

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT DURANT TUCKER
(CRD No. 1725356),

Respondent.

Disciplinary Proceeding
No. 2012034923001

Hearing Officer - MC

DEFAULT DECISION

December 27, 2013

Respondent is barred from associating with any FINRA member firm in any capacity for (i) making misrepresentations and omissions of material fact in connection with the sale of a purported security, in violation of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and FINRA Rules 2020 and 2010; and (ii) converting customer funds, in violation of FINRA Rules 2150 and 2010.

Appearances

Lynn M. Rider, Esq., and Lara Thyagarajan, Esq., New York, NY, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

I. Background

Respondent Robert Durant Tucker made misrepresentations and omissions of material facts when he induced a customer to invest in what he represented was a security related to a business venture. Tucker did not invest the customer's funds in the security he described. Instead, Tucker used the customer's funds to pay bills for a failing business in which Tucker had an interest, and for personal expenses.

The Department of Enforcement filed and served the attached four-cause Complaint upon Tucker on June 21, 2013. Tucker did not file an Answer or otherwise respond to the Complaint. Consequently, Enforcement filed and served a Second Notice of Complaint. Because it, too, went unanswered, Enforcement filed a Motion for Entry of Default and Imposition of Sanctions ("Default Motion") supported by the Declaration of Walter Naeder, Esq., and seven exhibits.

Tucker's failure to file an Answer to the Complaint constitutes a default.¹ Accordingly, for the reasons set forth below, Enforcement's Default Motion is granted.²

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Tucker first became registered with FINRA in October 1991. Since then, he has been registered through 26 member firms. During the period relevant to this matter, between January 13, 2010, and November 29, 2012, Tucker was registered with FINRA member firm ICM Capital Markets Ltd. ("ICM").³ Tucker was registered as a corporate securities representative with another FINRA member firm until March 18, 2013, when that firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U5").⁴ Tucker is no longer registered or associated with a FINRA member firm. However, FINRA retains jurisdiction over him for the purposes of this disciplinary proceeding because Enforcement filed the Complaint less than two years after the effective date of the termination of his registration with his last

¹ *Dep't of Enforcement v. Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003).

² The factual determinations in this Decision are based on the allegations in the Complaint, which are deemed admitted pursuant to FINRA Rule 9269(a)(2), Enforcement's Default Motion, the Declaration of Walter Naeder, Esq. ("Naeder Decl."), and Enforcement's exhibits CX-1 through CX-7.

³ ICM is now known as Lampert Capital Market, Inc. Compl. ¶¶ 1, 4-5.

⁴ Compl. ¶ 6.

employer firm, and the misconduct described in the Complaint occurred while he was registered.⁵

B. Respondent Defaulted

Enforcement served the Complaint and Notice of Complaint on Tucker by certified and first-class mail on June 21, 2013, at Tucker's residential address, a New York City apartment, shown in FINRA's Central Registration Depository ("CRD address").⁶ Enforcement received the receipt for the certified mailing with a signature and the descriptor "doorman."⁷ Tucker did not file an Answer or respond in any way to the Complaint.⁸

Enforcement served the Complaint and Second Notice of Complaint on Tucker by certified and first-class mail at the CRD address on July 22, 2013. Once again, Enforcement received the receipt for the certified mailing with a signature and the descriptor "doorman." Tucker failed to file an Answer or respond in any way to the Complaint.⁹

An e-mail Tucker sent to Enforcement on the deadline for filing an Answer confirms that Tucker received actual notice of the Complaint. In the e-mail, dated August 8, 2013, Tucker requested an extension of the deadline. Tucker gave illness as the reason for his need for the extension. Enforcement forwarded the request to the Office of Hearing Officers. The Hearing Officer directed Tucker to file, by August 18, a Motion for Extension to File Answer. Tucker did not do so. A telephonic pre-hearing conference was scheduled for August 29. Tucker failed to

⁵ Compl. ¶ 7; FINRA By-Laws, Article V, Section 4.

⁶ Naeder Decl. ¶¶ 7, 9.

⁷ *Id.* at ¶ 10.

⁸ *Id.* at ¶ 13.

⁹ *Id.* at ¶¶ 14-17.

appear for it. The Hearing Officer directed Tucker to provide a status report on the state of his health by September 5. Tucker failed to do so.¹⁰

Enforcement complied with FINRA Rule 9134 by mailing the Complaint and Notices of Complaint to Tucker's CRD address, thereby giving him constructive notice of this proceeding. In addition, Tucker received actual notice. By failing to file an Answer, Tucker defaulted. Accordingly, pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

C. Securities Fraud – Cause One

On November 29, 2012, after Tucker left ICM, the firm filed a Form U5, which disclosed that a customer had contacted ICM to ask about an investment the customer made by wiring funds to Tucker. ICM knew nothing about the investment.¹¹ FINRA staff followed up by obtaining documents and information from Tucker, ICM, and the customer to investigate whether Tucker had violated any FINRA rules or securities laws.¹²

FINRA's investigation revealed that in July 2010, the customer, DY, opened a brokerage account with ICM and the firm assigned Tucker to the account.¹³

In November 2011, Tucker submitted an Outside Business Activities Form to ICM disclosing that he was the president of an entity known as Lenox Pizzeria LLC ("Lenox"), which

¹⁰ Naeder Decl. ¶¶ 18-21. Tucker has a history of postponing disciplinary proceedings by claiming ill-health. In 2009, he failed to appear at a hearing on the scheduled date, having checked into a hospital emergency room the night before, complaining of chest pains. He was given an aspirin and was released that night; the hearing was adjourned for two months. In 2012, Tucker claimed to become ill when he arrived at FINRA's offices on the morning of another scheduled hearing. He called an ambulance. He was discharged from the hospital the same day with no restrictions. The day before his scheduled oral argument before the National Adjudicatory Council, he notified FINRA that he was unable to attend because he was ill and on his way to the hospital. The NAC proceeded with the argument but left the record open to allow him to participate by telephone on a later date if he provided evidence of the medical condition that made him unable to be present. Tucker did not provide the evidence. The NAC deemed Tucker to have abandoned his request for oral argument. *Id.* at ¶¶ 22-25.

¹¹ *Id.* at ¶ 6.

¹² *Id.* at ¶¶ 27-28.

¹³ *Id.* at ¶ 29.

operates a pizza parlor in New York City. Tucker held a one-third ownership interest in the business. Lenox had a business checking account at a bank. Tucker was an authorized signatory on the account and used a debit card to withdraw cash from it. At the beginning of May 2012, Lenox's account had a negative balance. Lenox owed \$27,000 in overdue rent to the pizzeria's landlord.¹⁴

In May 2012, Tucker recommended that customer DY invest \$33,400 in a security. In a phone call on May 18, 2012, Tucker made a number of material misrepresentations about the security to DY. Tucker told DY that the security was being issued to raise funds for a business venture of a well-known celebrity chef and entrepreneur opening a restaurant in Atlantic City, New Jersey. Tucker represented that DY's investment would earn between 8 and 11 percent interest annually and would mature in two years. Tucker's representations about the security were false.¹⁵

Tucker failed to disclose numerous material facts to DY. Tucker did not disclose that he would deposit DY's investment of \$33,400 into a bank account Tucker controlled, that he would use DY's funds to pay Lenox's and his own personal expenses, and that Lenox was in financial trouble with a negative bank account balance.¹⁶

DY, relying on Tucker's representations, agreed to invest \$33,400 in the security for the celebrity chef's new venture. On May 18, 2012, Tucker faxed a document to DY at his business in North Carolina and instructed DY to sign it. The document authorized ICM's clearing firm to transfer \$33,400 from DY's ICM brokerage account to Lenox's bank account. DY signed the

¹⁴ Naeder Decl. ¶¶ 30-32.

¹⁵ *Id.* at ¶ 33.

¹⁶ *Id.* at ¶ 35. Tucker's debit card purchases with DY's funds included \$12.50 payable to FINRA. *Id.* at ¶ 44(b).

document and faxed it to Tucker. ICM refused to transfer the funds because it does not execute third party wires.¹⁷

Tucker then told DY to instruct ICM to transfer the funds from DY's brokerage account to DY's personal bank account. DY prepared and signed revised instructions and faxed them to Tucker, who then sent the instructions to ICM's clearing firm. On May 22, 2012, ICM's clearing firm executed the revised instructions. DY then authorized his bank to wire the funds to the Lenox account. Tucker told DY that this was the account for the restaurant sponsored by the celebrity chef.

The funds were deposited into the Lenox account. Over the next two months, Tucker spent the funds. He used \$27,000 to pay overdue rent to Lenox's landlord. He also made a series of cash withdrawals and debit purchases with the account's ATM card. The Lenox account balance was negative by the end of July 2012. DY did not authorize Tucker to use his funds for his personal and business expenses. Even though DY subsequently made a demand for the return of his money, Tucker has not returned any of it.¹⁸

Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5, prohibit misrepresentations and omissions of material fact in the offer or sale of securities. FINRA Rule 2020, an anti-fraud provision, bars members from inducing the "purchase or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance." In this case, Tucker made false representations of material fact, and failed to disclose material facts, to induce DY to invest in a security. One of the false representations was that the security existed. It is a species of securities fraud to represent something as a security when it is not.¹⁹

¹⁷ Naeder Decl. ¶¶ 36-37.

¹⁸ *Id.* at ¶¶ 42-46.

¹⁹ *SEC v. Lauer*, 52 F.3d 667, 670-71 (7th Cir. 1995).

By selling a nonexistent security to DY, Tucker committed securities fraud.²⁰ Tucker's misconduct contained all of the elements required to prove securities fraud. Tucker made the misrepresentations and omissions of material facts to DY in connection with the sale of what he represented was a security. He resorted to the instrumentalities of interstate commerce to perpetrate his fraud, using faxes, wire transfers, and telephone calls to DY. The misrepresentations and omissions he made, and the use to which he put DY's invested funds, were deliberate and knowing, and therefore reflect scienter, the required intent to deceive.²¹ These facts establish that Tucker willfully violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and FINRA Rules 2020 and 2010, as charged in the Complaint's first cause of action.

D. Conversion and Misuse of Customer Funds – Causes Two and Three

FINRA Rule 2150 states simply: "No member or person associated with a member shall make improper use of a customer's securities or funds." Tucker used DY's investment funds for business and personal expenses. DY did not authorize Tucker's misuse of the funds. DY has demanded return of the funds, but Tucker has not responded. Tucker's expenditures of DY's funds constituted conversion, which is "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."²² Thus, Tucker violated FINRA Rules 2150(a) and 2010, as charged in the Complaint's second and third causes of action.

E. Private Securities Transaction – Cause Four

NASD Rule 3040(a) prohibits members from participating "in any manner in a private securities transaction except in accordance" with requirements the Rule sets forth. Rule 3040(b)

²⁰ *SEC v. Gallard*, 1997 U.S. Dist. LEXIS 19677, at *8-9 (S.D.N.Y. Dec. 10, 1997).

²¹ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

²² *FINRA Sanction Guidelines* 36 (2011).

requires an associated person, prior to participating in a securities transaction outside the regular scope of the person's employment, to provide written notice to the member firm, detailing the proposed transaction and the person's role in it, and whether he has received or may receive selling compensation in connection with the transaction. Rule 3040(c) requires the associated person to obtain written permission from his member firm to receive selling compensation. If the firm approves, the Rule requires recordation of the securities transaction on the firm's books and records, and the firm must also supervise the associated person's participation in the transaction.

In this case, Tucker did not provide written notice to ICM about inducing DY to invest in a nonexistent security. The Complaint's fourth cause of action charges that Tucker therefore engaged in a private securities transaction in violation of NASD Rule 3040 and FINRA Rule 2010. Because Tucker committed securities fraud and converted customer funds, violations which call for the most serious sanctions, there is no need to determine whether, under the circumstances of this case and based upon the limited record available in the context of a default decision, Tucker's fraud and conversion also constituted participating in a private securities transaction that violated NASD Rule 3040.

III. Sanctions

Enforcement, noting the seriousness of Tucker's misconduct, recommends the imposition of a bar. Enforcement's assessment of Tucker's misconduct as egregious is accurate. Tucker made up a fictitious business venture out of whole cloth to steal money from a trusting customer in order to pay business and personal expenses. He used his registered status with a FINRA member firm as a license to steal. His conduct reveals him to be unfit to be a securities industry professional.

It is necessary also to note that this is not the first time Tucker has run afoul of the securities laws and regulations. The Sanction Guidelines require adjudicators to consider a respondent's disciplinary history, and to consider increasing the severity of sanctions when that history reflects similar misconduct in the past, or a disregard for regulatory requirements.²³ Tucker's disciplinary history shows prior misconduct similar in nature to the misconduct in this case, and clearly reflects his disregard for regulatory requirements. A Hearing Panel barred Tucker in January 2013 for improperly approving a wire transfer to himself from a customer account and for converting and commingling customer funds.²⁴ Prior to that, a Hearing Panel found that Tucker willfully failed to disclose tax liens, bankruptcy filings, and judgments on his Form U4. On appeal, the National Adjudicatory Council sustained the Hearing Panel's findings and imposed a suspension in all capacities for two years.²⁵ The SEC subsequently affirmed this decision.²⁶

For egregious misconduct involving misrepresentations or omissions of material fact, the Sanction Guidelines recommend a bar.²⁷ For conversion of customer funds, regardless of the amount, the Guidelines also call for a bar.²⁸ There are no apparent mitigating factors to be considered here. The only appropriate sanction for Tucker's egregious, recidivist misconduct is a bar.

²³ *Guidelines* at 4 (2011).

²⁴ *Dep't of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS 19 (O.H.O. Jan. 11, 2013). Tucker has an appeal pending before the National Adjudicatory Council.

²⁵ *Dep't of Enforcement v. Tucker*, No. 2007009981201, 2011 FINRA Discip. LEXIS 66 (N.A.C. Oct. 4, 2011), Exchange Act Rel. No. 68210, 2012 SEC LEXIS 3496 (Nov. 9, 2012).

²⁶ *Robert D. Tucker*, Exchange Act Rel. No. 68210, 2012 SEC LEXIS 3496 (Nov. 9, 2012). Tucker has petitioned the United States Court of Appeals for the Second Circuit to review this decision.

²⁷ *Guidelines* at 88.

²⁸ *Id.* at 36.

Therefore, Tucker is barred from associating with any FINRA member firm in any capacity for the violations alleged in the Complaint's first and second causes of action. Because the third cause of action is predicated on the same facts charged in the second cause of action, there is no need to impose an additional penalty for Tucker's misuse of customer funds.

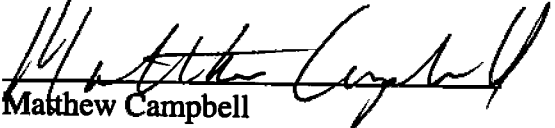
Because an identifiable person has suffered economic loss as a direct result of Tucker's misconduct, restitution is appropriate.²⁹

IV. Order

Respondent Robert Durant Tucker is barred from associating with any FINRA member firm in any capacity for (i) making misrepresentations and omissions of material fact in connection with the sale of a purported security, in violation of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and FINRA Rules 2020 and 2010, as charged in the Complaint's first cause of action; and (ii) converting customer funds, in violation of FINRA Rules 2150 and 2010, as charged in the Complaint's second cause of action.

Respondent shall also pay restitution to Customer DY in the amount of \$34,400 plus interest accruing from May 22, 2012, until paid. Interest shall be calculated at the rate set forth in the Internal Revenue Code at 26 U.S.C. 6621(a).³⁰

If this Decision becomes FINRA's final disciplinary action, the bars shall be effective immediately.


Matthew Campbell
Hearing Officer

²⁹ *Id.* at 4 (General Principle No. 5).

³⁰ The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. Customer DY is identified in the Addendum to this Decision, which is served only on the parties.

Copies to:

Robert Durant Tucker (*via overnight courier and first-class mail*)

Lynn M. Rider, Esq. (*via electronic and first-class mail*)

Lara Thyagarajan, Esq. (*via electronic mail*)

Jeffrey D. Pariser, Esq. (*via electronic mail*)