

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL A. NEMCIK
(CRD No. 5405918),

Respondent.

Disciplinary Proceeding
No. 2009017374501

Hearing Officer – LBB

DEFAULT DECISION

October 11, 2010

Respondent Michael A. Nemcik is barred for failure to provide information, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010. In light of the bar, no additional sanction is imposed for executing an unauthorized trade in a customer's account, in violation of FINRA Conduct Rule 2010.

Appearances

Mark J. Fernandez, Esq., Senior Regional Counsel, New Orleans, Louisiana, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

The Department of Enforcement filed the Complaint in this disciplinary proceeding on May 12, 2010, asserting two causes of action against Respondent Michael A. Nemcik ("Respondent"). The First Cause of Action charges Respondent with executing an unauthorized trade in a customer's account, in violation of FINRA Conduct Rule 2010. The Second Cause of Action charges Respondent with failure to provide information, in violation FINRA Procedural Rule 8210 and Conduct Rule 2010. Despite being properly served with the Complaint, Notice of

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Complaint, and Second Notice of Complaint, Respondent has not filed an answer or otherwise responded to the Complaint.

On August 11, 2010, Enforcement filed a Motion for Entry of Default Decision, to which Respondent did not respond. Accordingly, pursuant to Procedural Rules 9215(f) and 9269, the allegations in the Complaint will be deemed admitted and Enforcement's motion will be granted.¹

I. Respondent's Default

On May 12, 2010, Enforcement served the Complaint and Notice of Complaint on Respondent by first-class and certified mail at his residential address, as listed in the Central Registration Depository ("CRD"). Decl. ¶ 9; DX-1, DX-4. The Notice of Complaint informed Respondent that his answer to the Complaint was required to be filed by June 9, 2010. Decl. ¶ 11; DX-4. The mailings were returned to FINRA by the Postal Service marked, "Return to Sender – Not Deliverable as Addressed, Unable to Forward." Decl. ¶ 10; DX-4. Respondent did not answer or otherwise respond to the Complaint. Decl. ¶ 12.

On June 14, 2010, Enforcement served the Complaint and Second Notice of Complaint on Respondent by certified and first-class mail at his CRD address. Decl. ¶ 13. The Second Notice of Complaint informed Respondent that he was required to respond to the Complaint by July 1, 2010. Decl. ¶ 15; DX-6. The mailings were returned to FINRA by the Postal Service, marked "Return to Sender – Not Deliverable as Addressed, Unable to Forward." Decl. ¶ 14; DX-7. Respondent has not answered or otherwise responded to the Complaint. Decl. ¶¶ 16, 17.

¹ The factual determinations in this decision are based on the allegations of the attached Complaint and the materials Enforcement filed with its default motion, which included the Declaration Supporting Motion for Entry of Default Decision, and supporting documentation that was attached to counsel's declaration. Counsel's declaration is cited herein as "Decl. ¶ ____." The supporting documentation was marked by Enforcement as "DX-____," and is cited herein as "DX-____."

Enforcement served the Complaint and the Notices of Complaint on Respondent in accordance with Procedural Rule 9134, giving him constructive notice of this proceeding.² By failing to respond, he defaulted.

II. Jurisdiction

Respondent entered the securities industry with a FINRA member firm in 2007, and moved to member firm Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill Lynch”) on June 30, 2008. He was registered through Merrill Lynch from July 1, 2008, until his employment with Merrill Lynch was terminated in February 2009. On March 12, 2009, Merrill Lynch filed a Uniform Termination Notice for Securities Industry Registration (Form U5), reporting the termination of Respondent’s employment for exercising discretion in a client’s account. Respondent has not been registered with a FINRA member firm since the termination of his employment with Merrill Lynch. Decl. ¶¶ 6 – 8; DX-1.

Although Respondent is not registered with a FINRA member 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. Unauthorized Trading

The First Cause of Action alleges that Respondent executed an unauthorized trade in the account of customer S.G. Unauthorized trading is a “serious breach of the duty to observe high

² Staff does not have actual knowledge of any other addresses or places of employment for Respondent. Enforcement conducted searches on the Lexis-Nexis database for a more current address than that listed in CRD, but did not find one. Motion at 2; Decl. ¶¶ 19 – 20.

standards of commercial honor and just and equitable principles of trade,” and violates Rule 2010.³

S.G. opened an IRA account with Merrill Lynch on June 2, 2004. The account was initially serviced by Merrill Lynch representative J.O. Following J.O.’s departure from Merrill Lynch, the account was assigned to Nemcik. On February 12, 2009, Respondent executed an \$8,000 purchase of shares of the Dreyfus Total Return Advantage Fund for S.G.’s account, using S.G.’s money market fund. Respondent did not have discretionary trading authority, and had never met, spoken to, or corresponded with S.G. prior to executing the transaction. He had tried but failed to contact S.G., and merely assumed that she would consent to the transaction when he was able to contact her.

The allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Nemcik made an unauthorized transaction in S.G.’s account, and thereby violated Conduct Rule 2010.

B. Respondent Failed to Respond to Requests for Information, in Violation of FINRA Procedural Rule 8210 and Conduct Rule 2010

The Second Cause of Action charges Respondent with failure to respond to requests for information that were issued pursuant to FINRA Rule 8210. On April 1, 2009, pursuant to Rule 8210, FINRA Staff sent a letter to Respondent, requesting that he provide a signed statement responding to the allegations in the Form U5 that he had exercised discretion in a client’s account. On April 27, 2009, FINRA Staff received a signed letter from Respondent, stating, “The allegations made that I, Michael A. Nemcik[,] exercised discretion in a clients [sic] account are true.”

³ *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (citation omitted); *Dep’t of Enforcement v. Wiard*, No. C8A030078, 2005 NASD Discip. LEXIS 45, at *8 (N.A.C. Oct. 18, 2005).

On July 7, 2009, pursuant to Rule 8210, Staff sent a letter to Respondent requesting additional information concerning the transaction in S.G.'s account and general information about his dealings with S.G. The letter was sent by first-class and certified mail to Respondent at his CRD address. Both mailings were returned to the FINRA office by the Postal Service, and Respondent did not respond to the request.

FINRA Staff sent a request for information to Respondent on July 24, 2009, pursuant to Rule 8210, repeating the requests in the letter of July 7. The mailings were again sent to Respondent at his CRD address by first-class and certified mail, and returned to FINRA by the Postal Service. Staff searched the Lexis-Nexis service for a more recent address, but did not find one.

On August 18, 2009, FINRA Staff again sent a request for information to Respondent, pursuant to Rule 8210, by first-class and certified mail, reiterating the requests in the July 7 request. The mailings were returned to FINRA by the Postal Service, and Respondent did not respond.

All of 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 FINRA Rule 8210. These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent failed to respond to requests for information, in violation of FINRA Procedural Rule 8210. A violation FINRA Rule 8210 is also a violation of FINRA Conduct Rule 2010.⁴

⁴ *Dep't of Enforcement v. Hooper*, No. C02000037, 2001 NASD Discip. LEXIS 37, at *5 (N.A.C. Nov. 2, 2001) (violation of NASD Procedural Rule 8210 was a violation of NASD Conduct Rule 2110).

IV. Sanctions

A. Unauthorized Trading

For executing an unauthorized transaction in a client's account, the FINRA Sanction Guidelines recommend a fine of \$5,000 to \$75,000 and a suspension of 10 business days to one year. The principal considerations are whether respondent misunderstood his authority or the terms of the customer's orders, and whether the unauthorized trading was egregious. *FINRA Sanction Guidelines* at 103 (2007) ("Sanction Guidelines").

Enforcement recommends a fine of \$5,000 and a suspension of 10 business days, the lowest sanction recommended by the Sanction Guidelines, characterizing the violation as serious but not egregious. Enforcement's recommended sanction is too low. While Respondent executed only a single unauthorized transaction, he had never communicated with S.G., and therefore knew that he did not have authority to execute the transaction. A suspension of six months is more appropriate, in addition to the fine of \$5,000. In light of the bar for failure to respond to requests for information, however, no additional sanction is imposed for unauthorized trading.⁵

B. Failure to Respond to Requests for Information

The Sanction Guidelines recommend a bar where a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210. *Sanction Guidelines* at 35. Where mitigation exists, the Sanction Guidelines recommend consideration of a suspension in all capacities of up to two years.

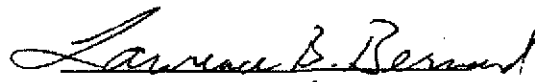
There are no mitigating factors that would justify imposition of a lesser sanction. Respondent's response to the first request for information is not a mitigating factor with respect

⁵ Enforcement has not requested restitution. Because Merrill Lynch reimbursed S.G. for the losses that resulted from Respondent's violation, restitution is not appropriate.

his failure to respond to the subsequent requests, which requested additional information about his dealings with S.G. A bar is the appropriate sanction under the facts and circumstances of this case for Respondent's violations of FINRA Procedural Rule 8210 and Conduct Rule 2010.

V. Conclusion

Respondent is barred from associating with any member firm in any capacity for failure to provide information, in violation of FINRA Procedural Rules 8210 and FINRA Conduct Rule 2010. In light of the bar, no additional sanction is imposed for executing an unauthorized trade in a customer's account, in violation of FINRA Conduct Rule 2010. The bar will become effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding.


Lawrence B. Bernard
Hearing Officer

Copies to: Michael A. Nemcik (*via overnight courier and first-class mail*)
Mark J. Fernandez, Esq. (*via first-class and electronic mail*)
Mark P. 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.

Michael A. Nemcik
(CRD No. 5405918),

Respondent.

DISCIPLINARY PROCEEDING

No. 2009017374501

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. On February 12, 2009, while Respondent Michael A. Nemcik (hereinafter, "Respondent" or "Nemcik") was registered with FINRA as a General Securities Representative through an association with member firm Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), he executed a purchase of \$8,000 of shares in the Dreyfus Total Return Advantage Fund in the account of Merrill Lynch customer SG without her knowledge or consent, in violation of FINRA Rule 2010.
2. Nemcik also failed to respond to requests for information sent to him pursuant to FINRA Rule 8210 by FINRA District 5 Member Regulation staff ("District 5 Staff") on July 7, 2009, July 24, 2009, and August 18, 2009. District 5 Staff's requests sought information about Nemcik's dealings with SG in general and additional details about the February 12, 2009 unauthorized purchase that Nemcik did not provide in

the April 22, 2009 statement he provided to FINRA. By failing to respond to District 5 Staff's requests for information, Nemcik violated FINRA Rules 8210 and 2010.

RESPONDENT AND JURISDICTION

3. Nemcik was associated with a FINRA member and registered with FINRA as an Investment Company/ Variable Contracts Products Representative from September 24, 2007 through February 18, 2009. He also was registered with FINRA as a General Securities Representative from June 17, 2008 through February 18, 2009.
4. Nemcik has not been associated with a FINRA member since February 18, 2009.
5. Nemcik 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 is filed within two years of the date on which he was last associated with a FINRA member.

FIRST CAUSE OF ACTION

(Unauthorized Transaction in a Customer Account)

6. The Department realleges and incorporates by reference paragraphs 1 through 5 above.
7. SG opened an Individual Retirement Account ("IRA") with Merrill Lynch on June 2, 2004 (hereinafter, "the Account"). The Account was initially serviced by Merrill Lynch General Securities Representative JO. Following JO's departure from Merrill Lynch in September 2008, Nemcik was assigned as broker for the Account.

8. On February 12, 2009, Nemcik executed in the Account a purchase of \$8,000 of shares in the Dreyfus Total Return Advantage Fund. The purchase was funded with available money market funds.
9. SG had never granted Nemcik discretionary trading authority, and she did not authorize him to purchase shares in the Dreyfus Total Return Advantage Fund. Indeed, before executing the February 12, 2009 purchase, Nemcik had never met, spoken to, or corresponded with SG.
10. By executing the purchase of shares in the Dreyfus Total Return Advantage Fund without SG's knowledge or consent, Nemcik violated FINRA Rule 2010.

SECOND CAUSE OF ACTION

(Failure to Respond to a FINRA Rule 8210 Request for Information)

11. The Department realleges and incorporates by reference paragraphs 1 through 10 above.
12. On February 18, 2009, SG sent an email to Nemcik's Merrill Lynch supervisor, SF, alleging that Nemcik had executed the February 12, 2009 purchase in the Account without her knowledge or permission.
13. On March 12, 2008, FINRA received a Form U5 from Merrill Lynch reporting that:
"Nemcik's employment was terminated on February 18, 2009 after the firm concluded that he exercised discretion in a client's account."
14. On April 1, 2009, FINRA Preliminary Investigative Unit staff ("PIU Staff") sent a letter to Nemcik requesting, pursuant to FINRA Rule 8210, that he provide a signed

statement responding to the allegation in the Form U5 that he exercised discretion in a client's account. The letter requested a response by May 1, 2009. The letter was addressed to Nemcik at his most recent residential address as reflected in the records of the Central Registration Depository: [REDACTED]

[REDACTED] (hereinafter, "CRD Address"). The letter was sent via first class mail and certified mail, return receipt requested.

15. On or about April 27, 2009, PIU Staff received a letter from Nemcik, dated April 22, 2009 and signed by him, stating, in pertinent part: "The allegations made that I, Michael A. Nemcik[,] exercised discretion in a clients [sic] account are true."
16. On June 12, 2009, PIU Staff referred the case to District 5 Staff for further investigation.
17. On July 7, 2009, District 5 Staff sent a letter Nemcik requesting, pursuant to FINRA Rule 8210, that he provide additional information concerning the transaction at issue and information about his dealings with SG in general. The letter requested that Nemcik respond by July 21, 2009. The letter was addressed to Nemcik at the CRD Address and sent via first class mail and certified mail, return receipt requested. The certified mailing was returned to the District 5 office on July 30, 2009, marked "Unclaimed." The first class mailing was returned to the District 5 office on August 31, 2009, marked "Return to Sender – Not Deliverable as Addressed – Unable to Forward."
18. On July 24, 2009, District 5 Staff sent a second letter to Nemcik, reiterating the July 7, 2009 request for information and directing Nemcik to respond by August 7, 2009. The letter was addressed to Nemcik at the CRD Address and sent via first class mail

and certified mail, return receipt requested. The certified mailing was returned to the District 5 office on August 17, 2009, marked "Unclaimed." The first class mailing was returned to the District 5 office on August 31, 2009, marked "Return to Sender – Not Deliverable as Addressed – Unable to Forward."

19. On July 31, 2009, District 5 Staff conducted a search on Lexis-Nexis for a more recent residential address for Nemcik, but none more recent than the CRD Address was found.
20. On August 18, 2009, District 5 Staff sent a third letter to Nemcik, reiterating the July 7, 2009 request for information and directing Nemcik to respond by September 1, 2009. The letter was addressed to Nemcik at the CRD Address and sent via first class mail and certified mail, return receipt requested. The first class mailing was returned to the District 5 office on August 31, 2009, marked "Return to Sender – Not Deliverable as Addressed – Unable to Forward." The certified mailing was returned to the District 5 office on September 10, 2009, marked "Unclaimed."
21. To date, District 5 Staff has received no response from Nemcik to its July 7, 2009, July 24, 2009, and August 18, 2009 letters.
22. By failing to respond to requests for information made pursuant to FINRA Rule 8210 by District 5 Staff, Nemcik violated FINRA Rules 8210 and 2010.

RELIEF REQUESTED

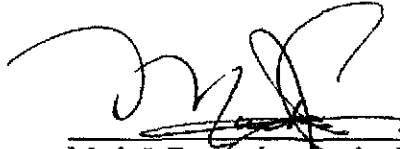
WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed.

B. order that Respondent Michael A. Nemcik 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: May 12, 2010



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