via electronic mail and first class mail*)
Mark Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

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

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

v.

KEVIN J. MACDONALD
CRD No. 5357796,

RESPONDENT.

DISCIPLINARY PROCEEDING
No. 20070103448

COMPLAINT

The Department of Enforcement alleges:

RESPONDENT & JURISDICTION

1. Kevin J. MacDonald ("Respondent") entered the securities industry on June 4, 2007, when he became registered with Citigroup Global Markets, Inc. ("Citigroup" or the "Firm"), a FINRA member, as a General Securities Representative. Citigroup terminated Respondent's employment on August 2, 2007 and since that time, Respondent has not been associated with any other FINRA member.
2. Although Respondent is not currently associated with a FINRA member, he remains subject to the jurisdiction of FINRA pursuant to Article V, Section 4, of the FINRA By-Laws in that the misconduct alleged occurred while Respondent was associated with a member and a complaint was filed within two years following Respondent's registration termination.

Professional Conduct ("Mass. R. Prof. C.") 1.2(a), 1.3 and 1.4(a); and (b) by knowingly making false statements of fact to two tribunals and backdating two documents he submitted to the Massachusetts Labor Relations Commission ("MLRC"), Respondent violated Mass. R. Prof. C. 3.3(a)(1) and 8.4(c), (d) and (h).

8. On or about June 4, 2007, Respondent signed and submitted an initial Form U4 to Citigroup and became employed with the Firm as a registered representative. Question 14F of the Form U4 asked the following question: "Have you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?" In response to that question, Respondent falsely answered "No."
9. Respondent failed to comply with just and equitable principals of trade when he failed to disclose his Suspension from the Massachusetts Bar and he misled the Firm to believe that he did not have any prior history of discipline.
10. Respondent's failure to disclose this information was material. The events that led to MacDonald's Suspension from the Massachusetts Bar involves conduct displaying a lack of truthfulness, a virtue important for a registered representative in the securities industry. Respondent's Suspension from the Massachusetts Bar would be significant to Citigroup, acting reasonably, when determining whether to hire Respondent and whether heightened supervision would be necessary.
11. Respondent's failure to disclose his Suspension from the Massachusetts Bar was willful. Question 14F on the Form U4 specifically asked him whether he ever "had an authorization to act as an attorney....that was revoked or suspended."

This question should have prompted MacDonald to disclose his Suspension from the Massachusetts Bar, which happened approximately two months prior to the filing of his Form U4.

12. On or about June 4, 2007, Respondent began working at the Firm in a registered capacity. On August 2, 2007, shortly after the Firm learned of Respondent's Suspension from the Massachusetts Bar, the Firm terminated Respondent's employment for failing to provide accurate information on a Form U4.
13. As a result of this conduct, Respondent violated NASD Conduct Rule 2110 and IM-1000-1.

SECOND CAUSE OF ACTION

Failing to Respond to Enforcement's Requests for Information and Documentation [NASD Rules 8210 and 2110]

14. The Department realleges and incorporates by reference paragraphs 1-13 above.
15. Respondent failed to respond to Enforcement's requests for information pursuant to NASD Rule 8210.
16. On September 17, 2007, Enforcement sent an information request to Respondent pursuant to NYSE Rules 476(a) and 477 via first class mail and certified mail, return receipt requested, to Respondent's residential address as reflected on the Central Registration Depository ("Respondent's CRD Address"). The information request sought from Respondent a detailed written explanation concerning Respondent's employment termination at Citigroup. Enforcement did not receive a response from Respondent by the due date of October 17, 2007. According to the U.S. Postal Service website, the document was delivered to

Respondent's CRD Address on September 20, 2007 at 11:42 a.m. To date, the letter sent via first class mail has not been returned to Enforcement.

17. On October 23, 2007, Enforcement sent a second information request pursuant to NASD Rule 8210 via first class mail and certified mail, return receipt requested, to Respondent's CRD Address, renewing it's request for a detailed written explanation concerning Respondent's employment termination from the Firm. Enforcement did not receive a response from Respondent by the due date of November 6, 2007. The postal service returned the receipt from the letter sent via certified mail to Enforcement with an illegible signature on it. To date, the letter sent via first class mail has not been returned to Enforcement.
18. On December 14, 2007, Enforcement sent a third information request pursuant to NASD Rule 8210 via first class mail and certified mail, return receipt requested, to Respondent's CRD Address, renewing it's request for a detailed written explanation concerning Respondent's employment termination from the Firm. Enforcement did not receive a response from Respondent by the due date of December 28, 2007. The postal service returned the letter sent via certified mail to Enforcement with a stamp that stated the parcel was "Unclaimed." To date, the letter sent via first class mail has not been returned to Enforcement.
19. On March 3, 2008, Enforcement sent a fourth information request pursuant to NASD Rule 8210 via first class mail and certified mail, return receipt requested, to Respondent's CRD Address. This request letter asked Respondent for specific information surrounding his Suspension from the Massachusetts Bar, as well as an explanation as to why he failed to disclose this suspension to Citigroup.

Enforcement did not receive a response from the Respondent by the due date of March 17, 2008. The postal service returned the letter sent via certified mail to Enforcement with a stamp that stated the parcel was "Unclaimed." To date, the letter sent via first class mail has not been returned to Enforcement.

20. On March 24, 2008, Enforcement sent a fifth information request pursuant to NASD Rule 8210 via first class mail and certified mail, return receipt requested, to Respondent's CRD Address, renewing its request for specific information surrounding Respondent's Suspension from the Massachusetts Bar, as well as an explanation as to why he failed to disclose this suspension to Citigroup. Enforcement did not receive a response from Respondent by the due date of April 7, 2008. The postal service returned the letter sent via certified mail to Enforcement with a stamp that stated the parcel was "Unclaimed." To date, the letter sent via first class mail has not been returned to Enforcement.
21. On May 22, 2008, Enforcement conducted an Internet search to find a telephone number that corresponds to Respondent's CRD Address. Enforcement called that number and spoke with a man that identified himself as the Respondent. Enforcement explained the purpose of its previous request letters and asked Respondent if he was going to submit a response. Respondent stated that he received all of the request letters from Enforcement and still has them, but he did not respond because he wants to put the situation behind him. However, before the conversation ended, Respondent stated that he would draft a response and provide it to Enforcement. To date, Enforcement has not received a response from Respondent.

22. As a result of this conduct, Respondent violated NASD Rules 8210 and 2110.

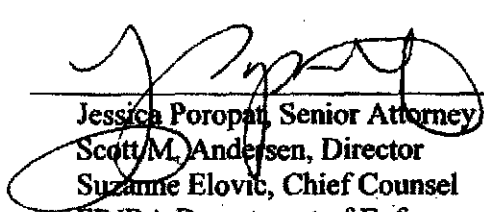
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

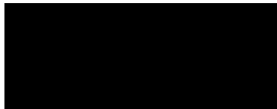
- A. order that one or more of the sanctions provided under NASD Rule 8310(a), including monetary sanctions, be imposed;
- B. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- C. make specific findings that Respondent's conduct alleged in the First Cause of Action was willful and the omitted information was material.

FINRA DEPARTMENT OF ENFORCEMENT

Dated: 10/15/08


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