

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

PHILIP JOHN NOCIFORO
(CRD No. 1482682),

Respondent.

Disciplinary Proceeding
No. C10050027

Hearing Officer – DRP

DEFAULT DECISION

October 17, 2005

Respondent is barred from association with any NASD member in any capacity for misusing customer funds, in violation of NASD Conduct Rule 2110. In light of the bar, no sanction is imposed for falsifying documents in violation of NASD Conduct Rule 2110.

Appearances

Julie K. Glynn, Senior Regional Attorney, New York, NY (Rory C. Flynn, Washington, DC, Of Counsel), for Complainant.

No appearance by or for Philip John Nociforo.

DECISION

I. Procedural Background

On May 9, 2005, the Department of Enforcement filed a four-count Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent Philip John Nociforo (Nociforo or Respondent) falsified documents and misused customer funds, in violation of NASD Conduct Rule 2110. Respondent did not file an Answer to the Complaint. Accordingly on August 15, 2005, Enforcement filed a Motion for Entry of Default Decision,

However, on August 8, 2005, Respondent telephoned Enforcement and left a message acknowledging he was required to respond that day and stating he would call back.

Nevertheless, Respondent did not file an Answer or otherwise file a response to the Complaint.³ (Decl. ¶¶ 17-23; CX-7, CX-8.)

Enforcement complied with NASD 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. Moreover, as evidenced by his telephone calls to Enforcement, Respondent had actual notice of this proceeding. By failing to file an Answer or otherwise respond to the Complaint, Respondent defaulted. Pursuant to NASD Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

III. Jurisdiction

Respondent was first registered with NASD member firm Pruco Securities LLC and Prudential Insurance Company (collectively Prudential) as an Investment Company Products/Variable Contracts Representative in April 1993. Since then, he has been registered in the same capacity with a number of NASD member firms, including Metropolitan Life Insurance Company and MetLife Securities Inc. (collectively MetLife) from March 1999 through May 2002. His most recent registration, with NASD member firm Park Avenue Securities LLC (Park Avenue), was terminated on February 15, 2005. Respondent has not been registered since that time. (Compl. ¶¶ 1-3; Decl. ¶¶ 5-7; CX-1.)

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

³ Enforcement staff returned Respondent's call on August 9, 2005 and left a message with an unidentified person at Respondent's home telephone number, asking that Respondent call Enforcement. He never called. (Decl. ¶ 22.)

Respondent's registration with Park Avenue, alleges misconduct that occurred while he was registered.

IV. Findings of Fact and Conclusions of Law

A. Falsification of Variable Life Insurance Applications

The first and second causes of the Complaint allege that Respondent falsified the variable life insurance applications of customers JMG and JEG, respectively. While at Prudential, Respondent was the agent who handled the customers' life insurance. In August 2000, Respondent persuaded the customers to surrender their Prudential life insurance policies by representing that they could use the cash value to obtain MetLife variable life insurance policies on better terms. On or about August 7, 2000, Respondent prepared and submitted variable life insurance applications to MetLife for JMG and JEG. In each application, Respondent falsely indicated that the customer did not have other life insurance coverage. He also falsely completed the Definition of Replacement form to reflect that the new policies were not replacing existing life insurance coverage. These falsehoods enabled Respondent to skip disclosures otherwise mandated by state law regarding replacement insurance policies and allowed his related misuse of customer funds to go undetected. (Compl. ¶¶ 6-12; Decl. ¶¶ 26- 30.)

Falsifying documents in an attempt to deceive a member firm and evade state law is unethical conduct that falls within the purview of NASD Conduct Rule 2110, which requires that members and associated persons observe "high standards of commercial honor and just and equitable principles of trade."⁴ The allegations in the Complaint, which are deemed admitted,

⁴ See also *Charles E. Kautz*, Exchange Act Release No. 37,072, 1996 SEC LEXIS 994 (Apr. 5, 1996) (falsification of ten annuity documents by misidentifying selling agent violates Rule 2110); *Donald M. Bickerstaff*, Exchange Act Release No. 35,607, 1995 SEC LEXIS 982 (Apr. 17, 1995) (confirming that document falsification constitutes a violation of Article III, Section 1 of NASD's Rules of Fair Practice, the predecessor to NASD Conduct Rule 2110).

are thus sufficient to establish, for purposes of this default decision, that Respondent falsified customer documents in violation of NASD Conduct Rule 2110, as charged in the first and second causes of the Complaint.

B. Misuse of Customer Funds

The third and fourth causes of the Complaint allege that Respondent misused funds belonging to JMG and JEG, respectively. Pursuant to Respondent's recommendation, the customers sold their Prudential life insurance policies and sought to purchase MetLife variable life insurance policies. In early October 2000, JMG received a check in the amount of \$11,609.15, representing the cash value of his Prudential policy, and endorsed it to Respondent in order to fund his MetLife policy purchase. Similarly, in early October 2000, JEG received a check in the amount of \$2,448.75, representing the cash value of her Prudential policy. She also endorsed the check to Respondent in order to fund her MetLife policy purchase. Later in October 2000, JEG received a check in the amount of \$1,992.56, representing the cash value of a second Prudential policy, which she endorsed over to Respondent, in order to further fund her MetLife policy purchase. (Compl. ¶¶ 14, 21, 23; Decl. ¶¶ 32, 36, 38.)

Respondent deposited all three checks into his personal bank account and made initial premium payments of \$3,572 toward JMG's MetLife policy and \$2,448.75 toward JEG's MetLife policy. Respondent never forwarded the remaining funds to MetLife as the customers intended, nor did he return the money to them. Instead, he converted the remaining funds for his personal use. (Compl. ¶¶ 15-19, 22, 24-28; Decl. ¶¶ 32-39.)

Improper use of a customer's funds occurs when the funds are not used as intended by the customer⁵ and is "patently antithetical" to the standards and principles that NASD seeks to promote through Rule 2110.⁶ The allegations in the third and fourth causes of the Complaint, which are deemed admitted, are thus sufficient to establish for purposes of this default decision that Respondent violated NASD Conduct Rule 2110.

V. Sanctions

For improper use of customer funds, NASD Sanction Guidelines recommend a fine of \$2,500 to \$50,000, and a bar, absent mitigating factors such as evidence of a misunderstanding regarding the customer's intentions.⁷ Here, there is no evidence of a misunderstanding or other mitigating factors that would warrant a lesser sanction. Indeed, the circumstances support the conclusion that Respondent, who deposited the customers' checks into his personal bank account and then submitted only a portion thereof to MetLife, knowingly acted contrary to his customers' wishes and simply converted their funds. Accordingly, a bar is imposed for this violation.⁸

For falsification of documents, the Guidelines suggest a fine of \$5,000 to \$100,000, and in egregious cases, a bar.⁹ Enforcement does not allege this is an egregious case but seeks a suspension of nine months. The Hearing Officer concurs that falsification of records is a serious violation that undermines the integrity of the securities markets and the confidence of individuals and institutions relying on that integrity, and that a lengthy suspension is appropriate in this case.

⁵ *Bernard D. Gorniak*, Exchange Act Release No. 35,996, 1995 SEC LEXIS 1820 (1995) (respondent violated Rule 2110 when he accepted customer funds and failed to make timely investments with the funds as instructed and failed to promptly return the funds).

⁶ *Brian L. Shegon*, No. C9A960030, 1997 NASD Discip. LEXIS 66, at *5 (NBCC Nov. 20, 1997) (quoting *Wheaton D. Blanchard*, 1976 SEC LEXIS 1571, at *2 (May 27, 1976)).

⁷ *Guidelines* at 38.

⁸ Enforcement does not seek restitution, because JMG and JEG were fully reimbursed for their losses, with interest, in November 2002. (Decl. ¶ 41.)

⁹ *NASD Sanction Guidelines* (2005 ed.) at 39.

Respondent knowingly falsified documents related to two insurance applications, evidencing both dishonesty and a total disregard for his customers' best interests. He falsified documents that were intended to operate as safeguards to ensure customer protection, thereby affording him an opportunity to misuse his customers' funds. A suspension of nine months is appropriate, but in light of the bar imposed for Respondent's misuse of customer funds, a suspension is redundant¹⁰ and serves no additional remedial purpose.¹¹ Accordingly, the Hearing Officer imposes no sanction for this violation.¹²

VI. Conclusion

Respondent Philip John Nociforo is barred from association with any NASD member in any capacity for misusing customer funds, in violation of NASD Conduct Rule 2110. In light of the bar, no further sanction is imposed for falsifying documents, in violation of NASD Conduct Rule 2110. The bar is effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Dana R. Pisanelli
Hearing Officer

Dated: October 17, 2005
Washington, DC

Copies to: Philip J. Nociforo (*via overnight and first class mail*)
Julie K. Glynn, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

¹⁰ *Jeffrey B. Hodde*, 2002 NASD Discip. LEXIS 4, at *17 (NAC Mar. 27, 2002).

¹¹ *Cf. Castle Securities Corp.*, No. C3A010036, 2004 NASD Discip. LEXIS 1, at **36-37 (NAC Feb. 19, 2004).

¹² *See Dep't of Enforcement v. Rogala*, No. C8A030089, 2005 NASD Discip. LEXIS __ (NAC Oct. 11, 2005).

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COMPLAINT

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

JURISDICTION

1. Respondent Philip John Nociforo first became registered with NASD as an Investment Company Products/Variable Contracts Representative ("IR") on April 6, 1993 through member firm Pruco Securities LLC (BD No. 5685) ("Pruco") and Prudential Insurance Company (BD No. 45533) (collectively, "Prudential"). He was subsequently registered through several NASD member firms.
2. From December 7, 1998 through May 31, 2002, Respondent was registered as an IR through member firm Metropolitan Life Insurance Company (BD No. 4095) and member firm MetLife Securities Inc. (BD No. 14251) (collectively, MetLife").
3. Respondent is not currently registered with NASD. On February 18, 2005, a different NASD member firm through which Respondent was registered filed with NASD a Uniform Termination Notice for Securities Industry Registration

("Form U-5") concerning Respondent. The Form U-5 indicated that Respondent's last day of employment at that firm was February 15, 2005.

4. Respondent remains subject to the jurisdiction of NASD pursuant to Article V, Section 4 of NASD's By-Laws.

BACKGROUND

5. Paragraphs 1 through 4, above, are re-alleged and incorporated herein by reference.
6. Respondent knew customers JMG and JEG (collectively, "J&J") when he worked at Prudential and J&J held life insurance through Prudential. He was aware of the life insurance that JMG held through Prudential.
7. Respondent completed and submitted a variable life insurance application for customer JMG to MetLife on or about August 7, 2000 ("JMG's MetLife Application.")
8. Respondent completed and submitted a variable life insurance application for customer JEG to MetLife on or about August 7, 2000 ("JEG's MetLife Application.")

FIRST CAUSE OF COMPLAINT (Falsification of Variable Life Insurance Application) (Violation of NASD Conduct Rule 2110)

9. Paragraphs 1 through 8, above, are re-alleged and incorporated herein by reference.
10. In connection with JMG's MetLife Application, Respondent completed and submitted various forms.

- a. On one form Respondent indicated that JMG did not have other life insurance coverage. Respondent knew that this was false.
- b. On another form Respondent indicated that JMG was not replacing existing life insurance coverage with the new MetLife policy. Respondent knew that this was false.

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

SECOND CAUSE OF COMPLAINT
(Falsification of Variable Life Insurance Application)
(Violation of NASD Conduct Rule 2110)

11. Paragraphs 1 through 10, above, are re-alleged and incorporated herein by reference.

12. In connection with JEG's MetLife Application, Respondent completed and submitted various forms.

- a. On one form Respondent indicated that JEG did not have other life insurance coverage. Respondent knew that this was false.
- b. On another form Respondent indicated that JEG was not replacing existing life insurance coverage with the new MetLife policy. Respondent knew that this was false.

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

THIRD CAUSE OF COMPLAINT
(Misuse of Funds Belonging to JMG)
(Violation of NASD Conduct Rule 2110)

13. Paragraphs 1 through 14 are re-alleged and incorporated herein by reference.

14. JMG gave Respondent a check for \$11,609.15 on or about October 3, 2000. JMG gave this money to Respondent for the specific purpose of funding his MetLife variable life insurance purchase.
15. Shortly after he received the check, Respondent deposited the check into his personal bank account.
16. On or around October 6, 2000, Respondent obtained a bank check in the amount of \$3,572. He forwarded that money to MetLife as an initial premium payment on JMG's variable life insurance policy.
17. Respondent never forwarded any other monies to MetLife for payment into JMG's variable life insurance policy.
18. Respondent did not apply JMG's funds as the customer directed and/or intended.
19. Respondent converted the remaining \$8037.15 of JMG's money for his personal use.

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

FOURTH CAUSE OF COMPLAINT
(Misuse of Funds Belonging to JEG)
(Violation of NASD Conduct Rule 2110)

20. Paragraphs 1 through 21 are re-alleged and incorporated herein by reference.
21. JEG gave Respondent a check for \$2,448.75 on or about October 3, 2000. JEG gave this money to Respondent for the specific purpose of funding her MetLife variable life insurance purchase.
22. Shortly after he received the first check from JEG, Respondent deposited it into his personal bank account.

23. On or around October 26, 2000, Respondent took an additional check in the amount of \$1,992.56 from JEG. JEG gave this money to Respondent for the specific purpose of funding her MetLife variable life insurance contract.
24. Shortly after he received the second check from JEG, Respondent deposited it into his personal bank account.
25. On or around October 6, 2000, Respondent obtained a bank check in the amount of \$2,448.75. He forwarded that money to MetLife as an initial premium payment on JEG's variable life insurance policy.
26. Respondent never forwarded any other monies to MetLife for payment into JEG's variable life insurance policy.
- * 27. Respondent did not apply JEG's funds as the customer directed and/or intended.
28. Respondent converted \$1,992.56 of JEG's money for his personal use.
- By reason of the foregoing, Respondent violated NASD Conduct Rule 2110.

PRAYER FOR RELIEF

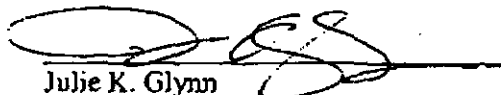
WHEREFORE, Complainant respectfully requests:

- 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 to pay any outstanding restitution to JMG and JEG, including interest on converted funds;

- D. An order imposing such costs of any proceedings as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330; and
- E. An order imposing any other fitting sanction.

Dated: May 5, 2005

DEPARTMENT OF ENFORCEMENT



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