

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

DAVID J. PALEN
(CRD No. 2321162),

Respondent.

Disciplinary Proceeding
No. E3A2004036501

Hearing Officer – SNB

DEFAULT DECISION

August 7, 2006

For misuse of customer funds, in violation of Rules 2330 and 2110, for forgery, in violation of Rule 2110, and for failure to provide requested information in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity.

Appearances

Helen Barnhill, Esq., Denver, CO; Lewis Taylor Egan, Esq., San Francisco, CA; Mark P. Dauer, Esq., New Orleans, LA; and Rory C. Flynn, Esq., of Counsel, Washington, DC, for the Department of Enforcement.

No appearance by Respondent.

DECISION

I. Background

On March 15, 2006, the Department of Enforcement (“Enforcement”) filed a three-count Complaint in this proceeding, attached to this Decision as Exhibit A. Count One alleges that Respondent David J. Palen (“Respondent”) violated Rules 2330 and 2110 by misusing customer funds. Count Two alleges that Respondent violated Rule 2110 by forging a customer’s signature. Count Three alleges that Respondent violated Rules 8210 and 2110 by failing to respond to an NASD Staff request that he appear and testify. Respondent did not file an Answer to the

Complaint. On June 15, 2006, Enforcement filed a Motion for Entry of Default Decision, supported by the declaration of Helen G. Barnhill, Esq. and seven 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 March 13, 2006, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address"). When he did not respond by the due date listed in the initial Notice of Complaint, Enforcement sent a Second Notice of Complaint in the same manner to the same address on April 19, 2006. 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. Therefore, pursuant to Rule 9215(f), the Hearing Officer deems the allegations in the Complaint admitted.

III. Jurisdiction

Respondent became registered in April 1993 as a general securities representative with American Express Financial Advisors, Inc. ("AEFA") and IDS Life Insurance Company. Respondent was registered with AEFA until January 2005, and he has not been registered or associated with an NASD member since that time.

Although Respondent is not currently associated with a member firm, NASD has jurisdiction to bring this proceeding, pursuant to Art. V, § 4 of NASD's By-Laws, because (1) the Complaint charges Respondent with misconduct while he was registered and with failing to

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

comply with requests for information made during the two-year period following termination of his last registration, and (2) the Complaint was filed within that two-year period.

IV. Violations

A. Misuse of Customer Funds

The Complaint alleges that between February 2001 and October 2004, Respondent withdrew approximately \$203,000 from 16 customer accounts at AEFA to pay for financial planning that Respondent never provided. These withdrawals were not authorized or approved by the customers. To withdraw the funds, Respondent provided AEFA with agreements purportedly signed by customers. In fact, customers did not sign these agreements. In one instance, a customer discovered a \$5,000 unauthorized withdrawal and asked Respondent about it. Respondent lied, and said the funds were transferred from one investment to another.

The funds withdrawn from the 16 customer accounts were deposited into AEFA's revenue account, and designated as payment for financial planning fees. Accordingly, Respondent received 80% of these funds.

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."² Improper use rises to the level of conversion when a registered representative withdraws funds from a customer account without authorization, and deposits the funds in an account, so that he can receive direct payments for his own benefit.³ It is well settled that conversion of funds violates Rule 2110.⁴ Here, the Complaint alleges that Respondent falsified documents in order to withdraw customer

² *Dep't of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49 at *6 (OHO June 30, 2004).

³ See *NASD Sanction Guidelines* (2006 ed.) at 38 n.2 ("[c]onversion generally is an intentional and unauthorized taking and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it").

⁴ See *Dep't of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *8 (NAC Dec. 14, 1999).

funds without authorization, lied about it, and took 80% of the funds for his own benefit. Therefore, the allegations of the Complaint, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent misused customer funds, in violation of Rules 2330 and 2110.

B. Forgery

The Complaint alleges that Respondent submitted, or caused to be submitted to AEFA, an Advisory Service Agreement, purportedly signed by customer GH. The agreement authorized AEFA to charge GH for preparation of a financial plan. Respondent signed GH's name to the agreement without GH's authorization or knowledge.

It is well established that forgery is not consistent with high standards of commercial honor and just and equitable principles of trade as required by Rule 2110.⁵ Therefore, the allegations of the Complaint, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent forged a customer signature on the Advisory Service Agreement without the knowledge or consent of the customer, in violation of Rule 2110.

C. Failure to Respond

The Complaint also alleges that, on or about September 7, 2005, NASD Staff sent Respondent a request to appear and testify pursuant to Rule 8210. Staff sent this request to Respondent at his CRD address by first class and certified mail. Staff served the request in accordance with Rule 8210(d), and therefore Respondent is deemed to have received it. Respondent did not appear, nor did he contact the staff to discuss the request.

Rule 8210 authorizes NASD to require any person subject to its jurisdiction to appear and provide testimony 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

⁵ See, e.g., *Donald M. Bickerstaff*, Exchange Act Release No. 35,607, 1995 SEC LEXIS 982 (Apr. 17, 1995).

subpoena power.⁶ Here, although Respondent received valid constructive notice of the Staff's request,⁷ he failed to respond to it. Respondent thereby violated Rules 8210 and 2110.

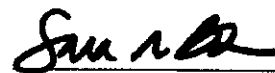
V. Sanctions

The Sanction Guidelines for conversion are appropriate for Respondent's misuse of customer funds. For conversion, the Sanction Guidelines recommend a bar, regardless of the amount converted.⁸ A bar is also standard for failure to provide requested information and egregious cases of forgery.⁹ There is no evidence of any mitigating circumstances that would justify a lesser sanction in this case for these violations. Accordingly, Respondent is barred from associating with any NASD member in any capacity for each violation.

VI. Conclusion

For misuse of customer funds, in violation of Rules 2330 and 2110, for forgery, in violation of Rule 2110, and for failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity. These bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.



Sara Nelson Bloom
Hearing Officer

⁶ 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).

⁷ See *David I. Cassuto*, Exchange Act Release No. 48,087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

⁸ *NASD Sanction Guidelines* at 38 (2006 ed.).

⁹ *Id.* at 35, 39.

Dated: August 7, 2006

Copies to: David J. Paler, *(via certified and first class mail)*
Helen Barnhill, Esq. *(via electronic and first class mail)*
Rory C. Flynn, Esq. *(via first class mail)*
Mark P. Dauer, Esq. *(via first class mail)*

EXHIBIT A

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

David J. Palen,
CRD No. 2321162

Respondent.

Disciplinary Proceeding
No. E3A2004036501

Hearing Officer

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent David J. Palen ("Palen") became registered with NASD in April 1993 as a general securities representative with American Express Financial Advisors, Inc. ("AEFA") and IDS Life Insurance Company. Palen's association with AEFA and IDS Life Insurance Company ended in January 2005. Palen has not been registered or associated with an NASD member since that time. Although Palen is not presently associated with a member, NASD has jurisdiction to issue this Complaint, pursuant to Article V, Section 4 of the NASD By-laws, until January 2007.

CAUSE ONE

NASD Rules 2330 and 2110: Misuse of Customer Funds and Failure to Observe High Standards of Commercial Honor and Just and Equitable Principles of Trade

2. Between approximately February 2001 and October 2004, Palen withdrew approximately \$203,464 from sixteen customer accounts at AEFA to pay for financial planning fees that had not been authorized or approved by the customers. These withdrawals are more fully set forth on Schedule A attached hereto and made a part hereof.
3. To obtain the withdrawals from each customer account, Palen provided AEFA with an Advisory Service Agreement or a Good Until Changed or Cancelled Service Agreement "GUC Agreement" purportedly signed by each customer. Each agreement authorized Palen to charge the customers for

the creation of a financial plan for that customer. None of the customers set forth on Schedule A either signed their agreement, authorized the creation of a financial plan on their behalf or authorized the withdrawal of fees from their accounts for the payment of such a plan.

4. The funds withdrawn from the sixteen customer accounts were deposited into AEFA's revenue account. Palen was paid approximately 80% of the financial planning fees he improperly withdrew or had withdrawn from these sixteen customer accounts.
5. Palen failed to provide the sixteen customers with the financial plans, for which he had charged their accounts without their knowledge, authorization or consent.
6. In one instance, when an unauthorized withdrawal was detected, Palen lied about his conduct to a customer. In or about October 2004, after learning of an unexplained and unauthorized \$5000 withdrawal from his account, customer J.D. contacted Palen. Palen assured J.D. that his money had merely been moved from one investment to another and that no money was lost. The foregoing conduct constitutes misuse of customer funds and a violation of Conduct Rule 2330. By engaging in such acts, practices, and conduct Palen also failed to observe high standards of commercial honor and just and equitable principles of trade in violation of NASD Conduct Rule 2110.

CAUSE TWO

NASD Conduct Rule 2110: Forgery

7. Paragraph numbers 1 through 7 above are realleged and incorporated herein by reference.
8. On or about January 5, 2004, Respondent Palen, submitted or caused to be submitted to AEFA, an Advisory Service Agreement purportedly signed by customer GH. The agreement authorized AEFA to charge GH for the creation of a financial plan.
9. GH did not sign the Advisory Service Agreement; did not authorize the creation of a financial plan on his behalf and did not authorize Palen to withdraw funds from his investment account to pay for a financial plan.

10. Palen signed customer G.H.'s name to the Advisory Service Agreement without the authorization of customer G.H.

11. The foregoing conduct constitutes separate and distinct violations of NASD Conduct Rule 2110.

CAUSE THREE

**NASD Conduct Rule 2110 and Procedural Rule 8210
Refusal to Provide Information**

12. Paragraph numbers 1 through 12 above are realleged and incorporated herein by reference.

13. On or about September 7, 2005, the staff sent Palen a letter, by first class and certified mail to [REDACTED] [REDACTED] his CRD address, requesting that he appear for an on-the-record ("OTR") interview on September 28, 2005 in Denver, Colorado. NASD staff wanted to question Palen at the OTR about the matters alleged in paragraph 2 through 7 above. The certified letter was returned marked "return to sender, not deliverable as addressed, unable to forward." The first class letter was not returned. Palen did not contact the staff concerning the OTR request letter. Nor did he appear for his OTR on September 28, 2005.

14. Palen's failure to appear for his OTR violated NASD Procedural Rule 8210. This conduct is also inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110 by Respondent.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

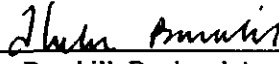
A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;

B. An order imposing sanctions upon the Respondent 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 imposing any other fitting sanction.

Date: March 13, 2006


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Exhibit A

	Customer	Funds wrongfully taken from customer account	Approximate Date Funds taken from accounts
1	L.A. and L.A.	\$5,000	June 21, 2002
2	D.A. and S. A.	\$5,000	May 19, 2003
3	F. A and B. A.	\$55,000	March 30, 2001, March 18, 2002, January 27, 2003, December 8, 2003 and August 26, 2004
4	M.B.	\$18,000	January 10, 2002 and October 11, 2004
5	A. C. and J. C.	\$4,455	November 20, 2003
6	J.D.	\$5,000	October 11, 2004
7	J.D. and J. D.	\$3,000	November 20, 2003
8	O. H. and R.B.	\$34,000	May 9, 2001, March 18, 2002, January 27, 2003 and November 20, 2003
9	G.H.	\$5,000	January 12, 2004
10	M.L.	\$16,000	February 13, 2001 and February 10, 2003
11	K.L.	\$5,000	September 12, 2003
12	H.M and J. M.	\$5,000	March 15, 2004
13	J.P.	\$5,000	October 11, 2004
14	A.R. and C.R.	\$18,000	May 9, 2001, June 7, 2002 April 23, 2004, and September 13, 2004
15	S.S.	\$5,000	February 2, 2004
16	J.S.	\$15,009	June 19, 2001, July 17, 2002, July 16, 2003
	Total	\$203,464	