

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN MARCUS NEWKIRK, JR.
(CRD No. 2708577),

Respondent.

Disciplinary Proceeding
No. 2008015195001

Hearing Officer – SNB

DEFAULT DECISION

June 22, 2010

Respondent converted customer funds, in violation of NASD Conduct Rules 2330(a) and 2110, presented a false account document to a customer, in violation of NASD Conduct Rule 2110, and failed to respond to requests for information and appear for testimony, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010. For these violations, Respondent is barred from associating with a member firm.

Appearances

Josefina Martinez, Esq., New York, NY, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

On January 22, 2010, the Department of Enforcement ("Enforcement") filed a four-cause Complaint. The first two causes of action allege that Respondent John Marcus Newkirk ("Respondent") converted funds from two customers, in violation of Conduct Rules 2330(a) and 2110. The third cause of action charges that Respondent presented a false document to a customer, in violation of Conduct Rule 2110. The fourth cause of action charges Respondent with failure to provide information and failure to appear and

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testify at an on-the-record interview ("OTR"), in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010.¹

Respondent did not file an Answer to the Complaint. Accordingly, on April 19, 2010, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of Josefina Martinez, Esq. ("Martinez Decl.") and seven exhibits. Respondent did not file a response to the Motion.

For the reasons set forth below, Enforcement's motion is granted.²

I. Respondent's Default

On January 22, 2010, Enforcement served Respondent with the Complaint and Notice of Complaint by first-class and certified mail at his residential address as reflected in the Central Registration Depository ("CRD"), as well as an alternative address (the "First Alternative" address). Martinez Decl. ¶¶ 20-21; CX-1, CX-4. The certified mailings were returned to FINRA by the Postal Service marked "Return to Sender," with a notation indicating a second alternative address (the "Second Alternative" address). Martinez Decl. ¶ 22. The first-class mailings were not returned. Martinez Decl. ¶ 23. Respondent did not file an answer.

On February 23, 2010, Enforcement served Respondent with a Second Notice of Complaint, and copies of the original Notice of Complaint and Complaint, by first-class

¹ Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, the procedural rules that apply are the current FINRA Rules. The conduct rules that apply are the NASD Rules that existed at the time of the conduct at issue. 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, and the declarations and exhibits filed by Enforcement with its motion. The exhibits are referred to as "CX-___."

and certified mail at his CRD address and the First and Second Alternative addresses. Martinez Decl. ¶¶ 25-26; CX-6. FINRA received each of the certified mail return receipts bearing Respondent's signature. Martinez Decl. ¶ 27; CX-7. The first-class mailings were not returned. Martinez Decl. ¶ 28. Respondent did not file an answer.

Enforcement complied with Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD, First, and Second Alternative addresses, thereby giving him constructive notice of this proceeding. Based upon the signature on the certified mail return receipts, it also appears that Respondent received actual notice. By failing to file an Answer, Respondent defaulted. Accordingly, pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

II. Jurisdiction

Respondent was first registered with a FINRA member firm in 1996. Between June 2007 and October 2008, Respondent was registered as a General Securities Representative with FINRA member firm Harbor Financial Services, LLC (the "Firm"). Martinez Decl. ¶ 5; CX-1.

On October 10, 2008, the Firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") reporting that Respondent was terminated for inappropriately accepting cash from a customer and depositing it in his personal account. Martinez Decl. ¶ 6; CX-2. On October 28, 2008, and February 5, 2009, the Firm filed Amended Forms U5 reporting that Respondent misappropriated funds from two other Firm customers. Martinez Decl. ¶ 7; CX-3. Respondent has not been registered with any FINRA member firm since his termination from the Firm. Martinez Decl. ¶ 8; CX-1.

Although Respondent has not been registered with any FINRA member firm since the termination of his employment with the Firm, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after the termination of his registration with a member firm, and it charges him with misconduct while he was registered with a member firm and with failing to respond to Rule 8210 requests issued within two years following the termination of his registration with a member firm.

III. Violations

A. Conversion of Customer Funds - NASD Conduct Rules 2330(a) and 2110

The first and second causes of the Complaint allege that Respondent, while employed by the Firm, converted \$4,550 in cash received from two customers for deposit in their accounts. In one case, he accepted \$4,000 in cash for deposit in a customer account for the purchase of securities. However, he did not deposit the funds in the customer's account. Instead, several weeks later, he deposited a check for \$4,000 from an account he controlled into the customer's account, which was later returned for insufficient funds. In the other case, he accepted a \$550 dividend check from the daughter of a deceased customer for deposit in that customer's account. However, he deposited the funds into his own account instead.

Conduct Rule 2330(a) prohibits any person associated with a member from making improper use of a customer's securities or funds. A violation of one conduct rule is a violation of Conduct Rule 2110.³ Moreover, FINRA Sanction Guidelines

³ *Charles C. Fawcett, IV*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *11 – 12 (Nov. 8, 2007) (stating that violations of FINRA rules are inconsistent with just and equitable principles of trade and constitute a violation of Rule 2110).

("Guidelines") specifically recognize conversion as a violation of Conduct Rule 2110. The Guidelines define conversion as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."⁴

The allegations of the Complaint are sufficient to establish, for purposes of this default decision, that Respondent violated NASD Conduct Rules 2330(a) and 2110 by misappropriating client funds.

B. False Account Documentation – NASD Conduct Rule 2110

The third cause of the Complaint alleges that Respondent provided a Firm customer with a false document purporting to reflect the status of the customer's account holdings. In particular, on June 6, 2007, when he was not yet employed by a member firm, he accepted a \$71,407.27 check from a customer. On June 25, 2007, when Respondent joined the Firm, he assisted the customer in opening an account. Then, in October 2007, Respondent provided the customer with a false account statement reflecting fictitious holdings, in an apparent attempt to hide the fact that Respondent did not fund the account with the customer's funds, but converted them to his own use.

The allegations of the Complaint are sufficient to establish, for purposes of this default decision, that Respondent violated Conduct Rule 2110 by providing a false document to a customer.

C. Failure to Provide Information, in Violation of FINRA Procedural Rule 8210 and Conduct Rule 2010

The fourth cause alleges that Respondent failed to respond to two requests for documents and information and failed to appear for testimony.

⁴ *FINRA Sanction Guidelines* 38 (2007), <http://www.finra.org/RegulatoryEnforcement/index.htm>

On February 19, 2009, FINRA Staff sent Respondent a Rule 8210 request for information regarding the circumstances of his termination from the Firm. The request was sent to Respondent at his CRD address by first-class and certified mail. Martinez Decl. ¶ 19. The certified mailing receipt was returned bearing Respondent's signature. *Id.*

Again, on March 11, 2009, in the same manner, FINRA Staff sent the same request for information. Again, the certified mailing receipt was returned with Respondent's signature. *Id.*

On March 12, 2009, FINRA Staff sent a request that Respondent appear for testimony. The request was sent by first-class and certified mail to Respondent's CRD address. The certified mailing was returned bearing Respondent's signature. *Id.*

The requests were served within two years of the termination of Respondent's registration with a member firm. Respondent was required to respond pursuant to Rule 8210 and Article V, Section 4 of FINRA's By-Laws, but he did not do so.

The allegations are sufficient to establish, for purposes of this default decision, that Respondent failed to respond to requests for information and failed to appear for testimony, in violation of Procedural Rule 8210. A violation of Procedural Rule 8210 is also a violation of Conduct Rule 2010.⁵

IV. Sanctions

FINRA Sanction Guidelines ("Guidelines") recommend a bar as the sanction for conversion, regardless of the amount converted. *Guidelines* at 38.⁶ A bar is also recommended for falsification of documents where, as here, no mitigation is present.

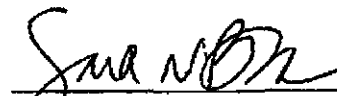
⁵ *Dep't of Enforcement v. Hooper*, No. C02000037, 2001 NASD Discip. LEXIS 37, at *5 (NAC Nov. 2, 2001) (violation of NASD Procedural Rule 8210 was a violation of NASD Conduct Rule 2110).

⁶ Available at <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf>.

Guidelines at 39. Likewise, a bar is standard for failing to provide requested information in any manner. *Guidelines* at 35. There is no evidence of any mitigating circumstances that would justify a lesser sanction for these violations. Therefore, the Hearing Officer imposes a bar for each violation.⁷

V. Conclusion

Respondent converted customer funds, in violation of NASD Conduct Rules 2330(a) and 2110, presented a false account document to a customer, in violation of NASD Conduct Rule 2110, and failed to respond to requests for information and appear for testimony, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010. For these violations, Respondent is barred from associating with a member firm. These bars will become effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding.


Sara Nelson Bloom
Hearing Officer

Copies to: John M. Newkirk, Jr. (*via overnight courier and first-class mail*)
Josefina Martinez, Esq. (*via electronic and first-class mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

⁷ Enforcement did not seek restitution because the Firm reimbursed the customers.

**FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

v.

JOHN MARCUS NEWKIRK,
(CRD 2708577)

RESPONDENT.

DISCIPLINARY PROCEEDING
No. 20080151950

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. From on or about June 2007 through October 2008, Respondent converted in excess of \$4,550 from two Firm customers in violation of NASD Rules 2330(a) and 2110.
2. Respondent also presented to a Firm customer a false document similar to an account statement in violation of NASD Rule 2110.
3. Respondent also failed to respond to two Enforcement requests for documents and information and failed to appear for testimony on April 2, 2009 as requested by the staff pursuant to FINRA Rule 8210 in violation of that rule and FINRA Rule 2010.

RESPONDENT AND JURISDICTION

4. John Marcus Newkirk ("Newkirk") entered the securities industry in January 1996 with a FINRA member and became licensed as a General Securities

Representative in May 1996. From January 1996 through May 2007, Newkirk was registered with five FINRA member firms, including Linsco Private Ledger Corp. ("LPL") during the period from February 15, 2006 through May 16, 2007. In or about April 2006, Newkirk became licensed as a General Securities Principal.

5. From June 25, 2007 through October 10, 2008 (the "Relevant Period"), Newkirk was registered with Harbor Financial Services LLC ("Harbor" or the "Firm"). Newkirk conducted this business under the name Newkirk Financial Services, a branch office of the Firm which operated from two locations in Ohio. Harbor terminated Newkirk's employment on October 10, 2008. Newkirk is not currently registered with a FINRA member but remains subject to FINRA's jurisdiction pursuant to Article V, Section 4 of the NASD By-laws.

**FIRST CAUSE OF ACTION
Conversion of Customer Funds
Violation of NASD Rules 2330(a) and 2110**

6. The allegations in paragraphs one through five above are realleged and incorporated by reference.

7. On or about July 2007, Customer GL opened a brokerage account with the Firm. Newkirk was the registered representative responsible for Customer GL's account.

8. On or about July 14, 2008, Customer GL gave Newkirk \$4,000 in cash to be used for the purchase of 1,000 shares of Anadigics Inc. ("ANAD") in his Firm account. Customer GL provided the money to Newkirk in four stacks of ten \$100 dollar bills, each bound by a paper strap.

9. As a receipt for the monies, Customer GL made a photocopy of the four stacks of \$100 bills and wrote on the side of the photocopy, "Received for Account

██████ [Customer GL] \$4,000 by John Newkirk." The number ██████ was Customer GL's Harbor account number. Customer GL asked Newkirk to sign the photocopy, which he did.

10. The Firm's policies and procedures prohibited the acceptance of customer cash deposits and required that all check deposits into a Firm account be made payable to Raymond James & Associates, Inc. During the Relevant Period, Raymond James & Associates, Inc. was Harbor's clearing firm.

11. Raymond James & Associates, Inc. used a back office system called Checks in Transit to record client checks that are received in a branch and forwarded to Raymond James & Associates, Inc. for deposit to customer accounts. Harbor registered representatives, including Newkirk, were required to make appropriate entries in the Checks in Transit system.

12. On or about July 14, 2008, Newkirk entered in the Checks in Transit system, a \$4,000 check deposit for Customer GL's account.

13. Raymond James & Associates, Inc. did not receive a \$4,000 check corresponding to the July 14, 2008 Customer GL Checks in Transit entry until on or about August 8, 2008.

14. The \$4,000 check that Newkirk forwarded for deposit in Customer GL's Harbor brokerage account was drawn on a bank account held in the name of Precision Installations LLC ("Precision") at Somerville National Bank (the "Precision Check"). Precision was one of Newkirk's outside businesses that had been approved by the Firm. The Precision Check was dated August 10, 2008 and made payable to Raymond James &

Associates, Inc. The memo section of the check had a notation bearing Customer GL's account number.

15. On or about August 8, 2008, Newkirk entered an order for the purchase of 1,000 shares of ANAD in Customer GL's account. The Precision Check was intended to fund this purchase.

16. On or about August 13, 2008, settlement date for the transaction, 1,000 shares of ANAD were purchased in Customer GL's account at a cost of approximately \$3,300.

17. On or about August 25, 2008, the Precision Check was returned to Raymond James & Associates, Inc. for insufficient funds.

18. On or about September 23, 2008, Raymond James & Associates, Inc. notified Harbor that Customer GL had an account debit balance in excess of \$3,700 related in part to the return of the Precision Check and the August 13, 2008 purchase of ANAD in his Harbor account.

19. On or about September 29, 2008, Raymond James & Associates, Inc. sold some of Customer GL's ANAD shares to cover the debit balance.

20. Harbor's procedures during the Relevant Period required Newkirk to send to his branch office supervisor a daily blotter reflecting a list of each check received for deposit into customer accounts and forwarded to Raymond James & Associates, Inc. for deposit.

21. Newkirk did not forward to his branch office supervisor a copy of the \$4,000 check he entered in the Checks in Transit system on July 14, 2008 for deposit into the Customer GL account or a daily blotter reflecting its deposit.

22. Newkirk did not forward to his branch office supervisor a copy of the \$4,000 check he forwarded to Raymond James & Associates, Inc. for deposit into Customer GL's account on August 8, 2008 or a daily blotter reflecting its deposit.

23. Newkirk never provided funds to Harbor, Raymond James & Associates, Inc. or to Customer GL to cover the purchase of 1,000 shares of ANAD in Customer GL's Harbor account.

24. The conversion of funds demonstrated by the acts, practices and conduct described above constitute a violation of NASD Rules 2330(a) and 2110.

SECOND CAUSE OF ACTION
Conversion of Customer Funds
Violation of NASD Rules 2330(a) and 2110

25. The allegations in paragraphs one through 24 above are realleged and incorporated by reference.

26. On or about July 2007, Customer GS opened a brokerage account with the Firm. Newkirk was the registered representative responsible for Customer GS's account.

27. On or about August 28, 2008, Customer GS passed away.

28. Shortly thereafter, Newkirk met with Customer GS's daughter, BB, who presented Newkirk with a dividend check issued by Raymond James & Associates, Inc. in the amount of \$550 made payable to Customer GS (the "Customer GS Check"). The Customer GS check was dated September 4, 2008.

29. BB gave the Customer GS Check to Newkirk and requested that the funds be re-deposited into her mother's Firm account.

30. The Customer GS check was not endorsed at the time it was presented to Newkirk.

31. On or about September 12, 2008, the Customer GS Check was deposited into an account held at US Bank (the "US Bank Account").

32. The Customer GS Check deposited into the US Bank Account bore two endorsements on the back. The first was the signed name of Customer GS. The second was the signature of "John Newkirk." The back of the Customer GS Check also bore the notation, "pay to Newkirk Rentals."

33. Newkirk Rentals was another of Respondent's approved outside businesses.

34. Newkirk never provided funds to Harbor, Raymond James & Associates, Inc. or to Customer GS' estate to repay the \$550 he converted.

35. The conversion of funds demonstrated by the acts, practices and conduct described above constitute a violation of NASD Rules 2330(a) and 2110.

**THIRD CAUSE OF ACTION
Presenting False Account Document to Firm Customer
Violation of NASD Rule 2110**

36. The allegations in paragraphs one through 34 above are realleged and incorporated by reference.

37. Newkirk ended his employment with LPL on May 16, 2007 and commenced his employment with Harbor on June 25, 2007.

38. On or about June 4, 2007, EH met with Respondent to discuss opening a brokerage account at the Firm. EH was not a Firm customer at that time.

39. During their conversations, EH informed Respondent that he would transfer approximately \$71,400 presently held with Brokerage ABC in his former employer's retirement plan to fund the new Firm account. EH further informed

Respondent that he wished to receive monthly payments of approximately \$2,000 from the new Firm account to meet his living expenses.

40. Respondent directed EH to have Brokerage ABC issue a check for the total of his retirement savings made payable, not to Raymond James & Associates, Inc. or Harbor, but to Newkirk Financial Services. This was contrary to Harbor's policies and procedures regarding funds for deposit into Harbor accounts.

41. Respondent further advised EH that Harbor was occasionally late in issuing monthly payments and offered to make payments to EH from Newkirk's personal accounts with the understanding that Newkirk would replace the funds he paid to EH on a monthly basis with withdrawals from EH's new Firm account. EH agreed to this arrangement.

42. On or about June 6, 2007 Brokerage ABC issued a check in the amount of \$71,407.27 payable to Newkirk Financial Services. This check was forwarded to EH who then delivered it to Respondent.

43. At the time he received the \$71,407.27 check, Newkirk was not employed by a FINRA member firm, was not registered with FINRA and Newkirk Financial Services was not a Harbor branch office.

44. On or about June 25, 2007, the first day of Newkirk's employment with Harbor, EH completed a Harbor Financial Traditional Individual Retirement Account application, which Newkirk submitted to the Firm and which was subsequently approved by the Firm (the "EH IRA Account"). EH became a customer of the Firm on or about this date.

45. The EH IRA Account was never funded and no purchases or sales of securities were effected therein. The EH IRA Account was closed in May 2008 due to inactivity. Neither Raymond James & Associates, Inc. nor Harbor ever generated nor issued account statements for the EH IRA Account.

46. From in or about July 2007 through September 2008, EH received monthly checks from Newkirk typically in the amount of \$2,000. At least one of these monthly checks was drawn on US Bank from an account entitled "Newkirk Financial Services and John M. Newkirk, Jr." (the "US Bank Account")

47. From in or about July 2007 through September 2008, EH received from Respondent approximately \$30,000 via 15 monthly payments as described above.

48. On or about October 30, 2008, EH received a check drawn on the US Bank Account in the amount of \$1,500. EH deposited the check which was returned for insufficient funds. This was the last check EH received from Respondent.

49. On one occasion in or about October 2007, a check received by EH from Newkirk was accompanied by a document similar to an account statement. The one-page document was on Harbor letterhead and entitled "[EH] IRA Portfolio Value." The document further listed EH's "American Funds Value as of 10/1/2007" and identified three funds in which his monies were purportedly invested (the "Fictitious Account Recap").

50. The Fictitious Account Recap was not issued by Harbor or Raymond James & Associates, Inc.

51. The Fictitious Account Recap was a false account document presented by Respondent to EH.

52. The presentation of a false account document to a Firm customer demonstrated by the acts, practices and conduct described above constitute a violation of NASD Rule 2110.

**FOURTH CAUSE OF ACTION
Failure to Respond
Violations of FINRA Rules 8210 and 2010**

53. The allegations in paragraphs one through 51 above are realleged and incorporated by reference.

54. On February 19, 2009, Enforcement forwarded a FINRA Rule 8210 request letter to Newkirk at his last known address as listed on CRD by certified mail, return receipt requested, and by first class mail requesting that he provide a signed written statement and certain additional information regarding the circumstances of his termination from Harbor (the "February 19, 2009 Letter").

55. The certified mail receipt for the February 19, 2009 Letter bearing Newkirk's signature was returned to Enforcement on or about February 27, 2009. The copy of the February 19, 2009 Letter sent by first class mail has not been returned to Enforcement.

56. To date, Newkirk has not responded to the February 19, 2009 Letter.

57. On March 11, 2009, Enforcement sent a second FINRA Rule 8210 request letter to Newkirk at his last known address as listed on CRD by certified mail, return receipt requested, and by first class mail repeating the request set forth in the February 19, 2009 Letter (the "March 11, 2009 Letter").

58. The certified mail receipt for the March 11, 2009 Letter bearing Newkirk's signature was returned to Enforcement on or about April 3, 2009. The copy of the March 11, 2009 Letter sent by first class mail has not been returned to Enforcement.

59. To date, Newkirk has not responded to the March 11, 2009 Letter.

60. On March 12, 2009, Enforcement sent a FINRA Rule 8210 request letter to Newkirk at his last known address as listed on CRD by certified mail, return receipt requested, and by first class mail directing Newkirk to appear for testimony under oath at the Department of Enforcement's 14 Wall Street, New York office on April 2, 2009 (the "March 12, 2009 Letter").

61. The certified mail receipt for the March 12, 2009 Letter bearing Newkirk's signature was returned to Enforcement on or about April 3, 2009. The copy of the March 12, 2009 Letter sent by first class mail has not been returned to Enforcement.

62. Newkirk did not appear and give testimony on April 2, 2009.

63. The acts, practices and conduct described above demonstrate Respondent's failure to cooperate with this investigation and constitute violations of FINRA Rules 8210 and 2010.

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), including monetary sanctions be imposed.
- B. order that the Respondent bear such costs of proceedings as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: January 22, 2010

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