

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ANTHONY S. McCOMAS
(CRD No. 708707)



Respondent.

Disciplinary Proceeding
No. C07040072

Hearing Officer – DRP

DEFAULT DECISION

March 4, 2005

Respondent converted customer funds, in violation of NASD Conduct Rules 2330 and 2110, and 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 and ordered to pay restitution in the amount of \$466,827.

Appearances

Gene E. Carasick, Esq., Atlanta, GA (Rory C. Flynn, Esq., Washington DC, Of Counsel) for Complainant.

No appearance by or for Anthony S. McComas.

DECISION

I. Background

On August 26, 2004, the Department of Enforcement filed a two-count Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Anthony S. McComas (Respondent or McComas) (1) converted customer funds, in violation of NASD Conduct Rules 2110 and 2330, and (2) failed to respond to staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

Respondent did not file an Answer to the Complaint. Accordingly, on November 17, 2004, Enforcement filed a motion for entry of default decision, supported by the Affidavit of Gene E. Carasick and three exhibits. McComas did not file a response to the motion.

For the reasons set forth below, Enforcement's motion is granted.¹

II. Respondent's Default

On August 23, 2004, Enforcement served the Complaint and Notice of Complaint on Respondent by certified and first class mail, sent to Respondent's current residential address, as reflected in the Central Registration Depository (the CRD address).² On September 23, 2004, Enforcement served the Complaint and Second Notice of Complaint on Respondent in the same manner.³ Respondent did not file an Answer.

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby providing constructive notice of this proceeding.⁴ By failing to file an Answer or otherwise respond to the Complaint, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

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

² Carasick Affidavit ¶ 5; CX-1, p. 1. The return receipt for the certified mailing was returned to the staff with an illegible signature. CX-2.

³ Carasick Affidavit ¶ 6.

⁴ Respondent likely also had actual notice of this proceeding, as evidenced by the signature on the receipt for the first certified mailing.

III. Jurisdiction

Respondent was associated with NASD member firm Oriental Financial Services Corp. (OFSC) from April 16, 1993 until March 28, 2003, when the firm terminated his registration.⁵ Since that time, he has not been associated or registered with any NASD member.

Respondent is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the Complaint, which was filed within two years of the termination of Respondent's registration with DLFA, alleges misconduct that occurred while he was registered, and a failure to comply with requests for information made during the two-year period following the termination.

IV. Findings of Fact and Conclusions of Law

A. Conversion

The first cause of Complaint alleges that Respondent converted \$466,827 of customer MA's funds. MA, who is Respondent's mother-in-law, started investing with Respondent in 1987 and opened an OFSC securities account with him on or about April 15, 1993, shortly after he became associated with the firm. She instructed Respondent to deposit all funds she received from various sources in the OFSC account and to distribute a monthly stipend to cover her living expenses. Additionally, MA delivered her monthly account statements to Respondent and relied on him to reconcile and review them because she did not understand them. (Complaint ¶¶ 2, 3, 4.)

In July 1996, Respondent opened a bank checking account in MA's name at Oriental Bank and Trust (OBT), which she believed to be associated with her securities account. Respondent gave MA the paperwork to open the account, which she signed; however, he never

⁵ CX-1, p. 4. Respondent became registered with OFSC as a general securities representative in July 1999.

told her that he was listed as a signatory on the account and was permitted to withdraw funds without her signature. Furthermore, Respondent listed his own address as the address of record on the account, so MA never received monthly statements on the OBT account. (Complaint ¶ 5.)

From the time he opened the OBT account through May 2002, Respondent caused checks to be issued from MA's OFSC account without her authorization and deposited them into the OBT account. Respondent then wrote checks from the OBT account, totaling \$466,827, to pay for his personal expenses. Until MA stopped receiving her monthly stipends from the OFSC account in 2002, she was unaware of this activity. (Complaint ¶¶ 5, 6, 7.)

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."⁶ 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."⁷

MA gave Respondent clear instructions on how to handle the money in her OFSC account, and she relied on him to help her manage her investments. Over the course of six years, Respondent abused her trust by creating the OBT account without disclosing his control over the account or that he used it to siphon money from her securities account. Moreover, Respondent led MA to believe that the OBT account was linked to her OFSC securities account, and thus she did not realize that the OBT account had separate periodic statements. Because she gave OFSC statements to Respondent to review, MA did not realize that he had been taking money from her for nearly six years.

⁶ *NASD Sanction Guidelines*, p. 40 n.2 (2004 ed.).

⁷ See *Dep't of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *8 (NAC Dec. 14, 1999).

Respondent ignored MA's instructions and intentionally took her money for his own personal use and benefit, without her knowledge, authorization or consent. Accordingly, the allegations in the first cause of Complaint, which are deemed admitted, are sufficient to establish for the purposes of this default decision that Respondent violated NASD Conduct Rules 2110 and 2330.

B. Failure to Respond to Information Requests

The second cause of the Complaint alleges that on April 4, 2003, the staff sent a letter to Respondent by first class and certified mail to his CRD address, pursuant to NASD Procedural Rule 8210, requesting that he provide a written statement responding to MA's allegations. Respondent's attorney responded to the first request by letter dated April 24, 2003, requesting two additional months to comply with the request. On April 25, 2003, the staff denied the request and explained the requirements of Rule 8210. (Complaint ¶¶ 9, 10.)

The staff sent a second request for information to Respondent on April 25, 2003, in an identical manner. Respondent's attorney telephoned the staff on May 19, 2003 to advise that Respondent would not be providing the requested written statement. The staff warned that Respondent could lose his license for failing to comply with the request for information. Nonetheless, Respondent did not submit the requested information. (Complaint ¶¶ 11, 12.)

The staff served the requests in accordance with Rule 8210(d), and pursuant to that rule, Respondent is deemed to have received them. Moreover, he had actual notice of the requests, as evidenced by his attorney's communications with the staff.

Procedural Rule 8210 provides that NASD "staff shall have the right to require a member . . . to provide information . . . with respect to any matter involved in [an] investigation . . ."

Rule 8210 further states that “no . . . person shall fail to provide information . . . pursuant to this Rule.”

In the absence of subpoena power, NASD must rely on Rule 8210 to obtain information from members in the course of its investigations. *Dep’t of Enforcement v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS 17 at *46 (NAC Nov. 22, 2004). Accordingly, members and associated persons have a duty to cooperate fully and promptly with NASD requests for information (*Brian L. Gibbons*, Exchange Act Rel. No. 37170, 1996 SEC LEXIS 1291 at *7 (May 8, 1996), *aff’d*, 112 F.3d 516 (9th Cir. 1997)), and may not impose conditions on their responses or determine the appropriate time for responding to 8210 requests (*Charles R. Stedman*, File No. 3-8298, 1994 SEC LEXIS 4235 at *8-9 (Aug. 10, 1994)), as Respondent’s counsel did here.

Thus, the allegations in the second cause of the Complaint, which are deemed admitted, are sufficient to establish for purposes of this default decision that Respondent failed to respond to the staff’s requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

V. Sanctions

NASD Sanction Guidelines provide that a bar is the standard sanction for conversion, regardless of the amount of funds or securities converted.⁸ Respondent caused unauthorized checks to be issued from MA’s securities account that he then deposited in MA’s bank account, which he controlled. He used these stolen funds to pay his personal expenses. There are no mitigating circumstances that would warrant any sanction less than a bar. Accordingly, Respondent will be barred in all capacities for conversion of customer funds.

⁸ *NASD Sanction Guidelines*, at p. 40 (2004 ed.).

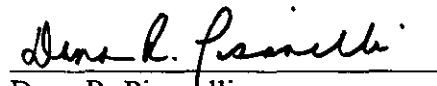
In addition, Enforcement has requested that Respondent be ordered to pay restitution to MA in the amount of \$466,827, plus interest. Restitution is appropriate in this case. MA unjustly suffered a quantifiable loss as a result of Respondent's misconduct, which has not been repaid.⁹

A bar is also standard for failure to respond to requests for information made pursuant to Rule 8210, where the individual did not respond in any way.¹⁰ Respondent failed to comply with the staff's requests, and his attorney's communication with the staff does not constitute a response. Accordingly, Respondent will be barred in all capacities for failing to respond to requests for information made pursuant to Rule 8210.

VI. Conclusion

Respondent Anthony S. McComas is barred from association with any member firm in any capacity for conversion of customer funds, in violation of NASD Conduct Rules 2110 and 2330, and for failure to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent is further ordered to pay restitution to MA, in the amount of \$466,827.¹¹ The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Dana R. Pisanelli
Hearing Officer

Dated: March 4, 2005
Washington, DC

⁹ The Guidelines generally recognize that, in cases where an identified individual has suffered a quantifiable loss because of a respondent's misconduct, it is fitting to order the respondent to pay restitution. *See id.* at 6.

¹⁰ *Id.* at 37.

¹¹ Enforcement requested restitution plus pre-judgment interest but did not offer a method for computing interest in this matter, which involves conversion of funds during a six-year period. Accordingly, the Hearing Officer declines to order interest payments.

Copies to: Anthony S. McComas (*via overnight and first class mail*)
Gene E. Carasick, 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.

Anthony S. McComas
CRD No. 708707

Respondent.

Disciplinary Proceeding
No. C07040072

Hearing Officer:

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent McComas was associated with NASD member Oriental Financial Services Corp. ("OFSC") from May 1993 until March 28, 2003. McComas first became registered, as a general securities representative, in December 1984, with an NASD member. NASD retains jurisdiction over McComas pursuant to Article V, Section 4 of NASD Bylaws.

**FIRST CAUSE OF COMPLAINT
Conversion of Customer Funds
NASD Conduct Rules 2110 and 2330**

2. Customer MA, who is Respondent McComas' mother-in-law, opened an account with McComas at OFSC on about April 15, 1993. MA had been investing with McComas since 1987. She opened the OFSC account to deposit GNMA's that she was holding, as well as for the deposit of checks that she would be receiving from various income sources.
3. MA instructed Respondent McComas to deposit all funds received in the OFSC account, and to distribute a monthly stipend to cover her living expenses. On or about November 23, 2001, McComas provided MA with a letter indicating that her account holdings were valued at \$1,150,000 and her monthly stipend would be \$5,503.25. In fact, the combined value of MA's OFSC securities

account and the Oriental Bank, and Trust checking account referenced below, was only about \$13,000.

4. Respondent McComas handled the monthly reconciliation of MA's OFSC account statements because MA unable to understand them. MA delivered her OFSC monthly account statements to McComas and didn't look at them.
5. In July 1996, Respondent McComas opened a bank checking account in MA's name at Oriental Bank and Trust ("OBT") (account # [REDACTED]). McComas furnished MA with the paperwork to open the account and MA signed the papers; however MA believed the OBT account was associated with her OFSC brokerage account. McComas was listed as a signor on this account, although MA didn't realize it at the time she signed the papers. McComas never told MA that the documents allowed him to withdraw her funds without her signature. The address of record for the OBT account was [REDACTED] [REDACTED] which was McComas' address. MA never received monthly statements for the OBT bank account. Beginning in 2002, MA stopped receiving the monthly stipends.
6. Beginning in July 1996, and continuing through May 2002, Respondent McComas caused checks to be issued from MA's OFSC securities account without her authorization, which he then deposited into the OBT bank account. McComas then wrote checks from the OBT bank account for cash to pay for personal expenses. Since the bank statements were mailed to McComas' address, MA was unaware of the activity in the bank account.
7. During this time period, Respondent McComas converted about \$466,827 of MA's funds.
8. The conversion of MA's funds by Respondent McComas constitutes separate and distinct violations of NASD Conduct Rules 2110 and 2330 by McComas.

SECOND CAUSE OF COMPLAINT
Failure to Respond to Staff Information Requests
NASD Procedural Rule 8210; NASD Conduct Rule 2110

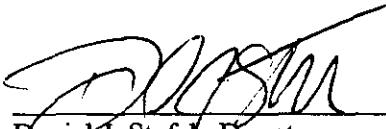
9. By letter dated April 4, 2003, sent via first class and certified mail to Respondent McComas' CRD address at [REDACTED] the staff requested McComas, pursuant to Rule 8210, to provide a written statement responding to MA's allegations by April 25, 2003. Neither the certified nor the first class mailing was returned by the Postal Service; the staff did not receive a signed delivery receipt for the certified mailing.
10. By letter dated April 24, 2003, Respondent McComas' attorney requested two additional months to respond to the staff's request. The staff denied the request and explained the requirements of Rule 8210 to him on April 25, 2003.
11. By letter dated April 25, 2003, sent via first class and certified mail to Respondent McComas' CRD address, the staff again requested a written statement from McComas pursuant to Rule 8210, this time by May 16, 2003. The staff received a telephone call from McComas' attorney on May 19, 2003, advising that McComas would not be responding to the NASD Rule 8210 request. The staff verified that McComas understood that he could lose his license for not responding. The staff received a delivery receipt for the certified mailing signed by McComas. The first class mailing was not returned.
12. To date, Respondent McComas has not responded to the staff's Rule 8210 requests.
13. The failure of Respondent McComas to respond to the staff's Rule 8210 information requests constitutes separate and distinct violations of NASD Conduct Rule 2110 and Procedural Rule 8210 by Respondent McComas.

PRAYER FOR RELIEF

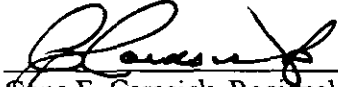
WHEREFORE, Complainant respectfully requests:

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

- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310.
- C. An order requiring the Respondent to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- E. An order imposing any other fitting sanction.



Daniel J. Stefek, Director
NASD, District 7
One Securities Centre, Suite 500
3490 Piedmont Road, N.E.
Atlanta, GA 30305
404-239-6128



Gene E. Carasick, Regional Counsel
Department of Enforcement
NASD, District 7
One Securities Centre, Suite 500
3490 Piedmont Road, N.E.
Atlanta, GA 30305
404-239-6125

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