

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

GERALD STUART MILLER
(CRD No. 1087230),

Respondent.

Disciplinary Proceeding
No. C01050002

Hearing Officer – AWH

Default Decision

September 15, 2005

Formerly registered representative (1) converted customer funds, in violation of NASD Conduct Rules 2330 and 2110; and (2) failed to respond to NASD Staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent is barred from associating with any member firm in any capacity for each violation.

Appearances:

David A. Watson, Esq., and Jacqueline D. Whelan, Esq., for the Department of Enforcement.

No appearance for Gerald Stuart Miller.

DECISION

Background

On January 27, 2005, the Department of Enforcement filed the Complaint in this proceeding, alleging that Gerald Stuart Miller ("Miller" or "Respondent") converted the funds of three customers, in violation of NASD Conduct Rules 2110 and 2330, and failed to respond to staff requests for information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. Miller failed to answer the Complaint. He also failed to answer the Second Notice of Complaint and Complaint that Enforcement served on

February 28, 2005. Enforcement also sent another copy of the Notice of Complaint and Complaint on April 15, 2005, and then a Second Notice of Complaint and Complaint on May 18, 2005, to two other possible addresses for Respondent. Respondent failed to respond to either of those Notices. As a result, on July 15, 2005, Enforcement filed a Motion for Entry of Default Decision. Respondent did not respond to that Motion. Accordingly, pursuant to NASD Procedural Rules 9215(f) and 9269, the Motion will be granted, and the allegations in the Complaint, which is attached to this decision, will be deemed admitted.

Findings of Fact¹

The Respondent

From January 2, 2003, to June 21, 2004, Miller was associated with NASD member firm OneAmerica Securities, Inc. ("OneAmerica"). Miller was registered with OneAmerica as a General Securities Representative from January 15, 2003, until his registration was terminated on June 21, 2004. He is not currently associated with any NASD member firm.

Conversion of Customer Funds

On October 8, 2003, December 5, 2003, and January 25, 2004, Customer SZ gave Miller three checks totaling \$19,500, to be deposited to her two accounts at OneAmerica. The checks were made out to Miller who, contrary to SZ's instructions, deposited the checks to his own personal bank account. On April 26, 2004, Miller obtained a check in the amount of \$4,260 from SZ's employer. Although the funds were to be deposited to one of SZ's accounts at OneAmerica, the funds were not so deposited, and no record

¹ All findings of fact are based on the admitted allegations in the Complaint, the Declaration Supporting a Motion for Entry of Default Decision by David A. Watson ("Declaration"), and the nine exhibits attached thereto.

exists as to their use. On April 30, 2004, Miller reimbursed SZ \$37,827 for the funds that he had used.

On April 25, 2004, customer CC, who with KC had an account at OneAmerica, gave Miller a check for \$40,000, made out to Miller. The check was to be used to open a pension account at OneAmerica. However, instead of opening such an account, Miller deposited the check into his own personal bank account. On June 23, 2004, KC gave Miller a check for \$10,000 to purchase various mutual funds. The check was made out to Miller who deposited the check into his own personal bank account. This last misappropriation took place after Miller was terminated from OneAmerica, and is not the subject of this proceeding. OneAmerica settled the complaint of CC and KC by paying them \$50,048.90.

Failure to Respond to Requests for Information

On July 1 and July 16, 2004, the Staff sent Miller requests for certain documents and information related to the complaint of customer SZ. The requests were issued pursuant to Procedural Rule 8210 and were mailed to Miller's Central Registration Depository ("CRD") residential address by first class and certified mail. The first certified mailing was returned, marked "Unclaimed." The second certified mailing and both first class mailings were not returned.

On September 8, 2004, OneAmerica informed the Staff of a more current address for Miller in Bohemia, New York (the "Bohemia address").² As a result, on September 13, 2004, the Staff sent a third request for information related to the complaints of all three customers. The request was sent to Miller at both his CRD address and the Bohemia address, via first class and certified mail. While neither first class mailing was

² That address is listed as: [REDACTED]

returned, both certified mailings were returned, each indicating a forwarding address in Moriches, New York (the "Moriches address").³

On October 25, 2004, the Staff sent a fourth request for information to Miller via first class and certified mail to the CRD, Bohemia, and Moriches addresses. Only the copy sent by certified mail to the Moriches address was returned. It was marked "Unclaimed." Miller failed to respond to any of the requests for information.

Discussion and Conclusions

NASD Jurisdiction Over Formerly Registered Persons

Article V, Section 4 of the NASD By-Laws confers retained jurisdiction over a formerly registered person for a two-year period after the effective date of the termination of the person's registration. During this period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was registered with a member firm, or such person's failure to provide information requested pursuant to Procedural Rule 8210, if the request was made, and the complaint is filed, during the period of retained jurisdiction.

Miller was registered through OneAmerica from January 15, 2003, until June 21, 2004. Enforcement filed the Complaint on January 27, 2005, within two years of the termination of Miller's registration. The Complaint is based upon conduct that occurred while he was registered with a member firm, and failures to respond to information requested during the two-year period following the termination of his registration. Therefore, NASD has jurisdiction over this proceeding.

³ That address is listed as: [REDACTED]

Respondent's Default

Enforcement properly served the Complaint on Miller by sending it via first class and certified mail to his CRD address and his last known residential address. Pursuant to NASD Procedural Rule 9134, those mailings establish that he had valid constructive notice of the Complaint. Because Miller failed to respond to the Complaint, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint against Miller are deemed admitted.

Conversion and Misuse of Customer Funds

Conversion 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." NASD SANCTION GUIDELINES, p. 40 n.2 (2004 ed.). Conversion of customer funds constitutes an "improper use" of those funds, in violation of NASD Conduct Rule 2330(a), and violates Conduct Rule 2110's requirement of "high standards of commercial honor and just and equitable principles of trade." See *Dep't of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *8 (NAC Dec. 14, 1999).

Miller failed to deposit the checks of customers SZ and CC into their accounts, and, instead, used their funds for his personal use and benefit without the customers' knowledge, consent, or authorization. By doing so, Miller converted and misused customer funds in violation of NASD Conduct Rules 2110 and 2330.

Failure to Respond to NASD Requests for Information

Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and

allows NASD to carry out its regulatory functions without subpoena power. See *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information); *Dep't of Enforcement v. Benz*, No. C01020014, 2003 NASD Discip. LEXIS 11, at *18 (OHO Mar. 4, 2003) ("Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD's self-regulatory function."). When an individual fails to respond to information requests, NASD's ability to perform its regulatory responsibilities is subverted. *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998). Further, a violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110, contravening "high standards of commercial honor." *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC, Apr. 19, 2000).

Under Procedural Rule 8210, notice of a request for information is considered received if the request is mailed or otherwise transmitted to the person's last known CRD address and any other more current address known to the Staff. Because Enforcement mailed the requests to Miller's last known CRD address, the Bohemia address, and the Moriches address, Miller received valid constructive notice of the requests. Miller's failure to respond in any way to those requests for information violated Procedural Rule 8210 and Conduct Rule 2110.

Sanctions

The NASD Sanction Guidelines provide that a bar is the standard sanction for conversion, regardless of the amount of funds or securities converted. NASD SANCTION

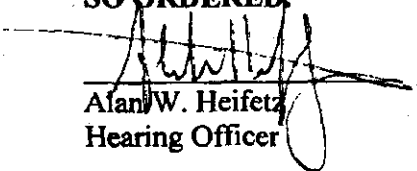
GUIDELINES, at p. 40 (2004 ed.). Here, there are no mitigating circumstances that would warrant a lesser sanction for conversion of the checks. Accordingly, Miller will be barred in all capacities for conversion of customer member funds.

For failure to respond to requests for information made pursuant to Rule 8210, NASD Sanction Guidelines provide that a bar is the standard sanction where the individual did not respond in any way. *Id.* at 37. Again, there are no mitigating circumstances that would warrant a lesser sanction. Accordingly, Miller will be barred in all capacities for failing to respond to requests for information made pursuant to Rule 8210.

Conclusion

Gerald Stuart Miller is barred from associating with any member firm in any capacity for conversion of customer funds, in violation of NASD Conduct Rules 2110 and 2330; and for failures to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Alan W. Heifetz
Hearing Officer

Copies to:
Via Overnight & First Class Mail
Gerald Stuart Miller

Via Electronic & First Class Mail
Jacqueline D. Whelan, Esq.
Rory C. Flynn, Esq.

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

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v.

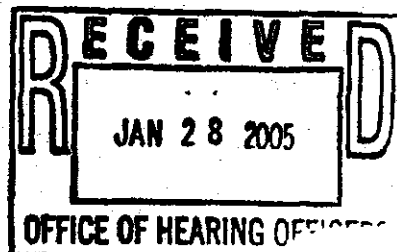
Gerald Stuart Miller,
(CRD No. 1087230)

Respondent.

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No. C01050002

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COMPLAINT



Upon information and belief, Complainant alleges as follows:

1. During the approximate period from January 2003 to June 21, 2004, Respondent Gerald Stuart Miller was associated with OneAmerica Securities, Inc. (OAS), a member of NASD. Respondent Miller was registered with NASD as a General Securities Principal until June 21, 2004. Pursuant to Article V, Section 4 of NASD's By-Laws, he remains subject to NASD jurisdiction for purposes of this Complaint.

FIRST CAUSE OF COMPLAINT
**(Conversion of Customer Funds – Violations
of Rules 2330 and 2110 by Respondent Miller)**

2. On or about October 8, 2003, Respondent Miller received a check from customer SZ in the amount of \$2,500 to be used for the purchase of securities at OAS. Rather than purchasing securities for SZ, Respondent Miller deposited the check to his own personal bank account.
3. On or about December 5, 2003, Respondent Miller received a check from customer SZ in the amount of \$3,500 to be deposited to her IRA account at OAS. Rather than deposit the check to SZ's IRA account, Respondent Miller deposited it to his personal bank account.

4. On or about January 25, 2004, Respondent Miller received a check from customer SZ in the amount of \$13,500. The funds were to be used for two purposes. \$10,000 was to be used by Respondent Miller to purchase securities at OAS. The remaining \$3,500 was to be deposited to SZ's IRA account at OAS. Rather than use the funds for those purposes, Respondent Miller deposited them to his personal bank account.

5. On or about April 27, 2004, at customer SZ's instruction, Respondent Miller obtained from her former employer a check for \$4,260 to be deposited to her IRA account at OAS. Respondent Miller obtained the check but did not deposit it to SZ's IRA account at OAS.

6. On or about April 25, 2004, Respondent Miller received a check for \$40,000 from customers KC and CC to establish a Simplified Employee Pension account at OAS. Rather than establishing such an account, Respondent Miller deposited the check to his personal bank account.

7. The foregoing acts, practices and conduct constitute separate and distinct violations of Rules 2330 and 2110 by Respondent Miller.

SECOND CAUSE OF COMPLAINT
(Failure to Provide Information to NASD –
Violations of Rules 8210 and 2110 by Respondent Miller)

8. On July 1, 2004, pursuant to and in accordance with Rule 8210, NASD requested that Respondent Miller provide NASD with information and documentation concerning SZ's customer complaint against Respondent Miller. A response was due no later than July 15, 2004.

9. The request was sent by regular first class and certified mail to Respondent Miller at [REDACTED]
[REDACTED] his last known address as reflected in the Central Registration

Depository (CRD Address). The request sent by regular first class mail was not returned. The request sent by certified mail was returned marked "Unclaimed."

10. NASD received no response from Respondent Miller to this request.

11. On July 16, 2004, pursuant to and in accordance with Rule 8210, NASD made a second request that Respondent Miller provide NASD with information and documentation concerning SZ's customer complaint against Respondent Miller. A response was due no later than July 30, 2004.

12. The second request was sent by regular first class and certified mail to Respondent Miller at his CRD Address. The request sent by regular first class mail was not returned. The request sent by certified mail was returned marked "Unclaimed."

13. NASD received no response from Respondent Miller to the second request.

14. On September 8, 2004, NASD contacted OAS to determine if OAS had a more current address for Respondent Miller. OAS provided NASD with a new address. That address is [REDACTED] (Bohemia Address).

15. On September 13, 2004, pursuant to and in accordance with Rule 8210, NASD made a third request that Respondent Miller provide NASD with information and documentation. This third request concerned SZ's customer complaint against Respondent Miller, as well as the complaint of customers KC and CC against Respondent Miller. A response was due no later than September 27, 2004.

16. The third request was sent by regular first class and certified mail to Respondent Miller at his CRD Address and the Bohemia Address.

17. The third request sent to the CRD Address by regular first class mail was not returned. The third request sent to the CRD Address by certified mail was returned. On that returned envelope the Postal Service provided the Bohemia Address as a forwarding address. However, that address was crossed out and the Postal Service indicated a new forwarding address of [REDACTED] (Moriches Address).

18. The third request sent to the Bohemia Address by regular first class mail was not returned. The third request sent to the Bohemia Address by certified mail was returned. It also contained as a forwarding address the Moriches Address.

19. NASD received no response from Respondent Miller to the third request.

20. On October 25, 2004, pursuant to and in accordance with Rule 8210, NASD made a fourth request that Respondent Miller provide NASD with information and documentation. The fourth request concerned SZ's customer complaint against Respondent Miller, as well as the complaint of customers KC and CC against Respondent Miller. A response was due no later than November 8, 2004.

21. The fourth request was sent by regular first class and certified mail to Respondent Miller at his CRD Address, the Bohemia Address and the Moriches Address.

22. The requests sent by regular first class and certified mail to the CRD Address and the Bohemia Address were not returned.

23. The request sent by regular first class mail to the Moriches Address was not returned. The request sent by certified mail to the Moriches Address was returned marked "Moved. Left No Address. Unclaimed."

24. NASD received no response from Respondent Miller to the fourth request.

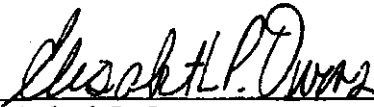
25. The foregoing acts, practices and conduct constitute separate and distinct violations of Rules 8210 and 2110 by Respondent Miller.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310;
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- D. An order imposing any other fitting sanction.

Date: January 27, 2005


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