

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARTIN R. HERSHNER
(CRD No. 2860063),

Respondent.

Disciplinary Proceeding
No. C8A050020

Hearing Officer – DRP

DEFAULT DECISION

August 18, 2005

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

Appearances

Dale A. Glanzman, Regional Counsel, Chicago, IL, for Complainant.

No appearance by or for Martin R. Hershner.

DECISION

I. Background

On March 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 Martin R. Hershner (Hershner or Respondent) converted customer funds, in violation of NASD Conduct Rules 2110 and 2330(a), 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.

Accordingly, on June 22, 2005, Enforcement filed a motion for entry of default decision, supported by the declaration of Dale A. Glanzman and six exhibits. Respondent 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 March 18, 2005, Enforcement served the Complaint and Notice of Complaint on Respondent by certified and first class mail, sent to his last known residential address, as reflected in the Central Registration Depository (the CRD address). The certified mailing was returned, marked "unclaimed." The first class mailing was not returned. Respondent did not file an Answer. (Declaration ¶ 6; CX-1, CX-2, CX-3.)

On April 25, 2005, Enforcement served the Complaint and Second Notice of Complaint on Respondent by certified and first class mail sent to the same address. The certified mailing was returned, marked "unclaimed," and the first class mailing was not returned. Again, Respondent failed to file an Answer or otherwise respond to the Complaint.² (Declaration ¶ 7; CX-4, CX-5.)

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 and the declaration and exhibits filed by Enforcement with its motion.

² Enforcement also served a copy of the Complaint and both Notices of Complaint on Bernard R. Davis, Esq., an attorney for Respondent.

III. Jurisdiction

Respondent was registered with NASD member MML Investor Services, Inc. (MML), as an investment company/variable contracts representative, from April 1997 until his registration was terminated in May 2004. He was registered with NASD member Stifel, Nicolaus & Company (Stifel) from July 1 to July 28, 2004. Since July 2004, Respondent has not been associated or registered with any NASD member. (Declaration ¶ 5; 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 Respondent's termination from Stifel, alleges misconduct that occurred while he was registered, and with failing to comply with requests for information made during the two-year period following termination of his registration.

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 customers' funds. More specifically, the Complaint alleges that on four occasions in 2003, Respondent cashed checks belonging to four customers and converted the funds for his own use or benefit, without the customers' knowledge or consent.

Rule 2330(a) prohibits the "improper use of a customer's securities or funds." Failing to use funds as intended by the customer constitutes an "improper use" of funds.³ Improper use rises to the level of conversion when a registered representative deposits a customer's check into

³ *Dep't of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49 at *6 (OHO June 30, 2004).

his own account without authorization and fails to repay the customer.⁴ It is well settled that conversion of customer funds violates Rule 2110.⁵

Here, Respondent violated both rules on four separate occasions. In or about February 2003, customer AL requested a \$10,000 redemption from her mutual fund. Without AL's knowledge or consent, Respondent had the entire value of the fund redeemed, then endorsed and cashed the check. Respondent provided AL with \$10,000 and kept the remaining \$16,270.10 for his own use and benefit.⁶ (Complaint ¶ 3; Declaration ¶ 10(A).)

In September 2003, customer CP liquidated three Oppenheimer mutual funds and received two separate checks for \$26,261.14 and \$5,199.37.⁷ CP endorsed the checks and instructed Respondent to deposit the funds in her securities account. Though Respondent deposited the larger check in the customer's account, he deposited the \$5,199.37 check in his own personal account, without CP's knowledge or consent. (Complaint ¶ 4; Declaration ¶ 10(B).)

⁴ *Dep't of Enforcement v. Kendzierski*, No. C9A980021, at http://www.nasd.com/web/groups/enforcement/documents/nac_disciplinary_decisions/nasdw_007276.pdf (NAC Nov. 12, 1999).

⁵ See, e.g., *Dep't of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *8 (NAC Dec. 14, 1999) (respondent violated Rules 2110 and 2330 by converting customer's check); *Dep't of Enforcement v. Kendzierski*, No. C9A980021, www.nasd.com/web/groups/enforcement/documents/nac_disciplinary_decisions/nasdw_007276.pdf (NAC Nov. 12, 1999); *Dep't of Enforcement v. Yancey*, No. C07970024, 1998 NASD Discip. LEXIS 57 (NAC June 4, 1998) (respondent violated Rule 2110 by depositing in his account funds collected from customer).

⁶ There is a small discrepancy between the amount of the conversion alleged in the Complaint and the amount outlined in the Declaration. Compare Complaint ¶ 3 and Declaration ¶ 9(b) (claiming Respondent cashed a \$25,670 check) with Declaration ¶ 10(A) (noting the check's value at \$26,270.10). In any case, Respondent provided AL with a cashier's check for \$10,000, retaining between \$15,670 and \$16,270 for himself.

⁷ There is a slight difference between the amount of the check alleged in the Complaint and the amount noted in the Declaration. Compare Complaint ¶ 4 (alleging Respondent cashed a check in the "approximate amount of \$5,119.37") with Declaration ¶ 10(B) (valuing the check at \$5,199.37). The amount alleged in the Complaint may have been a typographical error and was, in any event, an approximation.

In or about November 2003, Respondent liquidated an AIM Investments mutual fund, owned by deceased customer TP, at the request of the executor of TP's estate. Without authorization, Respondent endorsed the \$3,437.25 disbursement check and deposited it in his own bank account. (Complaint ¶ 5; Declaration ¶ 10(B).)

Finally, Respondent caused \$30,000 to be redeemed from customer MB's Oppenheimer mutual fund on or about November 18, 2003. Respondent obtained the check, then endorsed and cashed it without the customer's authorization. (Complaint ¶ 6; Declaration ¶ 10(C).)

The allegations, which are deemed admitted, are sufficient to establish for purposes of *this default decision that Respondent misused and converted the customers' funds, in violation of NASD Conduct Rule 2330(a) and NASD Conduct Rule 2110, as alleged in the first cause of the Complaint.*

B. Failure to Respond to Requests for Information

The second cause of the Complaint charges that Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to respond to the staff's requests for information.

The Complaint in this case alleges that on or about September 17, 2004, the staff sent a request, pursuant to Rule 8210, that Respondent provide certain documents and information. The Complaint further alleges that the staff sent the request to Respondent at his CRD address by certified and first class mail and that neither mailing was returned to NASD staff. Finally, the Complaint alleges that on September 29, 2004, Respondent, through his attorney, acknowledged receiving the staff's request but declined to provide the requested documents and information. (Complaint ¶¶ 8-9; Declaration ¶¶ 13-14.)

In the absence of subpoena power, NASD must rely on Rule 8210 to obtain information in the course of its investigations.⁸ Members and associated persons have a duty to cooperate fully and promptly with NASD requests for information.⁹ Failure to comply in any way is a serious violation because it subverts the NASD's ability to carry out its regulatory responsibilities.¹⁰

The allegations, which are deemed admitted, are sufficient to establish for purposes of this default decision that the Respondent failed to respond to the staff's requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110, as alleged in the second cause of the Complaint.

V. Sanctions

For conversion, NASD Sanction Guidelines recommend that the respondent be barred, regardless of the amount converted.¹¹ Under the Guidelines, a bar is also standard for failure to respond to requests for information.¹² There is no evidence of any mitigating circumstances that would justify a lesser sanction in this case for either violation. Accordingly, a bar is warranted and imposed for each violation.¹³

⁸ *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).

⁹ *Brian L. Gibbons*, Exchange Act Release No. 40,438, 1996 SEC LEXIS 1291, at *7 (May 8, 1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997).

¹⁰ *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) (citations omitted).

¹¹ *Guidelines* at 38 (2005 ed.).

¹² *Id.* at 35.

¹³ Enforcement did not request restitution or disgorgement of funds, because customers CP, TP and MB have been reimbursed, and MML intends to reimburse AL. (Declaration ¶¶ 10(A), (B), (C).)

VI. Conclusion

Respondent Martin R. Hershner is barred from associating with any NASD member firm in any capacity for converting customer funds, in violation of NASD Conduct Rules 2110 and 2330, and for failing to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The bars are effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.



Dana R. Pisanelli
Hearing Officer

Dated: August 18, 2005
Washington, DC

Copies to: Martin R. Hershner (*via overnight and first class mail*)
Dale A. Glanzman, 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

vs.

**MARTIN R. HERSHNER,
Registered Representative
(CRD No. 2860063)**

Respondent

**Disciplinary Proceeding
No. C8A050020**

Hearing Officer

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Between approximately April 1997 and May 2004, Martin R. Hershner ("Respondent") was registered as an Investment Company/Variable Contracts Products Representative with MML Investors Services, Inc. ("Member"), a member of NASD. Respondent therefore is subject to the jurisdiction of the NASD, pursuant to Article V, Section 4 of the NASD's By-Laws.

**FIRST CAUSE FOR COMPLAINT
Conversion and Misuse of Customers' Funds
Violations of NASD Conduct Rules 2110 and 2330(a)**

2. During all relevant times, A.L., C.P., T.P. and M.B. were public customers who each maintained securities accounts at the Member that were serviced by Respondent.

3. On or about February 3, 2003, Respondent caused a redemption of

approximately \$26,670 from customer A.L.'s Oppenheimer mutual fund, and committed conversion by cashing the \$25,670 check and using the funds for his own use or benefit, without the knowledge or consent of A.L.

4. In or about September 2003, Respondent converted customer funds by cashing a check in the approximate amount of \$5,119.37 that was a redemption from Oppenheimer mutual funds by customer C.P., and used the funds for his own use or benefit, without the knowledge or consent of C.P.

5. In or about November 2003, Respondent converted customer funds by cashing a check in the approximate amount of \$3,437 that was a redemption from an AIM mutual fund by customer T.P., and used the funds for his own use or benefit, without the knowledge or consent of T.P.

6. On or about November 18, 2003, Respondent caused a redemption of \$30,000 from customer M.B.'s Oppenheimer mutual fund, directed M.B. to bring the envelope containing the \$30,000 withdrawal check to him, and converted the \$30,000 by cashing the check and using the funds for his own use or benefit, without the knowledge or consent of M.B.

7. The acts, practices and conduct above constitute separate and distinct violations of NASD Conduct Rules 2110 and 2330(a) by Respondent.

SECOND CAUSE FOR COMPLAINT
NASD Conduct Rule 2110 and NASD Procedural Rule 8210
Refusal to Respond to Requests for Information

8. On or about September 17, 2004, NASD staff sent to Respondent a request that he provide certain documents and 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's address of record as contained in the records of the Central Registration Depository ("CRD address"). The mailings were not returned to NASD staff.

9. On or about September 29, 2004, Respondent, through his attorney, wrote a letter to NASD staff in which Respondent acknowledged receipt of NASD staff's 8210 request, described in Paragraph 8 above, and declined to respond.

12. Respondent has failed to respond to the request for documents and information described in Paragraph 8 above to date, and the date for responding to the request has passed.

13. The acts, practices and conduct described above constitutes a violation of NASD Conduct Rule 2110 and Procedural Rule 8210 by Respondent.

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 imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330; and

D. An order imposing any other fitting sanction.

March 18, 2005

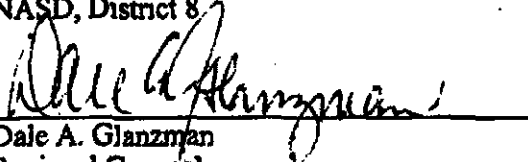
Dated



Carlotta A. Romano
Senior Vice President and Regional Director
NASD, District 8

March 18, 2005

Dated



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