

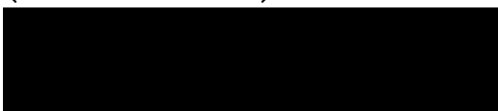
NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

CARMEN R. CARO
(CRD No. 1949991)



Respondent.

Disciplinary Proceeding
No. C07040066

DEFAULT DECISION

Hearing Officer – SW

Dated: January 7, 2005

Respondent is barred from associating with any member firm in any capacity for: (i) violating NASD Conduct Rules 2110 and 2330(a) by misusing customers' funds; and (ii) violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to requests for information issued by the NASD staff.

Appearances

George C. McGuigan, Jr., Esq., Regional Counsel, Dallas, Texas, and Rory C. Flynn, Of Counsel, Washington, DC, for the Department of Enforcement.

No appearance for Carmen R. Caro.

DECISION

I. Introduction

On August 5, 2004, the NASD Department of Enforcement ("Enforcement") filed a two-count Complaint against Respondent Carmen R. Caro ("Respondent"). The first cause of the Complaint alleges that Respondent, while registered with NASD member firm Prudential Securities Incorporated ("Prudential"), misused the funds of customers BP and AG, in violation of NASD Conduct Rules 2110 and 2330(a). The second cause

of the Complaint alleges that Respondent failed to respond to two requests for information issued by the NASD staff, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On November 4, 2004, Enforcement filed a Motion for Entry of Default Decision ("Motion"), supported by the Declaration of George C. McGuigan, Jr., Esq., Regional Counsel in NASD's Dallas office, and three exhibits.¹ On November 30, 2004, Enforcement supplemented its Motion with a supplemental declaration by George C. McGuigan, Jr.² For the reasons set forth below, the Hearing Officer grants Enforcement's Motion, as supplemented.

II. Respondent's Default

On August 4, 2004, Enforcement served the Complaint and Notice of Complaint on Respondent, via certified and first class mail, at her last known residential address as reflected in the Central Registration Depository ("CRD address") and at two alternative addresses obtained for Respondent by the NASD staff, *i.e.*, the "Guaynabo" address and the "Garden Hills" address.³ (CX-1, p. 1; CX-2; DECL at ¶¶12-13). On September 8, 2004, Enforcement served the Complaint and Second Notice of Complaint on Respondent at her CRD address, the Guaynabo address, and the Garden Hills address, via certified and first class mail. (CX-3; DECL at ¶14). To date, Respondent has not filed an answer to the allegations of the Complaint. (DECL at ¶14).

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

² Statements in the Supplemental Declaration will be designated as "Supp DECL."

³ Respondent's CRD address is listed as [REDACTED] (CX-1, p. 1). Enforcement obtained the Guaynabo address, *i.e.*, [REDACTED] from someone claiming to be Respondent's sister. (DECL at ¶13). Enforcement obtained the Garden Hills address, *i.e.*, [REDACTED] from an anonymous letter sent to the NASD staff. (*Id.*).

The Hearing Officer finds that Enforcement complied with NASD Procedural Rule 9134(b)(1) by sending the mailings to Respondent's CRD address and the two alternative addresses. Accordingly, the Hearing Officer finds that Respondent received effective constructive notice of this proceeding and defaulted by failing to answer the Complaint.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was registered as a general securities representative with NASD member firm Prudential from May 23, 2002 to November 7, 2002 (CX-1, p. 4; Complaint at ¶1).

Respondent has not been associated with any NASD member since November 7, 2002, but she remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws, because (1) the Complaint was filed within two years after Respondent's registration with Prudential terminated, and (2) the Complaint charges Respondent with misconduct while she was associated with Prudential and failures to provide information, requested pursuant to Rule 8210 during the period of retained jurisdiction.

B. Respondent Misused the Funds of Customers BP and AG

The first cause of the Complaint, attached to this Default Decision as Exhibit A, alleges that Respondent: (i) asked her customers BP and AG to sign an incomplete withdrawal form relating to their Allmerica Financial Pioneer Vision Variable Annuity and to sign an incomplete cover letter, in July 2002; (ii) told her customers that she

needed the withdrawal form and cover letter in order to send funds to the customers' Prudential account to take advantage of an investment opportunity on their behalf; (iii) told her customers that she would complete all the necessary information on the withdrawal form and cover letter at a later date; (iv) received from customers BP and AG a signed withdrawal form and cover letter on August 12, 2002; (v) recorded or caused to be recorded information on the signed withdrawal form and cover letter that authorized Allmerica Financial to issue a \$25,000 check from the customers' annuity to be paid to C.R.C.N., CPA Services and mailed to DW at [REDACTED] [REDACTED] without the authorization or knowledge of the customers; and (vi) submitted the completed withdrawal form and cover letter for processing to Allmerica Financial, without the authorization or knowledge of the customers. (Complaint at ¶¶3-5; DECL at ¶8). Based on the signed and completed withdrawal form and cover letter, \$25,000 payable to C.R.C.N., CPA Services was withdrawn from the annuity of customers BP and AG, without their knowledge, and mailed to DW. (Complaint at ¶5).

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

NASD Conduct Rule 2330(a) provides that "No member or person associated with a member shall make improper use of a customer's securities or funds." An associated person "improperly uses" customer funds when the associated person fails to apply the customer's funds as the customer directed.⁴ The improper use of customer funds threatens the fundamental relationship between a broker and a customer, and

⁴ See Lawrence R. Klein, Exchange Act Release No. 36595, 1995 SEC LEXIS 3418 (Dec. 14, 1995) (sustaining finding of improper use of customer funds where respondent transferred funds from one customer's account to another customer's account without authorization).

undermines the integrity of the securities industry.⁵ Conduct in violation of NASD Conduct Rule 2330(a) is also inconsistent with the high standards of commercial honor and just and equitable principles of trade, and thus violates NASD Conduct Rule 2110's ethical mandate.⁶

Based on the allegations deemed admitted, the Hearing Officer finds that Respondent misused her customers' funds in violation of NASD Conduct Rules 2110 and 2330(a).

C. Respondent Failed to Respond to NASD Requests for Information

The second cause of the Complaint alleges that Respondent failed to respond to two requests for information issued by the NASD staff. (Complaint at ¶¶8-10). Each request was made pursuant to NASD Procedural Rule 8210. (Complaint at ¶¶8-9).

On July 18, 2003, the NASD staff sent Respondent a written request for information, via first class and certified mail, to Respondent's CRD address. (Complaint at ¶8). On October 27, 2003, the NASD staff sent another request for information to Respondent at her CRD address and at three other addresses.⁷ (Complaint at ¶9). Respondent failed to respond to the two requests issued by the NASD staff. (Complaint at ¶10).

⁵ See *Dist. Bus. Conduct Comm. v. Julie S. Westberry*, No. C07940021, 1995 NASD Discip. LEXIS 225 (NBCC Aug. 11, 1995) (noting that "brokers who are entrusted with the safekeeping of customer funds must take extra care to ensure that those funds are used only as authorized by the customer and only in the customer's best interest").

⁶ See *Dist. Bus. Conduct Comm. v. Bernadette Jones*, No. C02970023, 1998 NASD Discip. LEXIS 60, at *8 (NAC Aug. 7, 1998) (finding simultaneous violations of Rule 2110 and 2330(a) for improper use of customer funds).

⁷ The three other addresses included the Garden Hills address, the Guaynabo address, and a third address c/o [REDACTED] (Supp DECL). The US Postal Service returned receipts with illegible signatures for the certified mailings sent to the Garden Hills address and the Guaynabo address. (*Id.*). The mailings sent to the third address were returned to the NASD staff marked insufficient address. (*Id.*).

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

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 violation of Rule 8210 is also a violation of NASD Conduct Rule 2110.¹⁰

Pursuant to Rule 8210(d), Respondent is deemed to have received the requests for information sent to her CRD address and the alternative addresses. Accordingly, based on the allegations deemed admitted, the Hearing Officer finds that Respondent received notice of the requests for information, and that she violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to those requests.

⁸ See, e.g., Richard J. Rouse, Exchange Act Release No. 32,685, 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) (noting that Rule 8210 provides a means for NASD to conduct its investigations effectively, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

⁹ Id.

¹⁰ See Dep’t of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at **21, 25 (NAC Apr. 19, 2000).

IV. Sanctions

A. Improper Use

For improper use of customer funds, the NASD Sanction Guidelines recommend a bar except in cases where the misuse resulted from respondent's misunderstanding of his or her customer's intended use of the funds or securities, or there are other mitigating circumstances.¹¹

Enforcement requested that Respondent be barred and ordered to reimburse customers BP and AG \$25,000 plus interest for misusing funds from their annuity account. In addition to the information in the Complaint, Enforcement provided information that Respondent requested her customers to sign a second blank withdrawal form in August 2002. Upon Respondent's second request that they execute a blank withdrawal form, the customers became suspicious and complained to the annuity company, which led to the investigation that led to the discovery of the \$25,000 unauthorized withdrawal. (Motion, p. 2).

The Hearing Officer finds that there are no mitigating circumstances surrounding Respondent's misuse of the funds of customers BP and AG, and that a bar and restitution are the appropriate sanctions.

B. Failure to Respond to Rule 8210 Requests for Information

The NASD Sanction Guideline for failure to respond to Rule 8210 requests for information states that a bar should be standard where the respondent failed to respond in any manner.¹² Enforcement requested, and the Hearing Officer agrees, that Respondent

¹¹ NASD Sanction Guidelines, p. 40 (2004).

¹² Guidelines at 37.

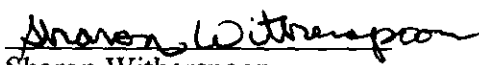
should be barred. The record is devoid of any mitigating factors that might justify a lesser sanction.

V. Order

Respondent Carmen R. Caro is barred from associating with any NASD member firm in any capacity for the following violations: (1) improperly using customer BP and AG's funds, in violation of NASD Conduct Rules 2330(a) and 2110; and (2) failing to respond to requests for information issued by the NASD staff, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. In addition, for improperly using customer BP and AG's funds, Respondent is directed to reimburse BP and AG \$25,000 plus interest calculated in accordance with the rate set forth in Section 6621 of the Internal Revenue Code (26 U.S.C. §6621(a)(2)) from the date the customer funds were withdrawn from their annuity until paid.¹³

The restitution order shall become effective on a date set by NASD, but not earlier than 30 days after the date this Decision becomes the final disciplinary decision of NASD; however, the bars will become effective immediately upon this Default Decision becoming the final disciplinary action of NASD.

SO ORDERED


Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
January 7, 2005

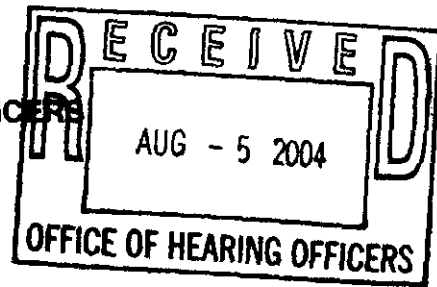
¹³ The Hearing Officer finds that BP and AG suffered a quantifiable loss because of Respondent's misconduct. (Guidelines at 6).

Copies to:

Carmen R. Caro (via Federal Express and first class mail)
George C. McGuigan, Jr., Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

EXHIBIT A

**NASD
OFFICE OF HEARING OFFICERS**



Department of Enforcement,
Complainant

v.

Carmen R. Caro
CRD No. 1949991

Respondent

Disciplinary Proceeding
No. C07040066

Hearing Officer _____

COMPLAINT

Date: August 4, 2004

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

1. Respondent Carmen R. Caro (hereinafter referred to as "Respondent Caro") entered the securities industry on or about June 20, 1989, as a General Securities Representative with a member of NASD. On or about May 23, 2002, she registered with member firm Prudential Securities Incorporated as a General Securities Representative and her registration with that member firm was terminated on or about November 7, 2002. Since that time she has not been registered with any member of NASD. NASD has jurisdiction to file this complaint against Respondent Caro pursuant to Article V, Section 4 of NASD By-Laws.

FIRST CAUSE OF COMPLAINT

Respondent Caro Made Improper Use of Customer Funds

(Violation of NASD Conduct Rules 2110 and 2330)

2. Paragraph number 1 above is realleged and incorporated herein by reference.
3. In or about July 2002, Respondent Caro contacted customers B. P. and A. G. and told them that they needed to sign, in blank, a Partial Withdrawal form for their Allmerica Financial Pioneer Vision Variable Annuity ("Pioneer Variable Annuity"). Respondent Caro also told the customers that she would complete all of the necessary information on the Partial Withdrawal form at a later date. Respondent Caro further stated that the purpose of the withdrawal was to send funds to the customers account at Prudential Securities in order to take advantage of investment opportunities.
4. On or about August 12, 2002, and based on Respondent Caro's recommendation, customers B. P. and A. G. signed in blank a Partial Withdrawal form relating to their Pioneer Variable Annuity. Along with signing the Partial Withdrawal form, the customers also signed a cover letter, which carried the date of July 30, 2002. When the customers signed the cover letter, there were no handwritten instructions on the cover letter directing that funds be mailed to D. W. at the following address: [REDACTED]
[REDACTED] Both the cover letter and the Partial Withdrawal form were returned to Allmerica Financial for processing.
5. Sometime after signing the Partial Withdrawal form and the cover letter dated July 30, 2002, \$25,000 was withdrawn from the customers' Pioneer Variable Annuity and a check was issued to C. R. C. N. , CPA Services and mailed to: D.

W. [REDACTED] The customers did not authorize the withdrawal of the specific amount of \$25,000 from their Pioneer Variable Annuity, nor did they know of C. R. C. N. CPA Services, nor did they authorize that the funds be mailed to D. W. at [REDACTED]
[REDACTED]

6. The aforementioned acts, practices, and conduct constitute separate and distinct violations of NASD Conduct Rules 2110 and 2330 by Respondent Carmen R. Caro.

SECOND CAUSE OF COMPLAINT

Respondent Caro Failed to Respond

(Violation of Conduct Rule 2110 and Procedural Rule 8210)

7. Paragraph numbers 1 – 6 are realleged and incorporated herein by reference.
8. By letter dated July 18, 2003, (the "July 18th letter") NASD staff requested, pursuant to Procedural Rule 8210, that Respondent Caro provide information and documentation relating to customers B. P. and A. G. The July 18th letter was sent, via certified and regular mail, to Respondent Caro at her CRD home address which was [REDACTED]
[REDACTED] and requested that she provide the information and documentation no later than July 18, 2003. The return receipt card for the certified mailing was signed and returned to the district office, but the regular mailing was never returned.
9. By letter dated October 27, 2003, (the "October 27th letter") the staff again requested, pursuant to Rule 8210, that Respondent Caro provide the information

previously requested in the July 18th letter. This final request was sent, via certified and regular mail, to Respondent Caro at her CRD home address which was [REDACTED]

[REDACTED] and to three other addresses NASD staff obtained from other sources.

The October 27th letter requested that Caro provide the requested information by November 17, 2003. The certified mailing to Caro at her CRD home address was returned to the district office marked "Return to Sender" and "Unclaimed."

The regular mailing was never returned. With regard to the certified mailings to the three non-CRD addresses, the return receipt cards for two such mailings were signed and returned to the district office. The third certified mailing was returned to the district office marked "Insufficient Address." With regard to the regular mailings to the three non-CRD addresses, two such mailings were never returned and one mailing was returned marked "Insufficient Address."

10. Respondent Caro never responded to the July 18th letter and never responded to the October 27th letter.

11. The aforementioned acts, practices, and conduct constitute separate and distinct violations of NASD Conduct Rules 2110 and NASD Procedural Rule 8210 by Respondent Carmen R. Caro.

PRAYER FOR RELIEF

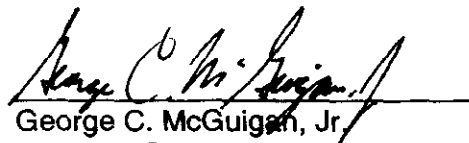
WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent Caro committed the violations charged and alleged herein;

- B. An order imposing sanctions upon Respondent Caro 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: August 4, 2004


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