

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

HAROLD PHILIP DONNERSTAG
(CRD No. 2691932),



Respondent.

Disciplinary Proceeding
No. C9B040103

Hearing Officer – SNB

DEFAULT DECISION

April 4, 2005

Respondent is barred from associating with any NASD member in any capacity for failing to respond to Staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. In light of the bar, no additional sanction is imposed for settling a customer complaint away from his firm, in violation of NASD Conduct Rule 2110.

Appearances

Lynn M. Kaseta, Esq., Senior Regional Attorney, Woodbridge New Jersey, and
Rory C. Flynn, Esq., Washington, DC, of Counsel, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

I. Background

On November 23, 2004, the Department of Enforcement (“Enforcement”) filed a two-cause Complaint in this proceeding, attached to this Decision as Exhibit A. In the first cause of action, the Complaint alleges that the Respondent Harold Philip Donnerstag (“Respondent”) violated NASD Conduct Rule 2110 by settling a customer complaint without notifying or receiving authorization from the firm with which he was registered. In the second cause of

action, the Complaint alleges that the Respondent violated NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to multiple NASD Staff requests for information. Respondent did not file an Answer to the Complaint. On February 15, 2005, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, supported by the declaration of Lynn M. Kaseta and four exhibits. Respondent did not reply to the Motion. For the reasons set forth below, the Motion is granted.¹

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on November 19, 2004, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address"). In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to Respondent on January 5, 2005. Finally, on January 28, 2005, Enforcement sent the Complaint and Second Notice of Complaint by Federal Express to Respondent at his CRD address. Respondent did not file an Answer to the Complaint.

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

III. Jurisdiction

Respondent first entered the securities industry in June 1996 as a General Securities Representative. Between January 2001 and July 2002, Respondent was registered in that capacity with Prime Capital Services, Inc. ("Prime Capital"), an NASD member firm. Most recently, Respondent was registered as a General Securities Representative with member firm

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, and the declaration and exhibits filed by Enforcement with its motion.

J.P. Turner & Company, L.L.C. Respondent has not been registered with NASD since that registration was terminated in February 2003.

Article V, Section 4 of the NASD By-Laws allows NASD to retain jurisdiction over a formerly registered person for two years following the effective date his registration terminated. Enforcement filed the Complaint within two years after Respondent's registration terminated, and the Complaint alleges misconduct that commenced while he was registered with NASD. Accordingly, the Hearing Officer finds that NASD has jurisdiction over this proceeding.

IV. Violations

A. Settling Away

The First Cause of the Complaint alleges that, on March 23, 2002, customer MS sent a letter to Donnerstag to complain about unauthorized trading in his account. On April 16, 2002, Donnerstag entered into a settlement agreement with MS regarding the allegations in the customer complaint, without Prime Capital's knowledge or approval. The settlement agreement provided that Donnerstag would pay 18 monthly installments to MS, totaling \$25,920.

The Hearing Officer finds that Donnerstag violated NASD Conduct Rule 2110 by entering into the private settlement agreement with MS. As NASD has observed:

[S]ettling a customer loss or complaint without the knowledge or authorization of the employer firm is a serious offense. In order to discharge their supervisory obligations adequately, member firms must be aware of all business-related contact and communications between their registered representatives and customers, particularly with respect to customer complaints. ... [Respondent's] private settlement with [a customer] prevented the firm from being aware of the circumstances, which otherwise might have prompted the firm to supervise [respondent] more closely and ensure that he did not engage in similar misconduct in the future. The investing public was thus placed at risk by [respondent's] actions.²

² *Dist. Bus. Conduct Comm. v. DiAngelo*, No. C10960003, 1996 NASD Discip. LEXIS 34, at **5-6 (N.B.C.C. Oct. 16, 1996).

Settling a customer complaint without informing the employing firm violates the high standards of commercial honor to which NASD holds registered representatives.³

B. Failure to Respond

The Complaint alleges that on January 6 and 12, 2004, NASD Staff sent Respondent requests for information concerning allegations of customer MS. The Staff sent the requests to Respondent at his CRD address by first class and certified mail, pursuant to NASD Procedural Rule 8210. In the same manner, on January 12, 2004, and July 15, 2004, Enforcement also sent requests for information to Respondent at a possible alternate address, which proved to be incorrect. The Staff served the requests in accordance with Rule 8210(d), and therefore Respondent is deemed to have received them. Respondent did not respond.

Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power.⁴ Here, although Donnerstag received valid constructive notice of the Staff's

³ See *Dist. Bus. Conduct Comm. v Hsieh*, No. C01940022, 1995 NASD Discip. LEXIS 227 (June 20, 1995).

⁴ See, e.g., *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *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 the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

requests,⁵ he failed to respond to them. Donnerstag thereby violated Procedural Rule 8210 and Conduct Rule 2110.

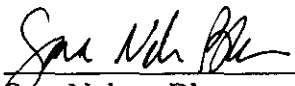
V. Sanctions

For failing to respond to Staff requests for information made pursuant to NASD Procedural Rule 8210, the NASD Sanction Guidelines ("Guidelines") recommend a bar as the standard sanction.⁶ There is no evidence of any mitigating circumstances that would justify a lesser sanction for the violation. Therefore, Respondent will be barred for failing to respond to Staff requests for information. In light of this bar, additional sanctions for settling a customer complaint away from Respondent's member firm would be redundant, and will not be imposed.⁷

VI. Conclusion

Respondent Harold Philip Donnerstag is barred from associating with any NASD member in any capacity for failing to respond to requests for information, in violation of Rules 8210 and 2110. In light of the bar, no separate sanctions are imposed for settling a customer complaint away from his member firm. The bar will become effective immediately if this decision becomes NASD's final disciplinary action.

SO ORDERED.


Sara Nelson Bloom
Hearing Officer

Dated: April 4, 2005

Copies to: Harold Philip Donnerstag (via overnight and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)
Lynn M. Kaseta, Esq. (via electronic and first class mail)

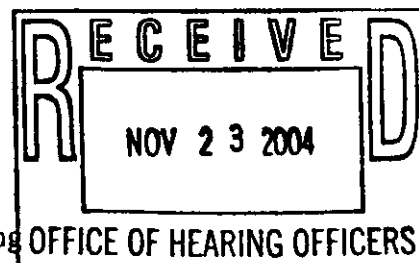
⁵ See *David I. Cassuto*, Exchange Act Release No. 48,087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

⁶ NASD Sanction Guidelines 35 (2005 ed.)

⁷ See *Dep't of Enforcement v. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *17 (NAC Mar. 27, 2002).

EXHIBIT A

NASD
OFFICE OF HEARING OFFICERS



Department of Enforcement,

Complainant,

v.

Harold Philip Donnerstag,
CRD No. 2691932



Respondent.

Disciplinary Proceeding
No. C9B040103

Hearing Officer:

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent Harold Philip Donnerstag ("Donnerstag") became registered with NASD as a General Securities Representative ("Series 7") on or about June 12, 1996. Donnerstag was registered with Prime Capital Services, Inc. ("Prime Capital") from on or about January 16, 2001 until his association with such member was terminated on or about July 12, 2002. Prime Capital filed a Form U-5 on Donnerstag's behalf on or about July 18, 2002, disclosing Donnerstag's termination. Donnerstag was last registered with a member firm, J.P. Turner & Company, L.L.C. ("JP Turner"), from on or about November 29, 2002 until his association with such member was terminated on or about February 7, 2003. The violations alleged in the First and Second Causes of Action of this Complaint occurred while Donnerstag was associated with Prime Capital, and the Failure to Respond violation alleged in the Third Cause of Action occurred within two years of his last association with a member firm. Accordingly, pursuant to Article V,

Section 4, of the NASD By-Laws, Donnerstag remains subject to NASD's jurisdiction until at least February 6, 2005.

FIRST CAUSE OF ACTION
SETTLING AWAY
NASD Conduct Rule 2110

2. Paragraph number 1 is re-alleged and incorporated herein by reference.
3. On or about March 23, 2002, MS sent a letter to Donnerstag complaining of unauthorized trading in his account.
4. On or about April 16, 2002, Donnerstag, without the knowledge or approval of Prime Capital, entered into a settlement agreement with MS wherein Donnerstag offered to pay him eighteen monthly installment payments, totaling \$25,920, to settle his unauthorized trading complaint.
5. As a result of this conduct, Donnerstag violated NASD Conduct Rule 2110.

SECOND CAUSE OF ACTION
FAILURE TO RESPOND
NASD Procedural Rule 8210 and NASD Conduct Rule 2110

6. Paragraph numbers 1 through 5 are re-alleged and incorporated herein by reference.
7. On or about January 6, 2004, NASD's District 9 – New Jersey staff ("staff"), pursuant to NASD Procedural Rule 8210, sent a letter to Donnerstag at [REDACTED] his Central Registration Depository address of record ("CRD address"), requesting information concerning customer MS's allegations of unauthorized trading. The letter was sent by first class and certified mail. The certified mail envelope was returned to the staff as undeliverable on January 9, 2004 and the first class envelope was returned to the staff as undeliverable on January 12, 2004.

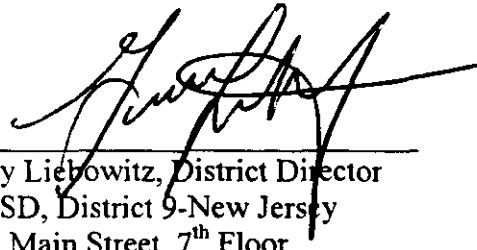
8. On or about January 12, 2004, the staff, pursuant to NASD Procedural Rule 8210, sent a second letter to Donnerstag's CRD address, requesting information concerning customer MS's allegations of unauthorized trading. The letter was sent by first class and certified mail. The certified mail envelope was returned to staff as undeliverable on January 16, 2004 and the first class envelope was returned to staff as undeliverable on January 26, 2004.
9. On or about January 12, 2004, the staff, pursuant to NASD Procedural Rule 8210, sent a letter to [REDACTED] ("Tinton Falls address"), a possible address for Donnerstag based on an Equifax report obtained by NASD staff, requesting information concerning the customer complaint by MS. The letter was sent by first class and certified mail. The certified mail envelope was returned to the staff as undeliverable on January 20, 2004 and the first class envelope was returned to the staff as undeliverable on January 16, 2004.
10. On or about July 15, 2004, the staff, pursuant to NASD Procedural Rule 8210, sent a second letter to Donnerstag's Tinton Falls address, requesting information concerning the customer complaint by MS. The letter was sent by first class and certified mail and advised Donnerstag that if he failed to respond he may be subject to disciplinary action. The certified mail envelope was returned to staff as undeliverable on July 19, 2004 and the first class envelope was returned to staff as undeliverable on July 20, 2004.
11. Donnerstag failed to respond to the staff's requests for information.
12. As a result of this conduct, Donnerstag violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

PRAYER FOR RELIEF

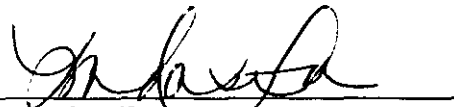
WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Donnerstag committed the violations charged and alleged herein;
- B. An order imposing sanctions upon Donnerstag in accordance with NASD Rule 8310;
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- D. An order granting all further relief that is warranted under the circumstances.

Date: November 19, 2004



Gary Liebowitz, District Director
NASD, District 9-New Jersey
581 Main Street, 7th Floor
Woodbridge, NJ 07095
(732) 596-2025



Lynn M. Kaseta,
Senior Regional Attorney
NASD, District 9-New Jersey
581 Main Street, 7th Floor
Woodbridge, NJ 07095
(732) 596-2079

Rory C. Flynn, Of Counsel
Department of Enforcement
NASD
1801 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 974-2874