

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

MICHAEL WAYNE GIBSON
(CRD No. 1501602),

Respondent.

Disciplinary Proceeding
No. C01050006

Hearing Officer – SNB

DEFAULT DECISION

September 28, 2005

For theft and embezzlement of customer funds, in violation of Rule 2110, and for failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity.

Appearances

Jacqueline D. Whelan, Esq., Regional Counsel, NASD, San Francisco, CA, and
Rory C. Flynn, Esq., of Counsel, Washington, DC, for the Department of Enforcement.

No appearance by Respondent.

DECISION

I. Background

On April 26, 2005, the Department of Enforcement ("Enforcement") filed a two-cause Complaint in this proceeding, attached as Exhibit A. The Complaint alleges that Respondent Michael Wayne Gibson ("Respondent") violated NASD Rule 2110 based upon his theft and embezzlement of customer funds. The Complaint also alleges that Respondent violated NASD Rules 8210 and 2110 by failing to respond to NASD Staff requests for information. Respondent did not file an Answer to the Complaint. On July 26, 2005, Enforcement filed a motion for a default decision, supported by the declaration

of David A. Watson, Esq. and three exhibits. Respondent did not reply to the Motion.

For the reasons set forth below, the Motion is granted.¹

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on April 25, 2005, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address").² In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to the same address on May 26, 2005.³ Respondent did not file an Answer to the Complaint.

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Therefore, pursuant to Rule 9215(f), the Hearing Officer deems the allegations in the Complaint admitted.

III. Jurisdiction

From July 25, 2002 to October 27, 2003, Respondent was registered with NASD member firm Round Hill Securities, Inc. ("Round Hill"). From May 9, 2003 to August 20, 2003, he was also registered with NASD member firm Avisen Securities, Inc. ("Avisen"). Respondent's registration with Round Hill was terminated on October 27, 2003, and his registration with Avisen was terminated on January 7, 2004. Respondent has not been registered since that time. On February 9, 2004, Avisen filed with NASD an

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, and the declaration and exhibits filed by Enforcement with its motion.

² The copy sent by certified mail was returned marked "unclaimed." The first class mailing was not returned.

³ Neither the copy sent by certified mail nor the return receipt for the certified mailing was returned. The first class mailing was not returned.

Amended Form U-5 which disclosed the issuance of a felony arrest warrant and an ongoing criminal investigation related to suspected embezzlement by the Respondent.

NASD has jurisdiction to bring this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws, because Enforcement filed the Complaint within two years after Respondent's registration terminated, and the Complaint alleges misconduct while he was registered with NASD.⁴

IV. Violations

A. Theft and Embezzlement

The Complaint alleges that during the period from approximately May 15, 2003 to September 29, 2003, Respondent committed a felony under the California penal code, based upon his theft and embezzlement of \$30,000 from an 89 year-old investor, JB.⁵ Respondent pled *nolo contendere*, and was convicted in the Superior Court of California, County of Sacramento on June 2, 2004.⁶

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent violated Rule 2110.

B. Failure to Respond

The Complaint also alleges that, on March 24 and on April 12, 2004, NASD Staff sent Respondent requests for information. The Staff sent these requests to Respondent at

⁴ Moreover, the running of the two-year jurisdictional period recommenced when Avisen filed an amended U-5 form revealing possible misconduct by Respondent within two years of his termination. NASD By-Laws, Art. V, § 4(a).

⁵ According to the Amended Form U-5 filed by Avisen, Respondent "convinced [JB] to issue three checks of \$10,000 each made payable to Michael Gibson towards an investment with potentially quick returns. The checks were promptly cashed. The Citrus Heights Police Dept. has verified from bank surveillance footage and bank records that the checks were cashed by Michael Gibson."

⁶ Under Section 1016 of the California Penal Code, a defendant's plea of *nolo contendere* to a felony has the same legal effect as a plea of guilty for all purposes. He was sentenced to 90 days in the Sacramento County Jail, four years probation and ordered to make restitution in the amount of \$30,000.

his CRD address by first class and certified mail.⁷ The Staff served the requests in accordance with Rule 8210(d), and therefore Respondent is deemed to have received them. Respondent did not respond to any of the requests for information.

Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information 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.⁸ Here, although Respondent received valid constructive notice of the Staff's requests,⁹ he failed to respond to them. Respondent thereby violated Rules 8210 and 2110.

V. Sanctions

For purposes of determining sanctions, conversion is analogous to theft and embezzlement. For conversion, the Sanction Guidelines recommend a bar, regardless of the amount converted. A bar is also standard for failure to provide requested information. NASD Sanction Guidelines at 35, 38 (2005 ed.). There is no evidence of any mitigating circumstances that would justify a lesser sanction in this case for either violation; therefore Respondent is barred from associating with any NASD member in any capacity.

⁷ Neither request sent by first class mail was returned, but both requests sent by certified mail were returned marked "Unclaimed."

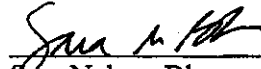
⁸ See, e.g., Dep't of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), aff'd, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); 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 the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

⁹ See David I. Cassuto, Exchange Act Release No. 48,087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

VI. Conclusion

For theft and embezzlement of customer funds, in violation of Rule 2110, and for failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity. These bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Sara Nelson Bloom
Hearing Officer

Copies to:

Michael Wayne Gibson (*via overnight and first class mail*)
Jacqueline D. Whelan, Esq. (*via facsimile and first class mail*)
Rory C. Flynn, Esq. (*via first class mail*)

ORIGINAL

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Michael Wayne Gibson
(CRD No. 1501602)

Respondent.

Disciplinary Proceeding
No. C01050006

Hearing Officer

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. During the approximate period from July 25, 2002, to October 24, 2003, Respondent Michael Wayne Gibson was associated with Round Hill Securities, Inc., a member of NASD. During the approximate period from May 9, 2003, to August 20, 2003, Gibson was also associated with Avisen Securities, Inc. (Avisen), another member of NASD. On February 4, 2004, Avisen filed an amended Form U-5 with NASD disclosing that Gibson was the subject of felony charges. Pursuant to Article V, Section 4 of NASD's By-Laws, Gibson remains subject to NASD's jurisdiction for purposes of this Complaint.

FIRST CAUSE OF COMPLAINT
**(Embezzlement from an Elder –
Violation of Rule 2110 by Respondent Gibson)**

2. On or about and between May 15, 2003, through September 29, 2003, at and in the County of Sacramento, State of California, Respondent Michael Wayne Gibson did commit a felony, namely: a violation of Section 368(d) of the Penal Code of the State of

California, in that said Respondent committed theft and embezzlement with respect to the property of an elder and dependent adult, said property having a value in excess of \$400, to wit, \$30,000, and knew and reasonably should have known that said person, JB, was an elder and dependent adult, age 89 years old.

3. The foregoing conduct constitutes a violation of Rule 2110 by Respondent Gibson.

SECOND CAUSE OF COMPLAINT

(Failure to Respond to Requests for Information – Violations of Rules 8210 and 2110 by Respondent Gibson)

4. On March 24, 2004, pursuant to and in accordance with Rule 8210, NASD requested that Respondent Michael Wayne Gibson provide NASD with information and documentation concerning allegations that he had misappropriated funds from JB.
5. A response to the request was required no later than April 8, 2004.
6. The request was sent by regular first class and certified mail to Gibson at [REDACTED], [REDACTED] which is Gibson's last known residential address as reflected in the Central Registration Depository (CRD address).
7. The copy of the request sent by regular first class mail was not returned.
8. The copy of the request sent by certified mail was returned marked "Unclaimed."
9. NASD received no response to the request.
10. On April 12, 2004, pursuant to and in accordance with Rule 8210, NASD requested that Respondent Michael Wayne Gibson provide NASD with information and documentation concerning allegations that he had misappropriated funds from JB.
11. A response to the request was required no later than April 8, 2004.
12. The request was sent by regular first class and certified mail to Gibson at his CRD address.

13. The copy of the request sent by regular first class mail was not returned.
14. The copy of the request sent by certified mail was returned marked "Unclaimed."
15. NASD received no response to the request.
16. The foregoing acts, practices and conduct constitute separate and distinct violations of Rules 8210 and 2110 by Respondent Gibson.

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: April 25, 2005

for 
Elisabeth P. Owens
Senior Vice President
West Region
NASD
525 Market Street
Suite 300
San Francisco, CA 94105
(415) 882-1200



David A. Watson
Regional Counsel
Department of Enforcement
NASD
525 Market Street
Suite 300
San Francisco, CA 94105
(415) 882-1200

Of Counsel:

Rory C. Flynn,
Vice President
Department of Enforcement
NASD
1801 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 974-2874

Lewis Taylor Egan
Regional Chief Counsel
Department of Enforcement
NASD
525 Market Street
Suite 300
San Francisco, CA 94105
(415) 882-1200