

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN B. CARTER
(CRD No. 1216771),

Respondent.

Disciplinary Proceeding
No. 2008012796701

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

December 1, 2009

Respondent is barred from associating with any member firm in any capacity for misusing investor funds, in violation of Conduct Rule 2110; and failing to respond to requests for information, in violation of Procedural Rule 8210, NASD Conduct Rule 2110, and FINRA Conduct Rule 2010.

Appearances

Helen G. Barnhill, Senior Regional Counsel, Denver, CO, for the Department of Enforcement.

No appearance by or on behalf of John B. Carter.

DECISION

I. Introduction

On August 18, 2009, the FINRA Department of Enforcement filed the attached Complaint with the Office of Hearing Officers against John B. Carter, a former broker with Omnivest, Inc. FINRA commenced the investigation that led to the filing of the Complaint in this proceeding following its receipt of a Uniform Termination Notice for Securities Industry Registration (Form U5) Omnivest submitted to FINRA in March 2008, which indicated that the State of Colorado had revoked Carter's securities registrations for misuse of investor funds. In the Complaint, Enforcement charged that Carter violated Conduct Rule 2110 by misusing

investor funds and Conduct Rules 2110 and 2010 by failing to provide information that FINRA had requested pursuant to Rule 8210 in connection with its investigation into his misuse of funds.¹

Carter did not answer or otherwise respond to the Complaint. Consequently, on October 22, 2009, Enforcement filed a Motion for Entry of Default Decision, which is supported by the Declaration of Helen G. Barnhill and seven exhibits. Carter did not reply to the motion.² The Hearing Officer therefore granted Enforcement's motion.

Based on the facts alleged in the Complaint, which are deemed admitted pursuant to Rules 9215(f) and 9269(a), the Hearing Officer barred Carter from associating with any member firm in any capacity for misusing investor funds and for failing to respond in any manner to FINRA's requests for information.

II. Jurisdiction

FINRA has jurisdiction of this proceeding pursuant to Article V, Section 4 of the FINRA By-Laws, which generally provides that a person who is terminated and no longer associated with any FINRA member continues to be subject to FINRA jurisdiction for a period of two years from the effective date of termination of registration, or from the filing of an amendment of a

¹ NASD consolidated with the member regulation and enforcement functions of NYSE Regulation in July 2007 and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008. See Regulatory Notice 08-57 (Oct. 2008). In that process, NASD Conduct Rule 2110 was renumbered as FINRA Conduct Rule 2010. This decision refers to and relies on the Conduct Rules that were in effect at the time of Respondents' alleged misconduct. For the first and second causes of action, the applicable conduct rule is NASD Conduct Rule 2110 because the alleged misconduct occurred before December 15, 2008. For the third cause of action, the applicable conduct rule is FINRA Conduct Rule 2010. In addition, because the Complaint was filed after December 15, 2008, FINRA's procedural rules govern this proceeding. The applicable rules are available at www.finra.org/rules.

² The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, as well as the additional evidentiary materials Enforcement filed in support of its motion for entry of default decision.

notice of termination that discloses any actionable conduct.³ Here, Carter was registered with FINRA when he misused funds given to him by customers RR, JS, and AC for investment in a retirement plan, and FINRA issued the requests for information pursuant to Rule 8210 and filed the Complaint within two years after March 18, 2008, the date Carter's FINRA registrations terminated.

III. Carter's Default

On August 13, 2009, Enforcement served Carter with the Notice of Complaint by first-class certified mail (return receipt requested) sent to his residential address recorded in the Central Registration Depository ("CRD").⁴ The U.S. Postal Service returned the mailing to Enforcement with a notation that it had been refused.⁵ Carter did not answer the Complaint by the deadline specified in the Notice of Complaint. On September 11, 2009, Enforcement served Carter with the Second Notice of Complaint by first-class certified mail (return receipt requested) sent to his CRD address.⁶ Enforcement did not receive confirmation that the mailing was delivered. However, the U.S. Postal Service's Track and Confirm Internet site shows that the mailing was returned to FINRA because it was not claimed by the addressee.⁷

Carter received valid constructive notice of this proceeding.⁸ Accordingly, the Hearing Officer finds that Carter defaulted by failing to answer or otherwise respond to the Complaint.

³ Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: Bylaws"). E.g., *Department of Enforcement v. Kapara*, No. C10030110, 2005 NASD Discip. LEXIS 41, at *8 (May 25, 2005).

⁴ Declaration of Helen G. Barnhill ("Barnhill Decl.") ¶ 11.

⁵ *Id.*

⁶ *Id.* ¶ 12.

⁷ *Id.*

⁸ *Department of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003) (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)).

IV. Findings of Fact and Conclusions of Law

A. Factual Background

Carter entered the securities industry as a General Securities Representative in March 1987. Thereafter, he was registered with FINRA through several member firms before he joined FFP Securities, Inc. as a broker in February 2002. While at FFP Securities, Carter was registered as a General Securities Representative and a General Securities Principal until he left in November 2002 to join Omnivest.⁹ At Omnivest, Carter was registered as a General Securities Representative, a General Securities Principal, and a Financial Operations Principal from November 2002 until March 18, 2008.¹⁰

According to the Complaint, Carter also controlled two companies, CIA and CIR, that were in the business of administering 403(b) retirement plans for community college employees. In summary, a 403(b) plan, named for section 403(b) of the Internal Revenue Code, is a retirement savings plan funded by employee contributions and employer matching contributions (though the latter are not required). Such plans are offered by tax-exempt entities such as churches, charities, and schools. The allowable contribution limit to a 403(b) plan changes over time, and contributions to a 403(b) plan are made through payroll deductions.

Here, Carter solicited community college employees to invest in 403(b) plans, which were administered by CIA and CIR. CIR was a registered broker-dealer in Colorado. Employee contributions to the plans were withheld from their paychecks by the community colleges. The colleges then sent Carter a single monthly check, payable either to CIR or CIA, for all of their participating employees. In the normal course of business, CIR, and later CIA, invested the plan contributions in mutual funds or other investment products.

⁹ CX-2.

¹⁰ CX-2, at 3.

B. Carter's Misuse of Investor Funds

Between March 1, 2002, and November 13, 2002, and again between November 21, 2002, and December 31, 2005, Carter *misused* approximately \$8,000 of plan participant RR's funds and approximately \$9,200 of plan participant JS's funds. In addition, between January 2004 and December 2006, Carter misused approximately \$1,280 of plan participant AC's funds. RR, JS, and AC had intended these funds to be contributed to their 403(b) retirement plans. However, Carter did not make the required investments.

In March 2008, the Colorado Securities Commissioner filed a complaint against Carter, which alleged that Carter had misused investor funds. In June 2008, Carter entered into a Stipulation for Order of Permanent Injunction and Judgment "(Stipulation)" in which Carter admitted to using investor funds for "purposes other than investing in the individual employee's 403(b) plan."¹¹ Although the Stipulation resolving the Colorado action did not identify the investors by name, Carter admitted to misusing funds belonging to JS and AC in taped interviews conducted by an examiner with the State of Colorado.¹² In those telephone conversations, Carter admitted that he used investor funds to make payments on his business line of credit. The settlement with the Colorado Securities Commissioner required Carter to repay his investors, including RR, JS, and AC.

Based on the foregoing facts, the Hearing Officer finds that Carter violated Conduct Rule 2110 by misusing investor funds.

C. Failure to Respond to Requests for Information

On September 18, 2008, FINRA staff sent Carter a written request for information and documents pursuant to Procedural Rule 8210 concerning his misuse of the 403(b) retirement plan

¹¹ Barnhill Decl. ¶ 17.

¹² *Id.* ¶ 18.

contributions. FINRA asked that the requested information be provided on or before October 2, 2008. The request was sent to Carter's CRD address by first-class and certified mail. The U.S. Postal Service returned both mailings to the staff marked "unclaimed." Carter did not respond in any manner to the request.

On October 15, 2008, FINRA staff sent Carter a second request letter seeking the same information pursuant to Rule 8210. The staff sent the second letter to Carter at his CRD address by first-class and certified mail. FINRA asked Carter to provide the requested information on or before October 29, 2008. The U.S. Postal Service returned both mailings with the notation, "unclaimed, unable to forward." Carter did not respond in any manner to the second request.

On February 10, 2009, FINRA staff sent Carter a written request that he appear and provide testimony on February 24, 2009. The staff sent the request to Carter at his CRD address by first-class and certified mail pursuant to Rule 8210. The U.S. Postal Service returned the certified mailing to FINRA with the notation, "return to sender, unclaimed, unable to forward." However, the staff did not receive the first-class mailing by return mail. Carter neither responded to the request nor appeared for his on-the-record interview on February 24, 2009.

The Hearing Officer finds that Carter failed to respond in any manner to FINRA's Rule 8210 requests for information and he thereby violated Procedural Rule 8210 and Conduct Rule 2110, as alleged in the Second Cause of Action, and Procedural Rule 8210 and Conduct Rule 2010, as alleged in the Third Cause of Action.

V. Sanctions

A. Misuse of Investor Funds

The FINRA Sanction Guidelines for improper use of funds or securities recommend a fine of \$2,500 to \$50,000 and a bar.¹³ Where the improper use resulted from the respondent's misunderstanding of his customer's intended use of the funds or other mitigating factors exist, the Sanction Guidelines recommend consideration of a suspension of six months to two years. Here, there is no evidence of any mitigating factors. Carter did not invest the 403(b) retirement plan contributions as required, and he admitted that for many years he diverted such funds for his own use. Accordingly, the Hearing Officer finds that a bar is the appropriate sanction for this violation.¹⁴

B. Failure to Respond to Requests for Information

The Sanction Guidelines recommend a bar when a respondent fails to respond in any manner to a request for information and there are no mitigating factors.¹⁵ Here, Carter failed to respond to requests that he provide information and documents and he failed to appear and provide testimony regarding his misuse of investor funds. There are no mitigating factors. Accordingly, the Hearing Officer will bar Carter for this violation as well.

VI. Order

John B. Carter is barred from associating with any member firm in any capacity for (1) misusing investor funds, in violation of Conduct Rule 2110, as alleged in the First Cause of

¹³ FINRA Sanction Guidelines 38 (2007), available at <http://www.finra.org/RegulatoryEnforcement/index.htm> (then follow "FINRA Sanction Guidelines" hyperlink).

¹⁴ Cf., e.g., *Bernard D. Gorniak*, Exchange Act Rel. No. 35996, 1995 SEC LEXIS 1820, at *6-7 (July 20, 1995) (holding that a bar is appropriate where the respondent held, for a substantial period, customer funds that were intended for the purchase of mutual funds). The Hearing Officer did not order Carter to pay restitution because the June 2008 Stipulation with the Colorado Securities Commissioner required him to repay all of the funds he misappropriated.

¹⁵ FINRA Sanction Guidelines 35.

Action; (2) for failing to respond to requests for information issued pursuant to Rule 8210, in violation of Conduct Rule 2110 and Procedural Rule 8210, as alleged in the Second Cause of Action; and (3) failing to appear and provide testimony, in violation of Conduct Rule 2010 and Procedural Rule 8210, as alleged in the Third Cause of Action. The bars shall become effective immediately if this Default Decision becomes the final disciplinary action of FINRA.

A handwritten signature in black ink, appearing to read 'A. Perkins', is written over a horizontal line.

Andrew H. Perkins
Hearing Officer

Copies to:

John B. Carter (by FedEx, next day delivery, and first-class mail)
Helen G. Barnhill, Esq. (by electronic and first-class mail)
Mark P. Dauer, Esq. (by electronic mail)
David R. Sonnenberg, Esq. (by electronic mail)