

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

WESTON RAYMOND KIRBY  
(CRD No. 3052965),  


Respondent.

Disciplinary Proceeding  
No. C06040038

Hearing Officer – AWH

**DEFAULT DECISION**

April 13, 2005

**Formerly registered representative barred from  
association with any member firm in any capacity for  
conversion, in violation of NASD Conduct Rule 2110.**

*Appearances:*

George C. McGuigan, Jr., Esq., for the Department of Enforcement.

No appearances by or for Weston Raymond Kirby.

**DECISION**

**Background**

On December 21, 2004, the Department of Enforcement ("Enforcement") issued the single-cause Complaint in this proceeding, alleging that Weston Raymond Kirby ("Respondent" or "Kirby") converted assets from both his employer firm and a customer, in violation of NASD Conduct Rule 2110.

Kirby failed to file an Answer to the Complaint; he similarly failed to respond to the Second Notice of Complaint, mailed to him on January 24, 2005. As a result, Enforcement filed a Motion for Entry of Default Decision on March 10, 2005. Kirby failed to respond to the Motion. Accordingly, pursuant to Procedural Rules 9215(f) and

9269, Enforcement's Motion will be granted, and the allegations of the Complaint, attached to this decision, will be deemed admitted.

### **Findings of Fact<sup>1</sup>**

#### Respondent

Kirby was registered with NASD through member firm First Avantus Securities ("First Avantus" or "the firm") from June 25, 2002, until January 8, 2004, when the firm filed a Form U-5 on his behalf, terminating his registration. Since that date, Kirby has not been associated with any NASD member firm.

#### Unauthorized Credits

In December 2003, Kirby used his position as Operations Manager at First Avantus to post two unauthorized credits to his personal brokerage account, totaling \$7,000. He then withdrew the money for his personal benefit. When confronted by firm personnel, Kirby admitted making the unauthorized credits. He made a similar admission in a letter to NASD Staff, claiming that "money was very tight," and indicating that he considered the credits advances on expected commissions.

#### Improper Activities in a Customer Account

In October 2003, a First Avantus customer sold 10,000 shares of GK Intelligent Systems stock at a price of 0.21 cents per share, resulting in net proceeds of approximately \$1,999. However, the customer failed to deliver the shares. Kirby moved the uncovered sale and the proceeds into his personal account without authorization from either the customer or First Avantus. He then purchased GK Intelligent Systems shares at a price of 0.11 cents per share to close the position, realizing a profit of nearly \$860. In a

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<sup>1</sup> All findings of fact are based upon the admitted allegations in the Complaint, the Declaration Supporting a Motion for Entry of Default Decision by George C. McGuigan, Jr., and the exhibits attached thereto.

letter to NASD Staff, Kirby admitted shifting the sale and proceeds into his personal account after the customer failed to deliver the shares.

#### Service of the Complaint

On December 21, 2004, Enforcement served Kirby with the Complaint and Notice of Complaint by both first-class and certified mail, sending the documents to his most current residential address reflected in the CRD, [REDACTED] [REDACTED] (“the CRD address”), as well as to another address he provided to NASD Staff during the course of the investigation, [REDACTED] (“the Golf Lakes address”). Kirby failed to file an Answer.

On January 24, 2005, Enforcement served Kirby with the Complaint and Second Notice of Complaint in an identical manner.<sup>2</sup> Kirby again failed to file an Answer or respond in any way.

### **Discussion and Conclusions**

#### Jurisdiction

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

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<sup>2</sup> The Declaration erroneously states that the Second Notice of Complaint was sent on November 23, 2004. The Second Notice of Complaint attached to the Declaration as an exhibit is dated January 24, 2005.

Enforcement filed the Complaint on December 21, 2004, within two years of the January 8, 2004, termination of Respondent's registration. The Complaint alleges misconduct occurring while Kirby was registered with an NASD member firm. Therefore, NASD has jurisdiction over this proceeding.

#### Respondent's Default

Enforcement properly served the Complaint on Kirby by sending it via first-class and certified mail to his CRD address, as well as to the Golf Lakes address. Pursuant to NASD Procedural Rule 9134, the mailings establish valid constructive notice of the Complaint. Because Kirby failed to respond, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint against Kirby are deemed admitted.

#### Conversion

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."<sup>3</sup> Conversion is "patently antithetical to the high standards of commercial honor and just and equitable principles of trade that NASD seeks to promote" through enforcing Conduct Rule 2110.<sup>4</sup> Here, Kirby admitted crediting funds to his personal account without the firm's authorization, and withdrawing credited amounts for his personal benefit. Additionally, Kirby admitted to shifting the uncovered sale of GK Intelligent Systems stock and its proceeds from a customer account to his personal account, without proper customer authority or consent. Therefore, his conduct constitutes conversion of both firm and customer assets, in violation of NASD Conduct Rule 2110.

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<sup>3</sup> NASD SANCTION GUIDELINES, p. 40 (2004 ed.).

<sup>4</sup> *Wheaton D. Blanchard*, 1976 SEC LEXIS 1571 at \*2 (May 27, 1976) (internal quotes omitted).

## **Sanctions**

### Conversion

The NASD Sanction Guideline pertaining to conversion states that a bar is the standard penalty, regardless of the amount converted.<sup>5</sup> Here, no mitigating factors are present that would warrant a lesser sanction than the standard bar. Accordingly, Weston Raymond Kirby will be barred from association with any NASD member in any capacity for converting firm and customer assets, in violation of NASD Conduct Rule 2110.

### **Order**

Weston Raymond Kirby is barred from association with any NASD member firm in any capacity for converting firm and customer assets, in violation of NASD Conduct Rule 2110. The bar will become effective immediately if this Decision becomes the final disciplinary action of NASD.

**SO ORDERED.**

  
Alan W. Heifetz  
Hearing Officer

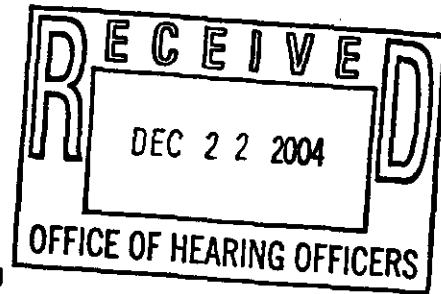
Copies to:  
Via First Class Mail & Overnight Courier  
Weston Raymond Kirby

Via First Class & Electronic Mail  
George C. McGuigan, Jr., Esq.  
Rory C. Flynn, Esq.

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<sup>5</sup> NASD SANCTION GUIDELINES, p. 40 (2004 ed.).

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Complainant

v.

Weston Raymond Kirby  
CRD No. 3052965

Respondent

Disciplinary Proceeding  
No. C06040038

Hearing Officer \_\_\_\_\_

**COMPLAINT**

Date: December 21, 2004

Upon information and belief the Department of Enforcement ("Complainant") alleges as follows:

1. Respondent Weston Raymond Kirby entered the securities industry in August 1998 as a General Securities Representative with a member of NASD. On or about June 25, 2002, Kirby registered with member firm First Avantus Securities, Inc. as a General Securities Representative. He terminated his employment with First Avantus on January 8, 2003 and since that time he has not been employed by or registered with any other member of NASD. NASD has jurisdiction to file this complaint against Kirby pursuant to Article V, Section 2 of the NASD By-Laws.

**CAUSE OF COMPLAINT**

**Kirby Misappropriated Funds**

**(Violation of NASD Conduct Rule 2110)**

2. Paragraph number 1 above is realleged and incorporated herein by reference.

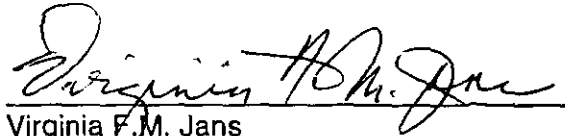
3. In or about December 2003, and while associated with member firm First Avantus Securities, Inc., Kirby credited his personal brokerage account with a total of \$7,000, all of which was done without any deposit of funds to support such credits and without the authorization or consent of his member firm. After making the unsupported credits to his account, Kirby withdrew funds from his account for his personal use and benefit.
4. In or about October 2003, a customer of First Avantus sold 10,000 shares of GK Intelligent Systems stock at a price of 0.21 cents per share. The customer failed to deliver the shares. On or about October 21, 2003, and while associated with member firm First Avantus, Kirby moved the customer's sale of the 10,000 shares of GK Intelligent stock into his personal account along with the sale proceeds of approximately \$1,999, and then purchased the shares at a price of \$0.11 cents per share in order to close the position. Kirby realized a profit of approximately \$860. Kirby effected the aforementioned transactions without the authorization or consent from his member firm.
5. The aforementioned acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 by Respondent Raymond Kirby.

#### PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Kirby committed the violations *charged and alleged herein*;
- B. An order imposing sanctions upon Kirby 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: December 21, 2004



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