

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

**RUSSELL J. BJERKE
(CRD No. 3178233),**

Respondent.

**Disciplinary Proceeding
No. C3B050015**

Hearing Officer – DRP

DEFAULT DECISION

March 2, 2006

Respondent is barred from associating with any NASD member firm in any capacity for converting customer funds, in violation of NASD Conduct Rules 2330(a) and 2110, and for failing to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Appearances

Mark A. Graves, Senior Regional Attorney, San Francisco, CA (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

No appearance by or for Russell J. Bjerke.

DECISION

I. Background

On June 24, 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 Russell J. Bjerke (Respondent or Bjerke) converted customer funds, in violation of NASD Conduct Rules 2330(a) and 2110, and failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Respondent did not file an Answer to the Complaint.

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Accordingly, on October 20, 2005, Enforcement filed a motion for entry of default decision, supported by the declaration of Mark A. Graves and seven exhibits. Bjerke did not file a response to the motion. On January 24, 2006, Enforcement filed a supplemental declaration and three additional exhibits. For the reasons set forth below, Enforcement's motion is granted.¹

II. Respondent's Default

On or about June 23, 2005, Enforcement served the Complaint and Notice of Complaint on Respondent by first class and certified mail sent to Respondent's last known residential address, as reflected in the Central Registration Depository (CRD address),² and to another address discovered during the investigation of this matter (Main Street address).³ Respondent did not file an Answer.⁴ (Decl. ¶¶ 6-9; Supp. Decl. ¶ 3; CX-2; CX-3; CX-4; CX-8; CX-9.)

On or about August 2, 2005, Enforcement served the Complaint and Second Notice of Complaint on Respondent by first class and certified mail at both addresses. As before, Respondent did not file an Answer.⁵ (Decl. ¶ 9; Supp. Decl. ¶ 5; CX-5; CX-6.)

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

² Respondent's CRD address is [REDACTED] (CX-8.)

³ The Main Street address is [REDACTED] Enforcement obtained this address from Respondent during a telephone conversation with him on December 14, 2004. (Supp. Decl. ¶ 4.)

⁴ The certified mailing to the CRD address was returned, marked "Not del[iverable] as addressed/unable to forward." The certified mailing to the Main Street address was returned, marked "Unclaimed." (Decl. ¶¶ 7-8; CX-3; CX-4.)

⁵ Once again, the certified mailing to the CRD address was returned, marked "Not del[iverable] as addressed/unable to forward," and the certified mailing to the Main Street address was returned, marked "Unclaimed." (CX-5; CX-6.)

On or about September 20, 2005, Enforcement served the Complaint and Third Notice of Complaint on Respondent by first class and certified mail at a third address obtained by NASD staff (Bellview address).⁶ Respondent did not file an Answer.⁷ (Decl. ¶ 10; 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.⁸ 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.

III. Jurisdiction

Respondent, who is not currently associated or registered with any NASD member, was registered as a general securities representative with Linsco/Private Ledger Corp. (Linsco) from November 2001 to December 2002. In January 2004, Linsco filed an amended Form U-5 (Uniform Termination Notice) to disclose an allegation by customer SB that, while registered with Linsco, Respondent deposited into his personal bank account funds SB gave him to invest. (Compl. ¶¶ 1-3; Decl. ¶¶ 3-5; CX-1.)

⁶ The Bellview address is [REDACTED] Enforcement obtained the address on February 17, 2004 from an Equifax search but had neglected to serve the Complaint and Second Notice of Complaint on Respondent at the Bellview address. (Decl. ¶ 10; Supp. Decl. ¶ 6; CX-10.)

⁷ The certified mailing to the Bellview address was returned affixed with a U.S. Postal Service sticker that bore Respondent's Main Street address. It read "Forward time exp[ired]" and "Return to sender." (Supp. Decl. ¶¶ 7, 8; CX-7.)

⁸ It is well settled that NASD Procedural Rule 9134(b)(1) provides for constructive notice by mailing a complaint to the respondent's most recent CRD address. *See, e.g., Lubeck v. SEC*, 156 F.3d 1237 (9th Cir. 1998) (NASD complied with notice requirements by mailing complaint to respondent's last known address); *Eric M. Diehm*, 51 S.E.C. 938, 941 n.14 (1994). Furthermore, it was Respondent's responsibility to provide CRD with any new address, even after he left the industry. *Dep't of Enforcement v. Hodde*, No. C10010005, 2002 NASD Discip LEXIS 4, at *12 (NAC Mar. 27, 2002). In any event, Enforcement also served Respondent at two additional addresses, including the Main Street address that Respondent provided during a conversation with the staff.

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 filing of the amended Form U-5, alleges misconduct that occurred while he was associated and failure to comply with requests for testimony made while he was subject to NASD's jurisdiction.

IV. Findings of Fact and Conclusions of Law

A. Conversion and Misuse of Funds

The first cause of the Complaint charges that Respondent violated NASD Conduct Rules 2330(a) and 2110 by converting funds totaling \$6,187 from customer SB. More specifically, the Complaint alleges that on five occasions, from approximately June 26, 2002 to December 13, 2002, Respondent obtained a check from SB to make an investment on her behalf, then deposited the funds in his personal bank account without her knowledge or consent.⁹ In so doing, Respondent converted the funds for his personal use. (Compl. ¶¶ 5-15; Decl. ¶¶ 12-17.)

Rule 2330(a) prohibits the "improper use of a customer's securities or funds." Failing to use the funds as intended by the customer constitutes an "improper use."¹⁰ Improper use rises to the level of conversion when a registered representative intentionally deposits a customer's checks into his own account without authorization.¹¹ It is well settled that conversion of funds violates Rule 2110.¹²

⁹ The Complaint alleges that SB gave Respondent checks in the following amounts: \$800 on June 26, 2002; \$600 on August 14, 2002; \$875 on September 3, 2002; \$1,477 on November 14, 2002; and \$2,435 on December 13, 2002.

¹⁰ *Dep't of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49 at *6 (OHO June 30, 2004).

¹¹ See *NASD Sanction Guidelines* (2005 ed.) at 38 n.2 (conversion is an intentional and unauthorized taking and/or exercise of ownership over property by one who neither owns, nor is entitled to possess, it).

¹² See *Dep't of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *8 (NAC Dec. 14, 1999).

Here, Respondent did not use funds he obtained from SB to invest on her behalf. Instead, without her knowledge, authorization or consent, Respondent deposited her funds in his personal bank account. 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 2330(a) and 2110.

B. Failure to Respond to Requests for Information

The second cause of the Complaint alleges that Respondent violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to the staff's requests for information. The Complaint alleges that on February 3, 2004, the staff sent Respondent a request for information pursuant to Rule 8210 related to its investigation of Respondent's conversion of SB's fund. The request was sent by first class and certified mail to Respondent's CRD address. He did not respond in any manner to the request.¹³ (Compl. ¶¶ 19-21; Decl. ¶¶ 18-19.)

The Complaint further alleges that on February 17, 2004, the staff sent a second Rule 8210 request for information by first class and certified mail to Respondent at his CRD address and the Bellview address. When he did not respond in any manner to the request,¹⁴ the staff sent a third request on March 3, 2004. The third request for information was also sent by first class and certified mail to Respondent at his CRD and Bellview addresses. To date, Bjerke has not responded in any manner to any of the staff's requests.¹⁵ (Compl. ¶¶ 27-31; Decl. ¶¶ 21-23.)

¹³ The first class mailing and the certified mailing were returned, each marked "Not del[iverable] as addressed." (Compl. ¶ 20.)

¹⁴ The first class and certified mailings to the CRD address were returned, both marked "Not del[iverable] as addressed." The certified mailing to the Bellview address was returned, marked "unclaimed," but the mailing sent by first class to the Bellview address was not returned. (Compl. ¶¶ 24-25.)

¹⁵ The certified mailing to the CRD address was returned, marked "Not del[iverable] as addressed." The certified mailing to the Bellview address was returned, marked "unclaimed." Neither mailing sent by first class mail was returned. (Compl. ¶¶ 28-29.)

Procedural Rule 8210 provides that NASD "staff shall have the right to require a member . . . to provide information . . . and to testify . . . with respect to any matter involved in [an] investigation . . ." and 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.¹⁶ Accordingly, members and associated persons have a duty to cooperate fully and promptly with NASD requests for information.¹⁷

By mailing the requests to Respondent at his last known residential address as reflected in CRD, the staff complied with Rule 8210(d), and pursuant to that rule, Respondent is deemed to have received them.¹⁸ 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 standard for conversion, regardless of the amount converted.¹⁹ Under the Guidelines, a bar is also standard for failure to respond to requests for information.²⁰ There is no evidence of any mitigating circumstances that would

¹⁶ *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).

¹⁷ *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).

¹⁸ Though not required to do so, the staff also mailed the second and third requests to the Bellview address, which the staff obtained from an Equifax search conducted on February 17, 2004. The staff did not obtain a more current address for Respondent until a conversation with him in December 2004, nine months after serving the third request for information.

¹⁹ *Guidelines* (2005 ed.) at 38.

²⁰ *Id.* at 35.

warrant any sanction less than a bar for either violation. Accordingly, Respondent will be barred in all capacities for each violation.

VI. Conclusion

Respondent Russell J. Bjerke is barred from association with any member firm in any capacity for conversion of customer funds, in violation of NASD Conduct Rules 2330(a) and 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. Pisanello
Hearing Officer

Dated: March 2, 2006
Washington, DC

Copies to: Russell J. Bjerke (*via overnight and first class mail*)
Mark A. Graves, Esq. (*via electronic and first class mail*)
Roger D. Hogoboom, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

**Russell J. Bjerke,
CRD No. 3178233**

Respondent.

**Disciplinary Proceeding
No. C3B050015**

Hearing Officer:

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent Russell J. Bjerke ("Bjerke") was initially associated with a member of NASD in January 1999. He became registered as a General Securities Representative in March 1999. From on or about November 11, 2001, until on or about December 18, 2002, he was registered through Linsco / Private Ledger Corporation ("LPL") as a General Securities Representative.
2. On or about January 21, 2004, LPL filed an amended Uniform Termination Notice for Securities Industry Registration ("Form U-5") on behalf of Respondent Bjerke. The amended Form U-5 disclosed that a customer of LPL alleged that Respondent Bjerke was supposed to have invested \$6,187 in checks that she provided to him in 2002, but that Bjerke deposited the money into his personal bank account instead.
3. Respondent Bjerke is not currently registered or associated with any member firm; however, pursuant to Article V, Section 4 of the NASD By-Laws, NASD retains jurisdiction over him for purposes of this Complaint.

FIRST CAUSE OF COMPLAINT

[NASD Conduct Rules 2110 and 2330(a), Conversion of Customer Funds]

4. Paragraphs number 1 through 3, above, are realleged and incorporated herein by reference.
5. On or about June 26, 2002, Respondent Bjerke obtained a check from SB, a customer of LPL, in the amount of \$800.00. SB intended that the funds provided to Respondent Bjerke would be used to make an investment on her behalf.
6. Respondent Bjerke did not use the funds obtained from SB to make an investment on her behalf, as she intended. Respondent Bjerke deposited SB's funds in a bank account that he controlled, without SB's knowledge, authorization, or consent. Respondent Bjerke thereby converted \$800 of SB's funds to his own use and benefit, without SB's knowledge, authorization, or consent.
7. On or about August 14, 2002, Respondent Bjerke obtained a check from SB, in the amount of \$600.00. SB intended that the funds provided to Respondent Bjerke would be used to make an investment on her behalf.
8. Respondent Bjerke did not use the funds obtained from SB to make an investment on her behalf, as she intended. Respondent Bjerke deposited SB's funds in a bank account that he controlled, without SB's knowledge, authorization, or consent. Respondent Bjerke thereby converted \$600 of SB's funds to his own use and benefit, without SB's knowledge, authorization, or consent.
9. On or about September 3, 2002, Respondent Bjerke obtained a check from SB, in the amount of \$875.00. SB intended that the funds provided to Respondent Bjerke would be used to make an investment on her behalf.

10. Respondent Bjerke did not use the funds obtained from SB to make an investment on her behalf, as she intended. Respondent Bjerke deposited SB's funds in a bank account that he controlled, without SB's knowledge, authorization, or consent. Respondent Bjerke thereby converted \$875 of SB's funds to his own use and benefit, without SB's knowledge, authorization, or consent.
11. On or about November 14, 2002, Respondent Bjerke obtained a check from SB, in the amount of \$1,477.00. SB intended that the funds provided to Respondent Bjerke would be used to make an investment on her behalf.
12. Respondent Bjerke did not use the funds obtained from SB to make an investment on her behalf, as she intended. Respondent Bjerke deposited SB's funds in a bank account that he controlled, without SB's knowledge, authorization, or consent. Respondent Bjerke thereby converted \$1,477 of SB's funds to his own use and benefit, without SB's knowledge, authorization, or consent.
13. On or about December 13, 2002, Respondent Bjerke obtained a check from SB, in the amount of \$2,435.00. SB intended that the funds provided to Respondent Bjerke would be used to make an investment on her behalf.
14. Respondent Bjerke did not use the funds obtained from SB to make an investment on her behalf, as she intended. Respondent Bjerke deposited SB's funds in a bank account that he controlled, without SB's knowledge, authorization, or consent. Respondent Bjerke thereby converted \$2,435 of SB's funds to his own use and benefit, without SB's knowledge, authorization, or consent.

15. Such acts, practices and conduct constitute a violation of NASD Conduct Rule 2330(a).

Such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 by Respondent Bjerke.

SECOND CAUSE OF COMPLAINT

[NASD Procedural Rule 8210 and Conduct Rule 2110, Failure to Respond to Requests for Information]

16. Paragraphs number 1 through 3 and 5 through 15, above, are realleged and incorporated herein by reference.

17. In or about January 2004, NASD initiated an investigation concerning Respondent Bjerke's receipt of funds from a customer of LPL. The investigation focused, among other things, on whether Respondent Bjerke had received funds from customer SB, which she intended would be used to make investments on her behalf, but were converted by Respondent Bjerke to his own use and benefit.

18. Respondent Bjerke's last known residential address, as reflected in the NASD Central Registration Depository, is [REDACTED] ("the CRD Address").

First Request for Information

19. On February 3, 2004, NASD staff sent a request for information pursuant to Procedural Rule 8210 relating to the subject matter of the NASD investigation, via U.S. Postal Service first class mail and certified mail, return receipt requested, to the CRD Address. The first request letter required a response no later than February 17, 2004.

20. The U.S. Postal Service returned the envelope sent to the CRD Address via first class mail, marked "Not Del As Addressed." The U.S. Postal Service returned the envelope sent to the CRD Address via certified mail, marked "Not Del As Addressed."

21. No response to the staff's first request was received from Respondent Bjerke.

Second Request for Information

22. On February 13, 2004, NASD staff obtained another address for Respondent Bjerke. The address that NASD staff obtained did not match the CRD Address. It listed Respondent Bjerke's current address as [REDACTED] (the "New Address").
23. On February 17, 2004, the staff sent a second request for information pursuant to NASD Procedural Rule 8210 relating to the subject matter of the NASD investigation, via U.S. Postal Service first class mail and certified mail, return receipt requested, to the CRD Address and the New Address. The second request letter provided the same information and requests as the February 3, 2004, letter. The second request letter required a response by March 2, 2004.
24. The U.S. Postal Service returned the envelope sent to the CRD Address via first class mail, marked "Not Del As Addressed." The U.S. Postal Service returned the envelope sent to the CRD Address via certified mail, marked "Not Del As Addressed."
25. The U.S. Postal Service did not return the envelope sent to the New Address via first class mail. The U.S. Postal Service returned the envelope sent to the New Address via certified mail, marked "Unclaimed."
26. No response to the staff's second request was received from Respondent Bjerke.

Third Request for Information

27. On March 3, 2004, the staff sent a third request for information pursuant to NASD Procedural Rule 8210 relating to the subject matter of the NASD investigation, via U.S. Postal Service first class mail and certified mail, return receipt requested, to the CRD

Address and the New Address. A copy of the staff's request letter of February 17, 2004, was enclosed. The third request letter required a response by March 17, 2004.

28. The U.S. Postal Service did not return the envelope sent to the CRD Address via first class mail. The U.S. Postal Service returned the envelope sent to the CRD Address via certified mail, marked "Not Del As Addressed."
29. The U.S. Postal Service did not return the envelope sent to the New Address via first class mail. The U.S. Postal Service returned the envelope sent to the New Address via certified mail, marked "Unclaimed."
30. No response to the staff's third request was received from Respondent Bjerke.
31. To date, NASD has not received any response to the foregoing requests for information.
32. Such acts, practices and conduct constitute separate and distinct violations of NASD Procedural Rule 8210. Such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 by Respondent Bjerke.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

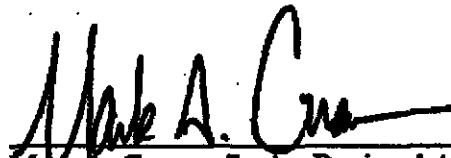
- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;**
- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310;**
- C. An order requiring Respondent to disgorge fully any and all ill-gotten gains and/or make full 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.

Date:

6/23/2005

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