

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	Disciplinary Proceeding
	:	No. C8A050019
Complainant,	:	
	:	
v.	:	DEFAULT DECISION
	:	
MARCOS A. GODFREY	:	Hearing Officer
(CRD No. 4230793),	:	
	:	July 25, 2005
Respondent.	:	

Respondent is barred from associating with any member firm in any capacity for: (i) violating NASD Conduct Rules 2110 and 2330(a) by misusing the funds of customer MP; and (ii) violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to two requests for information issued by the NASD staff.

Appearances

Kevin G. Kulling, Esq., Regional Counsel, Chicago, IL, and Rory C. Flynn, Esq., Of Counsel, Washington, DC, for the Department of Enforcement.

No appearance for Marcos A. Godfrey.

DECISION

I. Procedural Background

On March 21, 2005, the NASD Department of Enforcement ("Enforcement") filed a two-count Complaint against Respondent Marcos A. Godfrey ("Respondent"). The first cause of the Complaint alleges that Respondent, while associated with NASD member firm MetLife Securities, Inc. ("MetLife"), misused customer MP's funds, in violation of NASD Conduct Rules 2110 and 2330(a). The second cause of the Complaint alleges that Respondent failed to respond to two requests for information issued by the NASD staff, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On June 10, 2005, Enforcement filed a Motion for Entry of Default Decision ("Motion"), supported by the Declaration of Kevin G. Kulling, Esq., Regional Counsel in NASD's Chicago office, and eight exhibits.¹ For the reasons set forth below, the Hearing Officer grants Enforcement's Motion.

II. Respondent's Default

On March 18, 2005, Enforcement served the Complaint and Notice of Complaint on Respondent, via first class and certified mail, at his CRD address.² (CX-1, p. 1; CX-2, p. 5; CX-3; DECL at ¶6). On April 18, 2005, Enforcement served a Second Notice of Complaint and the Complaint on Respondent, via first class and certified mail, at Respondent's CRD address. (CX-4; CX-5; DECL at ¶7). On May 12, 2005, Enforcement served a Third Notice of Complaint and the Complaint on Respondent, via first class and certified mail, at a variation of Respondent's CRD address.³ (CX-6; CX-7; DECL at ¶9). Respondent did not file a response to the Complaint, the Second Notice of Complaint, or the Third Notice of Complaint. (DECL at ¶10).

The Hearing Officer finds that Enforcement complied with NASD Procedural Rule 9134(b)(1) by sending the mailings to Respondent's CRD address. Accordingly, the Hearing Officer finds that Respondent received effective constructive notice of this proceeding and defaulted by failing to answer the Complaint.

¹ Hereinafter, the statements in the Motion will be designated as "Motion, p."; statements in the Kulling Declaration will be designated as "DECL at ¶"; and Enforcement's exhibits will be designated as "CX."

² Respondent's CRD address is [REDACTED] (CX-1, p. 1; DECL at ¶¶6, 8). The correct zip code for the CRD address is [REDACTED] (DECL at ¶8). Despite the incorrect zip code on the CRD mailing, it was delivered to the correct address as evidenced by the unclaimed notation from the [REDACTED] post office. (CX-3; DECL at ¶8).

³ In an abundance of caution, the NASD staff mailed the Third Notice of Complaint to Respondent at his CRD address with the corrected zip code. (CX-7; DECL at ¶9).

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was registered as an investment company and variable contracts products representative with MetLife from September 12, 2000 to May 18, 2001. (CX-1, p. 5; DECL at ¶5). From July 11, 2001 to June 12, 2003, Respondent was similarly registered with NASD member firm Charter One Securities, Inc. (CX-1, p. 2; DECL at ¶5). Respondent is currently not employed in the securities industry. (CX-1, p. 2).

Article V, Section 4 of the NASD's By-Laws creates a two year period of retained jurisdiction over former registered persons, covering misconduct occurring before the registration terminated and failures to provide information requested during the period of retained jurisdiction.

Enforcement filed the Complaint on March 21, 2005, within two years of the date that Respondent's registration terminated. The Complaint alleges misconduct that occurred while Respondent was registered through MetLife, as well as failures to respond to requests for information issued during the period of retained jurisdiction. NASD thus has jurisdiction over this proceeding.

B. Respondent Misused Customer MP's Funds in Violation of NASD Conduct Rules 2110 and 2330(a)

The Complaint, attached to this Default Decision as Exhibit A, alleges that Respondent, while associated with MetLife, misused customer MP's funds by not investing the funds as the customer intended. (Complaint at ¶¶2-4). Specifically, in October 2000, customer MP paid \$600 to Respondent to purchase an annuity for the benefit of MP. (Complaint at ¶2). Respondent gave

MP a receipt for the funds, but Respondent failed to use the funds to purchase an annuity as MP intended. (Complaint at ¶¶3-4).

Enforcement submitted additional information with its Motion showing that Respondent claimed that he had purchased a money order with the \$600, which he tendered to MetLife to pay for the annuity. (DECL at ¶12; Motion, p. 3). During the NASD investigation, MetLife confirmed that Respondent had not purchased an annuity or submitted an application on MP's behalf. (DECL at ¶12). In addition, after undertaking an investigation, the currency exchange where Respondent claimed to have purchased the money order reported that Respondent had not purchased a \$600 money order payable to MetLife. (Motion, p. 3). Respondent was unable to provide NASD with any documents to establish that he had purchased a money order or used the funds as customer MP intended. (Motion, p. 3). MetLife ultimately reimbursed MP \$625 for the original \$600 plus interest. (DECL at ¶12).

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 "[n]o 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, in violation of NASD Conduct Rule 2330(a), when the associated person fails to apply the customer's funds as the customer directed.⁴ Improper use of

⁴ See Dist. Bus. Conduct Comm. v. Westberry, No. C07940021, 1995 NASD Discip. LEXIS 225 (NBCC Aug. 11, 1995) (noting that "brokers who are entrusted with the safekeeping of customer funds must take extra care to ensure that those funds are used only as authorized by the customer and only in the customer's best interest"); see also Bernard D. Gorniak, Exchange Act Release No. 35,996, 1995 SEC LEXIS 1820 (July 20, 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).

a customer's funds also violates NASD Conduct Rule 2110's requirement of "high standards of commercial honor and just and equitable principles of trade."⁵

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 MP's funds.

C. Respondent Failed to Respond to NASD Requests for Information

The second cause of the Complaint alleges that Respondent failed to respond to requests for information that were sent by the NASD staff to Respondent on December 5 and December 30, 2003, at his CRD address, via first class and certified mail. (Complaint at ¶¶6-7). Each request was made pursuant to NASD Procedural Rule 8210. (*Id.*).

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."⁶ Failure to comply with Rule 8210 requests for information is a serious violation

⁵ See Dist. Bus. Conduct Comm. v. Jones, No. C02970023, 1998 NASD Discip. LEXIS 60, at *8 (finding simultaneous violations of Rules 2110 and 2330(a) for improper use of customer funds).

⁶ 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).

because it subverts NASD's ability to perform its regulatory responsibilities.⁷ A violation of Rule 8210 is also a violation of NASD Conduct Rule 2110.⁸

Pursuant to Rule 8210(d), Respondent is deemed to have received the requests for information sent to his CRD 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. Respondent Misused Customer MP's Funds

The NASD Sanction Guidelines for misuse of funds recommends a fine of \$2,500 to \$50,000, and a bar unless mitigation exists, such as a misunderstanding of the customer's intended use of the funds.⁹ The Sanction Guidelines further state "Adjudicators generally should not impose a fine if an individual is barred."¹⁰ In the absence of any mitigating factors, Enforcement recommended that Respondent be barred.¹¹

The Hearing Officer finds that there are no mitigating factors in this case, and that the Respondent poses a risk to the investing public. Accordingly, the Hearing Officer bars Respondent from associating with any member firm in any capacity.

⁷ Id.

⁸ See Dep't of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at **21, 25 (NAC Apr. 19, 2000).

⁹ NASD Sanction Guidelines, p. 38 (2005).

¹⁰ Guidelines at 10.

¹¹ Enforcement did not request reimbursement for customer MP because MetLife reimbursed MP.

B. Respondent Failed to Respond to Two Rule 8210 Requests for Information

The NASD Sanction Guidelines recommend fines in the range of \$25,000 to \$50,000 for a failure to respond, and provide that, if an individual does not respond in any manner, a bar should be standard.¹²

In the instant case, where Enforcement has not identified any mitigating factors and the recommended bar is standard for this type of violation, the Hearing Officer accepts Enforcement's recommended sanction and bars Respondent from association with any member firm in any capacity.

V. Conclusion

Respondent Marcos A. Godfrey is barred from associating with any NASD member firm in any capacity for: (1) misusing MP's funds, in violation of NASD Conduct Rules 2110 and 2330(a); and (2) failing to respond to two requests for information issued by the NASD staff pursuant to NASD Procedural Rule 8210, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

The bars will become effective immediately upon this Default Decision becoming the final disciplinary action of NASD.


Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
July 25, 2005

Copies to:
Marcos A. Godfrey (via Federal Express and first class mail)
Kevin G. Kulling, Esq. (via electronic and first class mail)
Mark A. Koerner, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

¹² Guidelines at 35.

EXHIBIT A

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

**Marcos Godfrey,
CRD No. 4230793**

Respondent.

Disciplinary Proceeding
No. C8A050019

Hearing Officer

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent Marcos Godfrey (Respondent Godfrey) entered the securities industry in July 2000 as an Investment Company/General Contracts Representative of Met Life Securities, a member of NASD, where he remained until May 2001. Thereafter, in July 2001, he became similarly registered with another member of NASD until June 12, 2003. Respondent Godfrey therefore is, pursuant to Article V, Section 4 of the NASD's By-Laws, subject to the jurisdiction of the NASD.

**FIRST CAUSE OF COMPLAINT
Misuse of Customer Funds
NASD Conduct Rules 2330 and 2110**

2. In or about October 2000, Customer M.P. tendered to Respondent Godfrey \$600 cash that was intended as payment for the purchase of an annuity for the benefit of the customer.

3. Respondent Godfrey accepted the cash and wrote a receipt for the customer acknowledging acceptance of the funds. Respondent Godfrey signed the receipt and tendered it to customer M.P.
4. Respondent Godfrey did not, however, use the customer funds to purchase the annuity as intended. The funds were used for some other purpose than for the benefit of the customer.
5. The above constitutes separate and distinct violations of NASD Conduct Rules 2330 and 2110.

SECOND CAUSE OF COMPLAINT
Failure to Respond Completely to NASD Requests for Information
NASD Conduct Rule 2110 and NASD Procedural Rule 8210

6. On or about December 5, 2003, NASD staff sent to Respondent Godfrey a request that he provide certain additional information, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. That request for information was sent by first class mail and by certified mail, return receipt requested, to Respondent Godfrey's address of record as contained in the records of the Central Registration Depository ("CRD address"). The first class mailing to the CRD address was not returned to the NASD staff, and the certified mailing to the CRD address was returned, marked "Unclaimed."
7. On or about December 30, 2003, NASD staff sent to Respondent Godfrey a request that he provide the additional information initially requested on or about December 5, 2003, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. That request for information was sent by first class mail and by certified mail, return receipt requested, to Respondent Godfrey's CRD address. The first class mailing to the CRD address was not returned. The receipt for the certified mailing to the CRD address was returned marked

unclaimed.

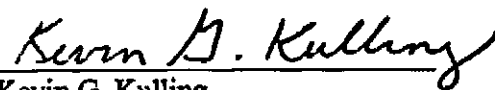
8. Respondent Godfrey has failed to respond to the requests for information described in the paragraphs above and the date for responding to the requests has passed.
9. The acts, practices and conduct described above constitute separate and distinct violations of NASD Conduct Rule 2110 and Procedural Rule 8210 by Respondent Godfrey.

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: March 18, 2005



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