

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOSE A. ALBA
(CRD No. 4680317),

Respondent.

Disciplinary Proceeding
No. C10050021

Hearing Officer – DRP

DEFAULT DECISION

September 16, 2005

Respondent is barred from associating with any NASD member firm in any capacity for converting funds, in violation of NASD Conduct Rule 2110, and for failing to respond to NASD staff requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Appearances

Peter Bon Viso, Senior Regional Attorney, New York, NY (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

No appearance by or for Jose A. Alba.

DECISION

I. Background

On April 21, 2005, the Department of Enforcement filed a two-count Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent Jose A. Alba (Respondent or Alba) converted funds, in violation of NASD Conduct Rule 2110, and failed to respond to staff requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Respondent did not file an Answer to the Complaint.

Accordingly, on July 13, 2005, Enforcement filed a motion for entry of default decision, supported by the declaration of Peter Bon Viso and fourteen exhibits. Alba 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 April 20, 2005, 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). The receipt for the certified mailing was returned bearing an illegible signature. The first class mailing was not returned. Respondent did not file an Answer. (Decl. ¶¶ 11-15; CX-1, CX-3, CX-4, CX-5.)

On May 23, 2005, Enforcement served the Complaint and Second Notice of Complaint on Respondent at the CRD Address in the same manner. Again, the receipt for the certified mailing was returned bearing an illegible signature, while the first class mailing was not returned. Respondent failed to file an Answer or otherwise respond to the Complaint. (Decl. ¶¶ 16-19; CX-6, CX-7.)

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. 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 declaration and exhibits filed by Enforcement with its motion.

III. Jurisdiction

Respondent was registered as an investment company/variable contracts representative with NASD member firm Quick & Reilly, Inc. (Quick) from October 8, 2003, until his registration was terminated on February 12, 2004. Since that time, he has not been associated or registered with any NASD member. (Decl. ¶¶ 7-10; CX-1, CX-2.)

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 Quick, 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 the Complaint charges that Respondent violated NASD Conduct Rule 2110 by converting funds totaling at least \$5,160 from Fleet National Bank/FleetBoston Financial.² Fleet opened an investigation of Respondent on or about January 12, 2004, after excessive rebates to several customer bank accounts were discovered during a branch audit. (Complaint ¶ 6; Decl. ¶ 9; CX-1, CX-8.)

In an interview with Fleet investigators, Respondent admitted that after posting unauthorized credits to several customer accounts, he took the funds and deposited a total of \$5,160 to his own account. In a written statement, Respondent explained that he took the money to repay a gambling debt and "deeply regret[ed] any inconvenience" he had caused. Fleet reported the matter to the FBI, and in June 2004, Respondent was sentenced to three years'

² While registered with NASD through Quick, Respondent was employed by Fleet as a sales and service representative until his termination on January 15, 2004.

probation and ordered to pay restitution of \$5,160, after entering a guilty plea to misdemeanor theft charges in U.S. District Court for the Southern District of New York. (Decl. ¶¶ 21-23; CX-9, CX-10.)

NASD Conduct Rule 2110 states a broad ethical principle that members "shall observe high standards of commercial honor and just and equitable principles of trade." Rule 115 extends this requirement to persons associated and registered with members. The ethical and legal obligations set forth in Rule 2110 are not limited to the sale of securities but encompass a wide variety of unethical business-related conduct.³

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."⁴ It is well settled that conversion of funds violates Rule 2110.⁵

In this case, Respondent embezzled funds from his employer. He deliberately generated the rebates, posted the rebates to various customer accounts, and then redirected the funds to his own account. Respondent admitted as much to Fleet investigators and pleaded guilty to criminal charges stemming from the same misconduct alleged here.

³ See *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (citations omitted); *Daniel J. Alderman*, Exchange Act Release No. 35,997, 1995 SEC LEXIS 1823, at *7 (July 20, 1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997); *Dep't of Enforcement v. Bendisen*, No. C01020025, 2004 NASD Discip. LEXIS 13, at *16 (NAC Aug. 9, 2004) ("[W]e have determined that disciplinary hearings under Rule 2110 are 'ethical proceedings, and one may find a violation of the ethical requirements where no legally cognizable wrong occurred [and that] NASD has authority to impose sanctions for violations of 'moral standards' even if there was no 'unlawful' conduct.'" quoting *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000)).

⁴ *NASD Sanction Guidelines* (2005 ed.) at 38 n.2.

⁵ See *Dep't of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *8 (NAC Dec. 14, 1999).

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 Rule 2110.

B. Failure to Respond to Requests for Information

The second cause of the Complaint alleges that on July 8, 2004, 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 response and documentation regarding the misappropriation of funds from Fleet. The Complaint further alleges that on September 14, 2004, the staff sent a second Rule 8210 request for information to Respondent at his CRD address, via first class and certified mail. Although in each instance the staff received the return receipt, the signature was illegible on each. Respondent did not respond to either request. The staff served the requests in accordance with Rule 8210(d), and pursuant to that rule, Respondent is deemed to have received them. (Complaint ¶¶ 8-10; Decl. ¶¶ 25-29; CX-11 – CX-14.)

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.⁶ Accordingly, members and associated persons have a duty to cooperate fully and promptly with NASD requests for information.⁷

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

⁶ *Dep't of Enforcement v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS 17, at *46 (NAC Nov. 22, 2004), *appeal docketed*, No. 3-11786 (SEC Dec. 28, 2004).

⁷ *Brian L. Gibbons*, Exchange Act Release No. 37,170, 1996 SEC LEXIS 1291, at *7 (May 8, 1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997).

to the staff's requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

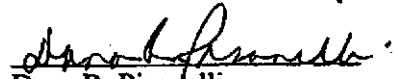
V. Sanctions

NASD Sanction Guidelines provide that a bar is standard for conversion, regardless of the amount converted.⁸ Under the Guidelines, a bar is also standard for failure to respond to requests for information.⁹ There are no mitigating circumstances that would warrant any sanction less than a bar for either violation. Accordingly, Respondent will be barred in all capacities for each violation.

VI. Conclusion

Respondent Jose A. Alba is barred from association with any member firm in any capacity for conversion of funds, in violation of NASD Conduct Rule 2110, and for failure to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Dana R. Pisartelli
Hearing Officer

Dated: September 16, 2005
Washington, DC

Copies to: Jose A. Alba (*via overnight and first class mail*)
Peter Bon Viso, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

⁸ Guidelines at 38.

⁹ Id. at 35.

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DEPARTMENT OF ENFORCEMENT,

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JOSE ANTONIO ALBA
(CRD NO. 4680317),

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No. C10050021**

Hearing Officer -

COMPLAINT

Upon information and belief, Complainant, the Department of Enforcement, alleges the following:

JURISDICTION

1. Jose Antonio Alba ("Respondent") was registered with NASD as an Investment Company and Variable Contracts Product Representative from on or about October 18, 2003, to on or about February 12, 2004, through his association with NASD member firm Quick & Reilly, Inc. (CRD No. 11217) (Q&R).
2. Q&R filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") regarding Respondent on or about February 12, 2004. The Form U-5 indicated that Respondent's last date of employment at Q&R was January 14, 2004, and stated, "Dual employee-discharged by Fleet Bank for misappropriation of Fleet Bank customer funds."
3. Respondent is not currently registered or associated with any NASD member firm.
4. Pursuant to Article V, Section 4 of NASD By-Laws, NASD retains jurisdiction over Respondent.

FIRST CAUSE OF COMPLAINT
(Conversion)
Violation of NASD Conduct Rule 2110

5. Paragraphs 1 through 4 of this Complaint are re-alleged and incorporated herein by reference.
6. From in or about December 2003, to in or about January 2004, while registered with NASD through his association with Q&R, Respondent converted funds totaling at least \$5,160.00 from Fleet National Bank/FleetBoston Financial.

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

SECOND CAUSE OF COMPLAINT
(Failure to Respond)
Violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110

7. Paragraphs 1 through 6 of this Complaint are re-alleged and incorporated herein by reference.
8. By letter dated July 8, 2004, sent to Respondent pursuant to and in accordance with NASD Procedural Rule 8210, the staff of NASD District 10 (the "Staff") requested that, by July 23, 2004, Respondent provide information relating to his misappropriation of funds. Respondent failed to respond.
9. By letter dated September 14, 2004, sent to Respondent pursuant to and in accordance with NASD Procedural Rule 8210, the Staff requested that Respondent provide the above-mentioned information by September 24, 2004. Respondent failed to respond.
10. Each request was sent to Respondent's Central Registration Depository ("CRD") address [REDACTED] ("CRD Address"), via first class mail with a certificate of mailing and certified mail. For each mailing to Respondent's CRD Address the Staff received the certificate of mailing receipt and a signed certified mail receipt. The signature on the certified mail receipt was illegible.

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 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;
- D. An order requiring Respondent to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- E. An order imposing any other fitting sanctions.

Dated: April 20, 2005

DEPARTMENT OF ENFORCEMENT



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Of Counsel

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