

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10040082
	:	
v.	:	DEFAULT DECISION
	:	
MARCUS KALMAN NAGEL	:	
(CRD No. 2170816)	:	Hearing Officer – SW
	:	
	:	Dated: January 10, 2005
Respondent.	:	
	:	

Respondent is barred from associating with any member firm in any capacity for: (i) violating NASD Conduct Rules 2330(a) and 2110 by improperly using a customer's 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

Vaishali S. Shetty, Esq., Senior Regional Attorney, Jericho, NY, and Rory C. Flynn, Of Counsel, Washington, DC, for the Department of Enforcement.

No appearance for Marcus Kalman Nagel.

DECISION

I. Introduction

On July 30, 2004, the NASD Department of Enforcement ("Enforcement") filed a two-count Complaint against Respondent Marcus Kalman Nagel ("Respondent"). The first cause of the Complaint alleges that Respondent, while registered with NASD member firm Raymond James Financial Services, Inc. ("Raymond James"), improperly used the funds of his customer by commingling his customer's funds with his own personal bank account funds. The second cause of the Complaint alleges that Respondent

failed to respond to three requests for information issued by the NASD staff, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On November 10, 2004, Enforcement filed a Motion For Entry of Default Decision ("Motion"), supported by the Declaration of Vaishali S. Shetty, Esq., Senior Regional Attorney in NASD's Jericho, NY office, and six exhibits.¹ For the reasons set forth below, the Hearing Officer grants Enforcement's Motion.

II. Respondent's Default

On July 29, 2004, Enforcement served the Complaint and Notice of Complaint on Respondent at his last known residential address as reflected in the Central Registration Depository ("CRD address"), via certified and first class mail.² (CX-1, p. 1; CX-2, DECL at ¶8). On September 2, 2004, Enforcement served the Complaint and Second Notice of Complaint on Respondent at his CRD address via certified and first class mail.³ (CX-4; DECL at ¶11). Respondent did not file a response to the Complaint or Second Notice of Complaint. (DECL at ¶17). Subsequently, Enforcement learned of a possible more current address for Respondent. (DECL at ¶13). The U.S. Postal Service returned to the NASD staff the July 29, 2004 certified mailing of the Complaint with [REDACTED] handwritten on the envelope as a forwarding address. (DECL at ¶13; CX-3).

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

² Respondent's CRD address is listed as [REDACTED] (CX-1, p. 1).

³ The U.S. Postal Service returned to the NASD staff a receipt, with an illegible signature, for the September 2, 2004 certified mailing. (CX-5; DECL at ¶12).

Accordingly, on October 19, 2004, Enforcement served the Complaint and a Third Notice of Complaint on Respondent at the forwarding address via certified and first class mail.⁴ (DECL at ¶14; CX-6). On December 9, 2004, Enforcement served a Fourth Notice of Complaint on Respondent at a fourth address obtained from the returned Third Notice of Complaint.⁵ To date, Respondent has not filed an answer to the allegations of the Complaint. (DECL at ¶17).

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 forwarding 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 Raymond James from January 4, 1999 through June 6, 2002. (CX-1, p. 6). Subsequently, Respondent was registered as a general securities representative with NASD member firms, Allstate Financial Services, LLC ("Allstate") from June 11, 2002 to October 24, 2003, and Ryan Beck & Co. ("Ryan Beck") from June 18, 2004 to June 29, 2004. (CX-1, pp. 5-6).

Respondent has not been associated with any NASD member since June 29, 2004, but he remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to

⁴ On December 1, 2004, subsequent to Enforcement's filing of the Motion on November 10, 2004, the U.S. Postal Service returned the Third Notice of Complaint to the NASD staff with a possible fourth address for Respondent.

⁵ The address listed on the returned Third Notice of Complaint was [REDACTED]

Article V, Section 4 of the NASD By-Laws, because (1) the Complaint was filed within two years after Respondent's registration with Ryan Beck terminated, and (2) the Complaint charges Respondent with misconduct while he was associated with Raymond James and with failures to provide information requested pursuant to Rule 8210 during the period that he was registered with Allstate.

B. Respondent Improperly Used Customer CB's Funds

The first cause of the Complaint, attached to this Default Decision as Exhibit A, alleges that Respondent, between October 1999 and December 2000, received from customer CB nine checks payable to Respondent, totaling \$307,139.67, which Respondent deposited into his personal savings account instead of CB's brokerage account at Raymond James as intended. (Complaint at ¶¶5-6). Respondent deposited only \$13,600 of the \$307,139.67, which he received from customer CB, into CB's brokerage account at Raymond James. (Complaint at ¶7).

In its Motion, Enforcement provided the additional information that, in August 1999, CB and her husband, RB, separated and began divorce proceedings. (Motion, p. 3). Shortly thereafter, in October 1999, CB began writing the checks to Respondent. (*Id.*). At that time, CB was legally blind and had increasing difficulty walking or traveling because of her chronic arthritis. (Motion, p. 4, note 4). In deposition testimony taken in connection with CB's divorce proceeding, Respondent admitted that he received the nine checks and that he deposited the checks into his personal savings account. (Motion, p. 3). Subsequently, in a 2003 arbitration proceeding brought against Raymond James by RB on behalf of his deceased wife, CB, Respondent stated that the monies were redirected to

CB's brokerage accounts or given to CB in the form of cash, but Respondent had no logs or documentation for the alleged cash disbursements to CB. (Motion, pp. 3-4).

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.⁶

Based on the allegations deemed admitted, the Hearing Officer finds that Respondent violated NASD Conduct Rules 2330(a) and 2110, as alleged in the first cause of the Complaint, by improperly using his customer's funds when he commingled CB's funds, intended for her securities account at Raymond James, with his own funds.

C. Respondent Failed to Respond to NASD Requests for Information

The second cause of the Complaint alleges that Respondent failed to respond to three requests for information and documents sent by the NASD staff. (Complaint at ¶¶10-17). Each request was made pursuant to NASD Procedural Rule 8210. (Id.).

After receiving notice of an arbitration claim filed on March 24, 2003 by CB's husband, RB, the NASD staff began an investigation. (Motion, pp. 2-3). On April 25, 2003, the NASD staff sent Respondent a written request for information, via first class

⁶ See Dist. Bus. Conduct Comm. District 2 v. Roach, 1998 NASD Discip. LEXIS 11 (Jan. 20, 1998) (finding respondent violated NASD Conduct Rule 2110 by making improper use of a customer's funds when she deposited 16 customer checks totaling \$160,000 into an account in her name, which funds remained in respondent's account for up to 112 days); see In re Bernard D. Gorniak, Exchange Act Release No. 35,996, 1995 SEC LEXIS 1820 (1995) (finding respondent violated NASD Conduct Rule 2110 when he accepted customer funds and failed to make timely investments with the funds as instructed by the customer and failed to promptly return the funds to the customer).

mail, at Respondent's CRD address and at the business address of Allstate, his then employer, ("Business address").⁷ (Complaint at ¶11). In response to the request, on May 11, 2003, Respondent telephoned the NASD staff and requested an extension of time in which to respond, which request was granted. (Complaint at ¶12).

On May 28, 2003, the NASD staff sent a second request for information to Respondent at his CRD address and his Business address. (Complaint at ¶13). On July 21, 2003, the NASD staff sent a third request for information to Respondent at his CRD address and his Business address. (Complaint at ¶15). Respondent failed to provide any information in response to the three requests issued by the NASD staff. (Complaint at ¶17).

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

⁷ The NASD staff also sent a copy of the April 25, 2003 request to Allstate's executive representative and CRD contact. (Complaint at ¶11).

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).

regulatory responsibilities.⁹ A violation of Rule 8210 is also a violation of NASD Conduct Rule 2110.¹⁰

The Hearing Officer finds that Respondent received actual notice of the requests for information because of Respondent's telephone conversations with the NASD staff. In any event, pursuant to Rule 8210(d), Respondent is deemed to have received the requests for information sent to his CRD address and the Business address. Accordingly, based on the allegations deemed admitted, the Hearing Officer finds that Respondent received notice of the requests for information, and he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to those requests.

IV. Sanctions

A. Improper Use

The NASD Sanction Guidelines for conversion or improper use of customer funds recommend a bar "regardless of the amount converted."¹¹ Enforcement argued that this was an egregious case and requested that Respondent be barred for improperly using the funds of customer CB.

Finding that Respondent, in nine separate transactions, commingled, with his own funds, in excess of \$300,000 of the funds of CB, an elderly and ailing individual, the Hearing Officer agrees that this is an egregious case that warrants a bar.¹²

⁹ Id.

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

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

¹² Enforcement did not request restitution because CB's husband, RB, has already secured an arbitration award of \$420,000 for Respondent's receipt of the nine checks.

B. Failure to Respond to Rule 8210 Requests for Information

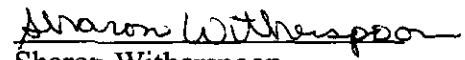
The NASD Sanction Guideline for failure to respond to Rule 8210 requests for information states that a bar should be standard where the respondent failed to respond in any manner.¹³ Enforcement requested, and the Hearing Officer agrees, that Respondent should be barred. The record is devoid of any mitigating factors that might justify a lesser sanction.

V. Order

Respondent Marcus Kalman Nagel is barred from associating with any NASD member firm in any capacity for the following violations: (1) improperly using customer CB'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.

If this Default Decision becomes the final disciplinary action of NASD, the bars shall become effective immediately.

SO ORDERED.


Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
January 10, 2005

Copies to:

Marcus Kalman Nagel (via Federal Express mail and first class mail)
Vaishali S. Shetty, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

¹³ Guidelines at 37.

EXHIBIT A

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARCUS KALMAN NAGEL
(CRD No. 2170816),

Respondent.

**Disciplinary Proceeding
No. C10040082**

Hearing Officer

COMPLAINT

Upon information and belief, the Department of Enforcement alleges that:

JURISDICTION

1. Respondent Marcus K. Nagel ("Respondent") first became registered with NASD, as a General Securities Representative ("GSR"), on approximately December 23, 1991, through an NASD member firm.
2. Respondent is not currently registered with NASD. From approximately January 4, 1999 through approximately June 4, 2002, Respondent was registered as a GSR with NASD through member firm Raymond James Financial Services, Inc. (BD No. 6694)("Raymond James").
3. On or about June 23, 2004, another member firm, Respondent's last securities industry employer, filed an amended Form U-5 disclosing that Respondent may have engaged in misconduct actionable under NASD rules. Nagel therefore remains subject to the jurisdiction of NASD pursuant to Article V, Section 4 of NASD's By-Laws, through at least June 22, 2006.

FIRST CAUSE OF COMPLAINT

**(Commingling and Improper Use of Customer Funds)
NASD Conduct Rules 2330(a) and 2110**

4. Paragraphs one through three are re-alleged and incorporated herein by reference.

5. In or around October 1999, Respondent handled four trading accounts at Raymond James on behalf of customer CB. At around that same time, CB began writing checks made payable to Respondent. Between October 1999 and December 2000, CB wrote at least nine checks, payable to Respondent, for a total of approximately \$307,139.67.
 6. Respondent deposited the checks from CB into his personal savings account.
 7. Of the approximately \$307,139.67 received by Respondent, Respondent placed approximately \$13,600.00 in CB's brokerage account at Raymond James.
 8. Respondent misused the above funds of CB.
- By reason of the foregoing, Respondent violated NASD Conduct Rules 2330(a) and 2110.

SECOND CAUSE OF COMPLAINT
(Failure To Respond)
NASD Procedural Rule 8210 and Conduct Rule 2110

9. Paragraphs one through eight are re-alleged and incorporated herein by reference.
10. On April 25, 2003, the staff of NASD ("the Staff") sent Respondent a letter requesting that he provide information and documents to NASD by May 9, 2003, concerning a filing under NASD Conduct Rule 3070, which disclosed allegations that Respondent engaged in churning and conversion in Raymond James customer CB's accounts.
11. The Staff's request was made pursuant to, and in accordance with, NASD Procedural Rule 8210. The request was sent by First Class mail to Respondent, at his address, as reflected in the Central Registration Depository ("CRD"), pursuant to, and in accordance with, the provisions of NASD Procedural Rule 8210 (the "CRD Address"). The Staff also sent the request by First Class mail to Respondent at his

then current employer's address (the "Business Address"). In addition, the Staff sent a copy of the request to CL, the Executive Representative and CRD contact for Respondent's then current employer ("Current Employer"). None of the letters was returned to the Staff by the United States Postal Service.

12. On May 11, 2003, Respondent called the Staff and requested an extension until May 26, 2003, to respond to the request letter. The Staff granted the request. On May 27, 2003, the Staff received a voicemail message from Respondent stating that he had retained counsel and would require an additional two to three weeks to prepare a response to the Staff's request.
13. On May 28, 2003, the Staff sent Respondent a second letter, pursuant to NASD Procedural Rule 8210, requesting that he respond to the NASD by June 6, 2003. The second request was sent via certified and first-class mail to the CRD Address and the Business Address. The Staff also sent this request to Respondent's Current Employer. None of the letters was returned to the Staff by the United States Postal Service.
14. On June 6, 2003, the Staff received a telephone call from counsel for Respondent who requested an extension of time until June 27, 2003, to respond to the request. The Staff granted this request. On June 24, 2003, counsel for Respondent called the Staff to request an additional extension until July 11, 2003, to respond to the request. The Staff again granted the extension. On July 17, 2003, Respondent's counsel called the Staff to request a further extension until August 5, 2003. The Staff granted the request.

15. On July 21, 2003, the Staff sent Respondent a third letter, pursuant to NASD Procedural Rule 8210, requesting that he respond to NASD by August 5, 2003. The Staff sent the third request via certified and first-class mail to the CRD Address and the Business Address. A copy of the letter also was sent to Respondent's counsel and to Respondent's Current Employer. None of the letters was returned to the Staff by the United States Postal Service.
16. On August 5, 2003, the Staff received a facsimile from Respondent's counsel informing the Staff that she had been discharged as Respondent's counsel and any future communications with Respondent should take place directly with Respondent.
17. Respondent has not responded to any of the Staff's requests made pursuant to NASD Procedural Rule 8210.

By reason of the foregoing, Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

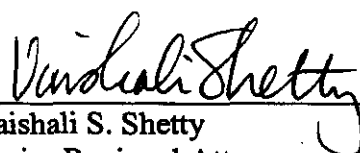
- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon Respondent in accordance with NASD Procedural Rule 8310;
- C. An order, pursuant to NASD Procedural Rule 8310, requiring Respondent to fully disgorge any 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 and in accordance with NASD Rule 8330; and

E. An order, pursuant to NASD Procedural Rule 8310, imposing any other fitting sanction.

Dated: July 29, 2004

DEPARTMENT OF ENFORCEMENT


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