

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

SHERWIN P. BROWN
(CRD No. 1842423),

Respondent.

Disciplinary Proceeding
No. C04050026

Hearing Officer – SW

DEFAULT DECISION

November 29, 2005

Respondent violated NASD Procedural Rule 8210 and Conduct Rule 2110 when he failed to respond to the NASD staff's requests for information and failed to appear for an on-the-record interview. Respondent is barred from associating with any member firm in any capacity for the violations.

Appearances

Jeffrey A. Ziesman, Esq., Regional Counsel, Kansas City, MO, and Rory C. Flynn, Esq., Of Counsel, Washington, DC, for the Department of Enforcement.

Sherwin P. Brown appeared pro se prior to his default.

DECISION

I. INTRODUCTION

On June 20, 2005, the Department of Enforcement ("Enforcement") filed a two-count Complaint alleging that Respondent Sherwin P. Brown ("Respondent") failed to (i) respond to NASD's requests for information and documents, and (ii) appear for an on-the-record interview, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On August 18, 2005, Respondent filed an Answer to the Complaint denying the allegations of the Complaint and specifically denying that he was subject to NASD's jurisdiction.

Subsequently, after Respondent failed to appear for a September 8, 2005 scheduled pre-hearing conference, the Hearing Officer issued an order on September 9, 2005 deeming Respondent in default.

On October 3, 2005, Enforcement filed a Motion for Entry of Default Decision ("Motion"), supported by the affidavit of Jeffrey A. Ziesman, Esq., Regional Counsel in NASD's Kansas City, MO office, and by 12 exhibits.¹ For the reasons set forth below, Enforcement's Motion is granted.

II. RESPONDENT'S DEFAULT

On June 16, 2005, Enforcement served a Complaint and Notice of Complaint on Respondent at his residential address as reflected in NASD's Central Registration Depository System ("CRD address"), and at his business address, via first class mail and certified mail.² (CX-1, p. 1; CX-5, p. 12).

On July 14, 2005, Enforcement served a Second Notice of Complaint and Complaint on Respondent, at his CRD address and his business address, via first class and certified mail. (CX-6, p. 14). On July 29, 2005, Enforcement received correspondence from Respondent that referenced this disciplinary proceeding No. C04050026. (DECL ¶ 23).

¹ Hereinafter, the statements in the Motion will be designated as "Motion, p.", the statements in the Ziesman Declaration will be designated as "DECL at ¶", and Enforcement's exhibits will be designated as "CX-" with the appropriate page numbers.

² Respondent's CRD address is [REDACTED] (CX-1, p. 1). Respondent's business address is c/o Jamerica Financial, Inc., Broadway Place East, Suite 135, 3433 Broadway Street, N.E., Minneapolis, MN 55413. (*Id.*). As of September 20, 2005, Jamerica's website identified Respondent as its president and owner. (CX-4, p. 2).

On August 2, 2005, Enforcement filed a notice of receipt of correspondence and a copy of Respondent's July 29, 2005 correspondence with the Office of Hearing Officers. (Id.). The July 29, 2005 correspondence did not address the allegations of the Complaint. (Id.). In its notice of receipt, Enforcement argued that Respondent's correspondence did not constitute an Answer to the Complaint. (Id.).

On August 3, 2005, the Hearing Officer served an order on Respondent at his CRD address directing Respondent to file an Answer that met the requirements of NASD Procedural Rule 9215.

On August 18, 2005, Respondent filed an Answer to the Complaint denying the allegations of the Complaint and specifically denying that he was subject to the jurisdiction of NASD.

On August 22, 2005, after receipt of Respondent's Answer, the Hearing Officer served an order on Respondent at his CRD address, scheduling a pre-hearing conference to be held via telephone on August 30, 2005.³ On August 26, 2005, Respondent filed a notice with the Office of Hearing Officers indicating that he would be unable to appear at the pre-hearing conference scheduled for August 30, 2005 because of the cost involved in participating via a long distance telephone call.

On August 29, 2005, the Hearing Officer issued an order canceling the August 30, 2005 pre-hearing conference and directing the Parties to propose alternative dates, within a limited period of time, to reschedule the pre-hearing conference. The August 29, 2005 order, which was served on Respondent at his CRD address, explicitly stated that, if the Parties failed to designate times and dates for the pre-hearing conference, the Hearing

³ Previously, on August 9, 2005, the Office of Hearing Officers received, via Enforcement, a copy of a letter from Respondent complaining about documents being served on him at his business address, and confirming that all documents should be served on him only at his CRD address.

Officer would reschedule the pre-hearing conference within the designated time period without their input. Respondent failed to propose an alternative date for the pre-hearing conference.

On September 6, 2005, the Hearing Officer scheduled a pre-hearing conference for September 8, 2005, to be held via telephone at a toll-free number, which order was served on Respondent at his CRD address.⁴ The September 6, 2005 order specifically stated **“A failure to appear at the pre-hearing conference, in person or through counsel, will be deemed a default.”**

Respondent failed to appear, in person or through counsel, at the September 8, 2005 pre-hearing conference. On September 9, 2005, the Hearing Officer issued an order holding Respondent in default pursuant to Code of Procedure Rules 9241(f) and 9269. Respondent failed to respond to the September 9, 2005 order.

Pursuant to Rule 9269, the Hearing Officer finds that Respondent received notice of the September 8, 2005 pre-hearing conference, and that he defaulted by failing to appear.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was associated with SunAmerica Securities, Inc. (“SunAmerica”) from July 16, 1996 through April 23, 2002. (CX-1, p. 2; DECL at ¶ 4). Respondent was registered with SunAmerica as a general securities representative on July 31, 1996 and as a general securities principal on November 8, 1996. (CX-1, p. 2). On April 24, 2002,

⁴ FedEx reported to the Office of Hearing Officers that the order was delivered on September 7, 2005.

SunAmerica filed a Form U-5, terminating Respondent's registrations.⁵ (CX-2; DECL at ¶ 5).

Subsequently, SunAmerica filed several amendments to Respondent's Form U-5, on August 13, 2002, September 4, 2002, November 22, 2002, January 7, 2003, October 30, 2003, and December 3, 2003, which disclosed that a number of customer arbitration proceedings had been filed against Respondent. (CX-3; DECL at ¶ 6).

On April 19, 2004, SunAmerica filed yet another amendment to Respondent's Form U-5, which disclosed arbitration proceedings against Respondent involving allegations of unsuitable recommendations. (CX-3, pp. 16-17; CX-8).

Article V, Section 4(a) of the NASD's By-Laws creates a two-year period of retained jurisdiction over former registered persons, covering misconduct that began before the registration terminated and failure to provide information, requested pursuant to Rule 8210, during the period of retained jurisdiction.

Article V, Section 4(a) also provides that the running of the two year period of retained jurisdiction recommences from the date of the filing of an amended Form U-5, if the amended Form U-5 (i) is filed within two years of the original Form U-5 filing and (ii) discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation.⁶

The Hearing Officer finds that the April 19, 2004 amended Form U-5 was filed within two years of the original April 24, 2002 Form U-5 filing, and the amended 2004 Form U-5 disclosed that the Respondent may have engaged in conduct actionable under

⁵ The Form U-5 disclosed, among other things, that Respondent had been discharged for failure to disclose outside business activities and for failure to adhere to the terms of a special supervision agreement. (CX-2, pp. 1-2). The Form U-5 further disclosed that, at the time of his termination, Respondent was the subject of litigation, which alleged sales practice violations by Respondent. (CX-2, p. 3).

⁶ NASD Notice to Members 92-19 (April 1992).

the NASD Rules. Accordingly, the two year period of retained jurisdiction recommenced on April 19, 2004 and extends to April 19, 2006.

The Complaint in this proceeding was filed within two years of April 19, 2004, and it alleges that Respondent's failure to provide information and appear for an on-the-record interview pursuant to Rule 8210 occurred while he remained subject to NASD's jurisdiction. Thus, contrary to the claim in Respondent's Answer, the Hearing Officer finds that NASD has jurisdiction over Respondent in this proceeding.⁷

B. Respondent violated NASD Conduct Rule 2110 and Procedural Rule 8210

The Complaint, attached to this Default Decision as Exhibit A, alleges that Respondent violated NASD Rules 2110 and 8210 by failing to respond to two requests for information issued pursuant to Rule 8210 and failing to appear for an on-the-record interview requested pursuant to Rule 8210.

Under Rule 9215(f) and Notice to Members 99-77, the allegations of the Complaint are deemed admitted, and they are hereby incorporated in this Default Decision as findings of fact

a. NASD staff requested information and documents

On August 17, 2004, the NASD staff sent Respondent a request for certain documents and information focusing on his alleged misconduct at SunAmerica. (Complaint at ¶ 6). The request for documents and information was issued pursuant to Procedural Rule 8210 and was mailed to Respondent's CRD address and his business address, via first class and certified mail. (*Id.*). Respondent failed to respond to the request for information. (Complaint at ¶ 7).

⁷ SunAmerica filed additional amendments to Respondent's Form U-5 after the April 19, 2004 amendment, which may further extend NASD's justification over Respondent beyond April 19, 2006. (CX-3, p. 19; DECL at ¶ 8).

On August 31, 2004, the NASD staff sent a follow-up request to Respondent at his CRD address and his business address, via first class and certified mail. (Complaint at ¶ 8). The receipt for the CRD certified mailing was returned, bearing an illegible signature. (*Id.*). The certified mailing for the business address was returned with the handwritten notation "Refused." (*Id.*).

On September 1, 2004, the NASD staff received a letter from Respondent, in which he provided certain information in response to the NASD staff's August 17, 2004 request, but the letter also stated that Respondent refused to produce the documents requested by the staff. (Complaint at ¶ 9).

b. NASD staff requested an on-the-record interview

On May 13, 2005, the NASD staff mailed Respondent, at his CRD address and his business address, a request that he appear for an on-the-record interview to be held on May 25, 2005 pursuant to Rule 8210. (Complaint at ¶ 13). On May 23, 2005, the NASD staff received a letter from Respondent, which referenced the staff's May 13, 2005 request and advised the staff that he would not attend the on-the-record interview. (Complaint at ¶ 14). Respondent failed to appear for the May 25, 2005 scheduled on-the-record interview. (Complaint at ¶ 15).

c. Procedural Rule 8210 and Conduct Rule 2110

Under NASD Procedural Rule 8210, NASD may require any person subject to its jurisdiction to provide information regarding any matter under investigation. The obligation to respond is unqualified. Because NASD lacks subpoena power, Rule 8210 is the means by which NASD carries out its regulatory functions. It is a "key element in the

NASD's efforts to police its members."⁸ Failure to comply with Rule 8210 requests for information is a serious violation because it subverts NASD's ability to perform its regulatory responsibilities.⁹ "A refusal to comply with an NASD request for information is tantamount to a complete failure to respond."¹⁰

Respondent's September 1, 2004 and May 23, 2005 communications with the NASD staff demonstrate that he received actual notice of the NASD staff's Rule 8210 requests. In any event, pursuant to Rule 8210(d), Respondent is deemed to have received the Rule 8210 requests, which were sent to his CRD address and his business address.

By failing to produce the documents and failing to appear for the on-the record interview, as requested by the NASD staff, Respondent violated NASD Procedural Rule 8210. A violation of Rule 8210 is also a violation of NASD Conduct Rule 2110.¹¹

IV. SANCTIONS

When an individual fails to respond in any manner to requests issued pursuant to Rule 8210, the NASD Sanction Guidelines provide that a bar is the standard sanction.¹² The Guidelines provide that a suspension for up to two year may be appropriate where mitigating factors exist.¹³ In this case, Respondent partially responded to the NASD staff's request for information. However, Respondent's partial response provides an insufficient basis for any reduction in the sanction in light of his refusal to provide any of

⁸ See Richard J. Rouse, Exchange Act Release No. 32,658, 1993 SEC LEXIS 1831, at *7 (1993); Joseph G. Chiulli, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000).

⁹ Id.

¹⁰ Dep't of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23 (NAC Aug. 11, 2003).

¹¹ See Dep't of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at **21, 25 (NAC Apr. 19, 2000).

¹² NASD Sanction Guidelines, p. 35 (2005).

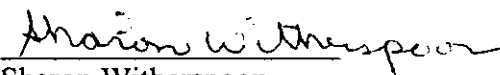
¹³ Id.

the requested documents, and to appear for scheduled testimony.¹⁴ Respondent's lack of cooperation frustrated the NASD staff's attempts to conduct an investigation into his alleged misconduct and warrants a bar.

Accordingly, the Hearing Officer bars Respondent in all capacities for refusing to produce the documents requested and for refusing to appear for an on-the-record interview as requested pursuant to Rule 8210.

V. CONCLUSION

Respondent Sherwin P. Brown is barred from associating with any member firm in any capacity for violating NASD Procedural Rule 8210 and Conduct Rule 2110. The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.


Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
November 29, 2005

Copies to:
Sherwin P. Brown (via Federal Express and first class mail)
Jeffrey A. Ziesman, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

¹⁴ Department of Enforcement v. Hoeper, No. C02000037, 2001 NASD Discip. LEXIS 37 (NAC Nov. 2, 2001).

NASD OFFICE OF HEARING OFFICERS**Department of Enforcement,****Complainant,****v.****Sherwin P. Brown
General Securities Principal
(CRD No. 1842423)****Respondent.****Disciplinary Proceeding No. C04050026****Hearing Officer - _____****COMPLAINT**

Upon information and belief, Complainant alleges as follows:

1. From July 16, 1996 through April 23, 2002, Respondent Sherwin Presley Brown (Respondent Brown) was associated with NASD member SunAmerica Securities, Inc. (SunAmerica) as a sales representative and was registered with NASD as a general securities principal.

2. On April 24, 2002, SunAmerica filed a Uniform Termination Notice for Securities Industry Registration (Form U-5) for Respondent Brown. Respondent Brown has not been associated with any NASD members or registered with NASD in any capacity since April 24, 2002.

3. SunAmerica amended Respondent Brown's Form U-5 on April 19, 2004, within the two-year time frame for retention of jurisdiction under Article V, Sections 3(b) and 4(a). NASD's Central Registration Depository (CRD) records indicate that Respondent Brown has over 100 disclosures. The vast majority of these disclosures reference allegations of unsuitable recommendations made by and/or transactions executed by Respondent Brown.

4. This Complaint is being filed within two years of the April 19, 2004, Form U-5 amendment for Respondent Brown. Accordingly, NASD retains jurisdiction over Respondent Brown pursuant to Article V, Section 4 of the NASD By-Laws.

FIRST CAUSE OF COMPLAINT
Failure to Respond to Requests for Information
NASD Conduct Rule 2110 and NASD Procedural Rule 8210

5. Complainant incorporates and realleges by reference Paragraph Nos. 1 through 4 above.

6. On August 17, 2004, NASD staff sent a written information request, citing NASD Procedural Rule 8210, to Respondent Brown seeking material and relevant information regarding alleged misconduct while associated with SunAmerica (First Request). The NASD staff sent the First Request by certified mail, return receipt requested, and first class mail to Respondent Brown's last known residential address, as listed in CRD. The NASD staff also sent the First Request by certified mail, return receipt requested, and first class mail to Respondent Brown's business address, as listed in CRD and as identified on Respondent Brown's website, www.jamericafinancial.com. The receipts for the certified mailings to Respondent Brown's residential and business addresses were returned bearing illegible signatures. The first class mailings to Respondent Brown's residential and business addresses were not returned. Accordingly, the NASD staff completed service of the First Request upon Respondent Brown in accordance with NASD Procedural Rule 8210.

7. Respondent Brown's response to the First Request was due by August 31, 2004. The NASD staff did not receive the responsive documents or the requested information from Respondent Brown by the close of business on August 31, 2004.

8. Consequently, at the close of business on August 31, 2004, the NASD staff sent a second written information request, citing NASD Procedural Rule 8210, to Respondent Brown (Second Request). NASD staff sent the Second Request by certified mail, return receipt requested, and first class mail to Respondent Brown's last known residential address, as listed in CRD. The NASD staff also sent the Second Request by certified mail, return receipt requested, and first class mail to Respondent Brown's business address, as listed in CRD and as identified on Respondent Brown's website, www.jamericafinancial.com. The receipt for the certified mailing to Respondent Brown's residential address was returned bearing an illegible signature. The first class mailing to Brown's residential address was not returned. The certified mailing to Respondent Brown's business address was returned with the handwritten notation "Refused." The first class mailing to Respondent Brown's business address was returned with the handwritten notation "Wrong Address." Accordingly, the NASD staff completed service of the Second Request upon Respondent Brown in accordance with NASD Procedural Rule 8210.

9. On September 1, 2004, the staff received a letter from Respondent Brown, which referenced the staff's August 17, 2004, Rule 8210 request. Rather than produce the requested documents, Respondent Brown made various statements that were non-responsive to the staff's requests. Respondent Brown did not produce, and indicated in his letter that he would not produce, the documents requested by the staff. To date, Respondent Brown has not produced the documents and information requested under the August 17, 2004, and August 31, 2004, Rule 8210 letters.

10. The documents and information sought in the First Request, and repeated in the Second Request, were important to the staff's investigation of a number of the above-referenced

100 CRD disclosures in which Respondent Brown was alleged to have made unsuitable recommendations and/or executed unsuitable transactions.

11. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by Respondent Brown.

SECOND CAUSE OF COMPLAINT
Failure to Appear for On-the-Record Interview
NASD Conduct Rule 2110 and NASD Procedural Rule 8210

12. Complainant incorporates herein Paragraph Nos. 1 through 11 above.

13. On May 13, 2005, the NASD Department of Enforcement (the DOE) sent a letter to Respondent Brown requesting his appearance for an on-the-record interview (OTR) on May 25, 2005, in the District No. 4 office. The letter was sent by certified mail, return receipt requested, and first class mail to Respondent Brown's last known CRD residential and business addresses. The business address to which the Rule 8210 request was sent was the address Respondent Brown continued to identify on his website, www.jamericafinancial.com. The letter cited NASD Procedural Rule 8210. The receipt for the certified mailing to Respondent Brown's CRD residential address was returned bearing an illegible signature. The first class mailing was not returned and is presumed to have been delivered. The receipt for the certified mailing to Respondent Brown's CRD business address was returned bearing an illegible signature, but a signature that resembled one Respondent Brown previously identified to be his own. The first class mailing was not returned and is presumed to have been delivered.

14. On or about May 23, 2004, the staff received a letter from Respondent Brown. Respondent Brown's correspondence referenced the staff's May 13, 2005, Rule 8210 letter requesting Respondent Brown's appearance for an OTR on May 25, 2005. Respondent Brown advised the staff that he would not attend the OTR.

15. Respondent Brown did not appear at the District No. 4 office on May 25, 2005, for his OTR.

16. Respondent Brown's testimony was important for the staff's investigation of a number of the above-referenced 100 CRD disclosures in which Respondent Brown was alleged to have made unsuitable recommendations and/or executed unsuitable transactions.

17. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

Findings of fact and conclusions of law that Respondent Brown committed the violations charged and alleged herein;

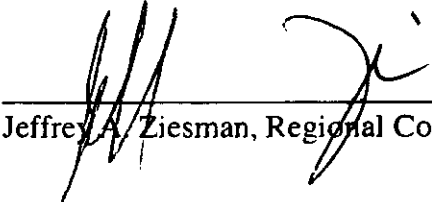
An order imposing sanctions against Respondent Brown in accordance with NASD Procedural Rule 8310;

An order requiring Respondent Brown to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;

An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330; and

An order imposing any other fitting sanction.

Date: June 16, 2005
Kansas City, Missouri



Jeffrey A. Ziesman, Regional Counsel



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