

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,
Complainant,

v.

JERRITT C. SIMMERS
(CRD No. 4590866),

Respondent.

Disciplinary Proceeding
No. C10050033

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

August 22, 2005

The Respondent willfully failed to disclose his criminal record on two Forms U-4, in violation of NASD Conduct Rule 2110 and IM-1000-1. The Respondent is barred from association with any member of NASD in any capacity.

Appearances

For the Department of Enforcement: Soo H. Im, Regional Attorney, New York, NY (Rory C. Flynn, Chief Litigation Counsel, Washington, D.C., Of Counsel).

For the Respondent: No appearance.

DECISION

I. Introduction

On May 16, 2005, the Department of Enforcement ("Enforcement") filed the attached Complaint alleging that the Respondent, Jerritt C. Simmers ("Simmers" or "Respondent") willfully failed to disclose material information on his Uniform Application for Securities Industry Registration or Transfer (Form U-4), in violation of NASD Conduct Rule 2110 and IM-1000-1. Pursuant to NASD Rules 9215(a) and 9138(c), Simmers was required to file an answer to the Complaint on or before June 10,

2005, which he failed to do. Consequently, on July 29, 2005, Enforcement filed a Motion for Entry of Default Decision, supported by the sworn declaration of Soo H. Im ("Im Decl.") and 13 exhibits. The Respondent did not respond to the Motion.

For the reasons discussed below, the Hearing Officer grants Enforcement's Motion.¹

II. Respondent's Default

Enforcement served the Respondent with copies of the Complaint and Notice of Complaint on May 13, 2005, by certified and first-class mail sent to his current residential address, as reflected in the Central Registration Depository (the "CRD address"), and to a second address the Respondent provided to NASD.² The Respondent did not file an Answer.

On June 13, 2005, Enforcement served the Respondent with copies of the Complaint and Second Notice of Complaint by certified and first-class mail sent to the same two addresses.³ Again, the Respondent failed to file an Answer or otherwise respond to the Complaint.

Enforcement properly served the Respondent in compliance with Procedural Rule 9134(b)(1) by sending the Complaint by certified mail to the Respondent's CRD address and the alternate address the Respondent supplied to NASD staff.⁴ Thus, the Respondent

¹ The factual findings in this Default Decision are based on the attached Complaint, the allegations of which are deemed admitted pursuant to Procedural Rule 9215(f), and on the declaration and exhibits Enforcement filed with the Motion. References to the Exhibits are cited as "CX" followed by the exhibit number.

² Im Decl. ¶ 12.

³ *Id.* ¶ 18; CX 8.

⁴ *Department of Enforcement, v. Reynolds Verdiner*, No. CAF020004, NASD 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003) (NASD Procedural Rule 9134(b)(1) allows for

received valid constructive notice of this proceeding and defaulted by failing to answer the Complaint. Accordingly, pursuant to Procedural Rules 9215(f) and 9269(a)(2), the Hearing Officer finds the Respondent in default and deems the allegations in the Complaint admitted.

III. Jurisdiction

Simmers was registered with NASD through member firm, Milestone Financial Services, Inc. ("Milestone"), from September 2002 until November 2002.⁵ Subsequently, from November 2002 until June 2003, Simmers was employed by NASD member firm, Aristatrade Securities, LLC ("Aristatrade"), and registered with NASD as a General Securities Representative.⁶ Simmers was again registered with NASD from June 2004 until August 2004, through NASD member firm, Gunnallen Financial, Inc. (Gunnallen).⁷ Simmers has not been associated with an NASD member firm, or registered with NASD, since leaving Gunnallen.⁸

NASD has jurisdiction of this proceeding pursuant to Article V, Section 4 of NASD's By-Laws, which provides that NASD may bring a disciplinary proceeding against a formerly registered individual for two years after his registration is terminated. In this case, Simmers' registration ended in August 2004, and Enforcement filed the Complaint in May 2005, within the two-year period of retained jurisdiction. Therefore, NASD has jurisdiction over this matter.

constructive notice by mailing a complaint to the respondent's most recent CRD address) quoting *Lubeck v. SEC*, 1998 U.S. App. LEXIS 18849, at *20 (9th Cir. Aug. 12, 1998).

⁵ CX 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

IV. Findings of Fact and Conclusions of Law

The Complaint alleges that Simmers executed a Form U-4 on September 19, 2002, which Milestone submitted to NASD on or about September 23, 2002. Simmers indicated on the Form U-4 that he had never been charged with any felony or with a misdemeanor involving the wrongful taking of property.⁹ Simmers made the same representations in another Form U-4 he signed on or about November 12, 2002, in connection with his employment with Aristatrade.¹⁰

In fact, Simmers was charged with three felonies in New York State between 1999 and 2001: Criminal Possession of Stolen Property in the Third Degree on or about December 3, 1999; Criminal Possession of a Forged Instrument in the Second Degree on or about July 7, 2001; and Burglary in the Second Degree on or about August 13, 2001.¹¹ Simmers also was charged in New York State with misdemeanor Petit Larceny on or about June 23, 2001.¹² Simmers was obligated to disclose each of these charges on his Form U-4, which he failed to do.

The criminal history of an applicant for NASD registration is material because it directly relates to the applicant's fitness for employment in the securities industry. And filing incomplete or inaccurate information that could in any way mislead NASD is inconsistent with just and equitable principles of trade and violates NASD Conduct Rule 2110 and IM-1000-1.

⁹ Compl. ¶¶ 12-15.

¹⁰ *Id.* ¶¶ 16-20.

¹¹ Im Decl. ¶¶ 23-27; CX 10-CX 13.

¹² *Id.*

In this case, there is no question that the serious nature of the criminal charges against Simmers would have been important information in evaluating Simmers' suitability for employment and registration. Thus, the Hearing Officer finds that Simmers misled NASD and both member firms concerning his qualifications when he failed to disclose this information, and he thereby violated NASD Conduct Rule 2110 and IM-1000-1.

Enforcement further alleges that Simmers' conduct was willful. Willfulness is not required to establish a violation of Rule 2110, but Article III, Section 4(f) of the NASD By-Laws provides that a person who has willfully made any false or misleading statement as to any material fact in any application to become registered with an NASD member, or who has omitted to disclose any material fact which is required to be disclosed in such an application, is subject to "disqualification." For this purpose, it is sufficient to establish willfulness if the respondent "knew or reasonably should have known under the particular facts and circumstances that his conduct was improper."¹³ A finding of willfulness does not require intent to violate the law or a specific rule, but simply intent to commit the act that constitutes the violation.¹⁴

The Hearing Officer concludes that the Respondent's criminal record was material information and that his failure to disclose this information was willful. Where a respondent has been charged with felonies repeatedly close in time to the filing of the subject Form U-4, there is no likelihood that the non-disclosure of the felony charges was inadvertent.

¹³ *Christopher LaPorte*, Exchange Act Release No. 39171, 1997 SEC LEXIS 2058, at *8 n.2 (Sept. 30, 1997).

¹⁴ *Department of Enforcement v. Nelson C. Onyejiaka*, No. C10990121, 2000 NASD Discip. LEXIS 22, at *11 (O.H.O. Oct. 20, 2000).

In conclusion, the Hearing Officer finds that Simmers willfully filed false and misleading information on his Forms U-4, in violation of NASD Conduct Rule 2110 and IM-1000-1.

V. Sanctions

The NASD Sanction Guidelines recommend a fine of \$2,500 to \$50,000 and a suspension in any or all capacities of from 5 to 30 days. In *egregious* cases, the Guidelines recommend consideration of a longer suspension or a bar.¹⁵ The principal considerations listed in determining the appropriate sanction are the nature and significance of the information at issue.¹⁶ Enforcement requests imposition of a \$10,000 fine and a two-year suspension.

Enforcement argues that Simmers misconduct was not “overly egregious.” Enforcement credits the fact that Simmers was not convicted of any of the felony charges. One of the felony charges was dismissed, and the other two were reduced to lesser charges to which Simmers entered guilty pleas.¹⁷ The misdemeanor charge was also dismissed. The Hearing Officer, however, does not find the disposition of the charges mitigating. As Enforcement points out in its Motion, the nature of the charges—criminal possession of stolen property, petit larceny, felony possession of a forged instrument, and burglary—raise serious questions about Simmers’ fitness to work in the securities business. A Respondent’s obligation to disclose such information is not dependent upon the ultimate disposition of the charges. Respondents are obligated to disclose the *charges* regardless of whether they are ultimately reduced or dismissed.

¹⁵ NASD Sanction Guidelines 73-74 (2005 ed.).

¹⁶ *Id.*

¹⁷ Compl. ¶¶ 7-10.

Taking into consideration all of the evidence available in the record, the Hearing Officer concludes that a bar is the appropriate sanction in this case. Further, the Hearing Officer finds that Simmers' failure to disclose his criminal record was willful. Simmers is therefore statutorily disqualified from association with a member of NASD under Article III, Section 4(f) of the NASD By-Laws.

VI. Order

Jerritt C. Simmers is barred from association with any NASD member in any capacity for his failure to disclose material information on two applications for registration, in violation of NASD Conduct Rule 2110. The bar shall become effective once this decision becomes the final disciplinary action of NASD.

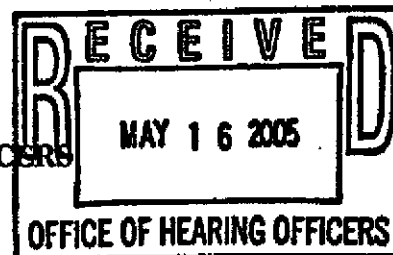
A handwritten signature in black ink, appearing to read 'Andrew H. Perkins', written over a horizontal line.

Andrew H. Perkins
Hearing Officer

Copies to:

Jerritt C. Simmers (by overnight courier and first-class mail)
Soo H. Im, Esq. (by first-class and electronic mail)
David Jaffe, Esq. (by first-class and electronic mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

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COMPLAINT

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

JURISDICTION

1. Respondent Jerritt C. Simmers (CRD No. 4590866) ("Respondent") first became registered with NASD as a General Securities Representative (GSR) on October 6, 2002, through an association with member firm Milestone Financial Services, Inc. (BD 43295) ("Milestone").
2. From November 2002 through June 2003, Respondent was associated with Aristatrade Securities, LLC (BD 112535) ("Aristatrade").
3. From June 2004 to August 2004, Respondent subsequently became associated with a member firm.
4. On August 23, 2004, this member filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") concerning Respondent, indicating that Respondent's last day of employment was August 19, 2004.

5. Upon information and belief, Respondent is not currently registered with NASD, nor is he otherwise employed in the securities industry. However, Respondent remains subject to the jurisdiction of NASD pursuant to Article V, Section 4 of its By-Laws.

BACKGROUND

6. Paragraphs 1 through 5 of this Complaint are realleged and incorporated herein by reference.
7. On or about December 3, 1999, Respondent was charged with Criminal Possession of Stolen Property in the Third Degree (New York Penal Law ["P.L."] §165.50), a felony under New York State law (the "1999 Felony Charge"). On or about May 3, 2000, the charge was reduced to, and Respondent pled guilty to disorderly conduct (P.L. §240.20), a violation under New York State law.
8. On or about June 23, 2001, Respondent was charged with, among other things, Petit Larceny (P.L. §155.25), a misdemeanor offense under New York State law (the "2001 Misdemeanor Charge"). On or about April 12, 2002, the Petit Larceny charge was dismissed.
9. On or about July 7, 2001, Respondent was charged with Criminal Possession of a Forged Instrument in the Second Degree (P.L. §170.25), a felony under New York State law (the "2001 Felony Charge"). On or about April 12, 2002, this charge was dismissed.
10. On or about August 13, 2001, Respondent was charged with, among other things, Burglary in the Second Degree (P.L. §140.25), a felony under New York State law (the "2001 Burglary Charge"). On or about April 12, 2002, the Burglary

charge was dismissed and Respondent pled guilty to trespass (P.L. §140.05), a violation under New York State law.

FIRST CAUSE OF COMPLAINT
(Failure to Disclose Material Facts on Forms U-4)
Violation of NASD Conduct Rule 2110 and NASD IM-1000-1

Failure to Disclose Charges at Milestone

11. Paragraphs 1 through 10 of this Complaint are realleged and incorporated herein by reference.
12. On or about September 19, 2002, in connection with his employment with Milestone, Respondent executed a Form U-4 that was submitted to NASD on his behalf by Milestone on or about September 23, 2002.
13. On the Form U-4, Respondent answered "no" to question 14A(1)(b), which asked whether he had "ever been *charged* with any *felony*." (Emphasis added).
14. Similarly, on the Form U-4, Respondent answered "no" to question 14B(1)(b), which asked whether he had "ever been *charged* with a *misdemeanor* specified in 14B(1)(a) [which includes a '*misdemeanor involving ... wrongful taking of property ...forgery, counterfeiting...*']." (Emphasis added).
15. On his Milestone Form U-4, Respondent willfully failed to disclose the following material facts: the 1999 Felony Charge; the 2001 Misdemeanor Charge; the 2001 Felony Charge; and the 2001 Burglary Charge.

Failure to Disclose Charges at Aristatrade

16. On or about November 12, 2002, in connection with his employment with Aristatrade, Respondent executed a Form U-4 that was submitted to NASD on his behalf by Aristatrade on or about November 19, 2002.

17. On the Form U-4, Respondent initially answered "no" to question 23A(1)(b), which asked whether he had "ever been *charged* with any *felony*." (Emphasis added).
18. Similarly, on the Form U-4, Respondent initially answered "no" to question 23B(1)(b), which asked whether he had "ever been *charged* with a *misdemeanor* specified in 23B(1)(a) [which includes a '*misdemeanor involving ... wrongful taking of property ...forgery, counterfeiting...'*]." (Emphasis added).
19. Subsequently, when Aristatrade's Compliance Officer notified Respondent that he needed to disclose his complete criminal history, on or about March 12, 2003, Respondent amended his Aristatrade Form U-4 to disclose the 1999 Felony Charge; the 2001 Misdemeanor Charge; the 2001 Felony Charge; and the 2001 Burglary Charge.
20. On his initial Aristatrade Form U-4, Respondent willfully failed to disclose the following material facts: the 1999 Felony Charge; the 2001 Misdemeanor Charge; the 2001 Felony Charge; and the 2001 Burglary Charge.

By reason of the foregoing, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and thus violated NASD IM-1000-1 and NASD Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

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

- B. Specific findings that Respondent's conduct was willful; the omitted information was material; and the omission to state material facts was on Forms U-4 applications;
- C. An order imposing sanctions upon Respondent in accordance with NASD Procedural Rule 8310;
- 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: May 13, 2005

DEPARTMENT OF ENFORCEMENT



Soo H. Im
Regional Attorney
NASD, District 10
One Liberty Plaza
New York, New York 10006
(212) 858-4170

Of Counsel:

David M. Jaffe, Esq.
Regional Chief Counsel
NASD, District 10
One Liberty Plaza
New York, New York 10006

Rory C. Flynn, Esq.
Chief Litigation Counsel
NASD
1801 K Street, NW, Suite 800
Washington, D.C. 20006