

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DUANE K. THELEN
(CRD No. 4555532),

Respondent.

Disciplinary Proceeding
No. E8A20040817-01

Hearing Officer – DMF

DEFAULT DECISION

May 11, 2006

Summary

Respondent is barred from associating with any NASD member in any capacity for misusing funds, in violation of Rule 2110, and for failing to respond to requests for information, in violation of Rules 8210 and 2110.

Appearances

Richard S. Schultz, Esq., Chicago, IL (Rory C. Flynn, Esq., Washington, DC, and Roger D. Hogoboom, Esq., Denver, CO, Of Counsel), for Complainant.

No appearance by or for Respondent.

DECISION

I. Introduction

The Department of Enforcement filed the attached Complaint on November 18, 2005, alleging that Respondent Duane K. Thelen misused funds, in violation of Rule 2110, and failed to respond to requests for information, in violation of Rules 8210 and 2110. Respondent did not file an Answer to the Complaint. On March 6, 2006,

Enforcement filed a motion for a default decision, supported by the declaration of Richard S. Schultz and seven exhibits. Respondent did not reply to the motion.¹

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on November 17, 2005, by regular and certified first class mail to Respondent's most current residential address listed in the Central Registration Depository (the CRD address) and to two other possible addresses that NASD staff obtained. Enforcement sent the Complaint and Second Notice of Complaint to Respondent by regular and certified first class mail to just the CRD address on January 3, 2006, after determining that the two possible addresses were not, in fact, valid addresses for Respondent. Respondent did not file an Answer or otherwise respond to the Complaint.

Enforcement served the Complaint and the Notices of Complaint on Respondent in accordance with Rule 9134 by sending them to his CRD address, giving him constructive notice of this proceeding. By failing to respond, he defaulted. Pursuant to Rule 9215(f), the Hearing Officer will deem the allegations in the Complaint admitted.

III. Jurisdiction

Respondent was registered as an Investment Company and Variable Contracts Products Limited Representative through Farmers' Financial Solutions, LLC from August 2002 until August 2004. Although Respondent has not been associated with any NASD member since the termination of his registration through Farmers', he remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Art. V, § 4 of NASD's

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

By-Laws, because the Complaint, which was filed within two years after the termination of his registration, charges him with misconduct while he was registered and with failing to provide information requested during that two-year period.

IV. Violations

The first cause of the Complaint alleges that on or about June 24, 2004, Farmers' noted that Respondent had not deposited funds with the firm to pay for nine electronic purchases of insurance for members of the public, which totaled more than \$20,000. Farmers' then audited Respondent's books and records and noted that Respondent had made deposits for these and other insurance purchases between July 8 and July 10, 2004. Respondent admitted to Farmers' that he made the deposits because Farmers' had informed him of the upcoming audit. At least some of the deposits were in the form of checks from Respondent's sister, rather than from the customers.

When questioned, Respondent initially claimed that the delay in depositing the funds occurred because he was busy, but that he had retained all the funds collected from the customers in a separate money bag until they were deposited. After Farmers' pointed out that at least some of the funds deposited did not come from the customers, Respondent claimed that about \$12,000 of the customers' funds, in cash, was stolen from his car in March 2004, but Respondent admitted that he did not call the police to report the theft.

These allegations, which are deemed admitted, are sufficient to establish for purposes of this default decision that Respondent misused customer funds, in violation of Rule 2110. To establish misuse, Enforcement need only show that Respondent failed to use the customers' funds in the manner intended by the customers. The allegations in the

Complaint, which are deemed admitted, establish that Respondent received funds from customers for the purchase of insurance, but failed to pay the premiums. By itself, this is sufficient to establish misuse. See, e.g., Bernard D. Gorniak, Exch. Act. Rel. No. 35996, 1995 SEC LEXIS 1820 (July 20, 1995). Furthermore, Respondent's lies when first questioned, coupled with his far-fetched claim that \$12,000 of the funds he was improperly retaining was stolen from his car, but he never bothered to report the theft, supports a conclusion that he misappropriated the funds. The Hearing Officer, therefore, finds that the allegations are sufficient to establish, for purposes of this default decision, that Respondent misused funds in violation of Rule 2110, as charged.

The second cause of the Complaint alleges that in the course of its investigation of the circumstances described above, NASD staff sent Respondent requests for information, pursuant to Rule 8210, on or about August 19, September 10, October 12, October 27, and November 8, 2004. Each of the requests was properly served by first class mail to Respondent at his CRD address, and, in most cases, also by certified mail to that address.² Respondent did not respond to any of these requests. These allegations, which are deemed admitted, are sufficient to establish for purposes of this default decision that Respondent failed to provide requested information, in violation of Rules 8210 and 2110.

² In addition, the later requests were sent to the same alternative addresses to which Enforcement later sent the Complaint, and which proved not to be valid addresses for Respondent. In any event, NASD staff had (and still has) no actual knowledge that the CRD address is out of date, so service to other addresses was not required.

V. Sanctions

For failing to provide requested information, the Guidelines recommend a bar. NASD Sanction Guidelines at 35. There is no evidence of any mitigating facts that could justify a lesser sanction in this case.³ For improper use of funds, the Sanction Guidelines recommend that adjudicators consider a bar, or a suspension of six months to two years and a fine if mitigating facts are shown. NASD Sanction Guidelines at 38. In this case the facts concerning Respondent's misuse of funds are unclear, in large measure due to Respondent's failure to respond to requests for information. It is therefore unclear whether Respondent's misconduct would call for a bar, or some lesser sanctions. In light of the bar for Respondent's failure to respond, however, any additional sanctions would be redundant and would serve no regulatory purpose. Accordingly, no separate sanctions are imposed for that violation.

VI. Conclusion

Respondent Duane K. Thelen 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. The bar will be effective immediately if this decision becomes NASD's final disciplinary action.

SO ORDERED.


David M. FitzGerald
Hearing Officer

³ Enforcement does not request restitution, and there is no indication in Enforcement's papers that any customer suffered a loss as a result of Respondent's misuse of funds.

Copies to: Duane K. Thelen *(via overnight courier and first class mail)*
Richard S. Schultz, 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 REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant

vs.

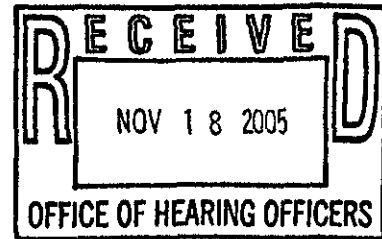
DUANE K. THELEN
Limited Registered Representative
(CRD No. 4555532)

Respondent

**Disciplinary Proceeding
No. E8A2004081701**

Hearing Officer

COMPLAINT



Upon information and belief, Complainant alleges as follows:

1. From on or about August 7, 2002 to on or about August 10, 2004, Duane K.

Thelen ("Respondent Thelen") was registered as an Investment Company and Variable Contracts Products Representative with Farmers' Financial Solutions, LLC ("Member") a member of NASD. Respondent Thelen is not currently registered with any member of NASD. Since this Complaint is filed within two years of the termination of Respondent Thelen's registration with the Member, Respondent Thelen is subject to the jurisdiction of NASD, pursuant to Article V, Section 4 of the NASD's By-Laws.

FIRST CAUSE FOR COMPLAINT

Conduct Rule 2110 by Respondent Thelen - Misuse of Customers' Funds by Respondent Thelen.

2. Paragraph number 1 above are re-alleged and incorporated herein by reference as paragraph 2.

3. On or about June 24, 2004, the Member noted that Respondent Thelen had not deposited funds with the Firm to pay for nine electronic purchases of insurance for members of

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the public, which totaled \$21,619.30. The Member audited Respondent Thelen's books and records on or about July 12, 2004, and noted that Respondent Thelen made deposits for these as well as other purchases between July 8 and July 10, 2004. Respondent Thelen admitted to the Member that he made the deposits then because the Member informed him of the audit on July 6, 2004. A review of the funds deposited shows that the funds were not the financial instruments, such as checks, that were paid by customers of the Member, but were checks from Respondent Thelen's sister.

4. When questioned about the apparent mishandling of customer funds, Respondent Thelen initially stated that the delays in depositing the funds occurred because he became busy at the office and did not go to the bank each day, but maintained that all collections remained in a money bag with him until they were deposited. The Member noted that the deposits that Respondent Thelen made on July 8, and 9, 2004, were not from the customers who were purchasing insurance policies. When he was questioned about this, Respondent Thelen stated for the first time that in or about March 2004 about \$12,000, in cash, of customer funds was stolen from the front seat of his car while it was parked in front of a grocery store. Respondent Thelen admitted that he did not call the police to report the theft and attempted to replace the stolen funds from his own funds, but only replaced about \$400 of the \$12,000 by July 2004.

5. Respondent Thelen misused at least \$12,000 of customer funds by failing to safeguard the funds,¹ or used the funds for some purpose other than the benefit of the customers.

¹ Respondent Thelen's explanation of the loss of customer funds is suspect because: he did not file a police report regarding the alleged theft; he was not truthful when he was initially requested to explain the delays in depositing funds, by improperly allowing about \$12,000 to accumulate rather than depositing the customers' funds promptly; he failed to pinpoint the exact day of the theft; he supposedly left the funds in his car, which he presumed

6. The acts, practices and conduct set forth above constitute separate and distinct violations of NASD Conduct Rule 2110 by Respondent Hodder.

SECOND CAUSE FOR COMPLAINT

Conduct Rule 2110 and Procedural Rule 8210 by Respondent Thelen - Failure to Respond to the Staff's Requests for Information by Respondent Thelen.

7. Paragraph numbers 1 through 6 above are re-alleged and incorporated herein by reference as paragraph 7.

8. On or about August 19, 2004, NASD staff ("Staff") sent to Respondent Thelen a request that he provide certain documents and information related to the misuse of customer premiums, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail to Respondent Thelen's address of record as contained in the records of the Central Registration Depository ("CRD Address"). A response was due by September 6, 2004. The mailing was not returned to the Staff.

9. On or about September 10, 2004, having not received a response from Respondent Thelen, the Staff sent him a request marked Second Request that he provide certain documents and information related to the misuse of customer premiums, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail and by certified mail, return receipt requested, to Respondent Thelen's CRD Address. A response was due by September 27, 2004. The first class mailing to the Thelen's CRD Address was not returned to the Staff and the certified return receipt for the mailing to the Comstock Address was returned signed by someone with the last name "Thelen."

10. On or about October 12, 2004, having not received a response from Respondent

was not locked because there was no forced entry into the vehicle; and, only the cash was taken and not the entire money bag or the customer checks.

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Thelen, the Staff sent him an additional request, with more specific questions, for the information that he provide certain documents and information related to the misuse of customer premiums and also requested additional information, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail and by certified mail, return receipt requested, to Respondent Thelen's CRD Addresses and to an address that the Staff learned of during its investigation at [REDACTED] [REDACTED] ("Fowler Address").² A response was due by October 12, 2004. The first class mailing to Respondent Thelen's CRD Address was not returned to the Staff. The certified mailing to Respondent Thelen's CRD Address was returned marked "Return to Sender Unclaimed." The first class mailing sent to the Fowler Address was returned to the Staff with a sticker stating that the "Forwarding Time" had expired for Respondent Thelen's address at [REDACTED] [REDACTED] ("Albion Address"). The certified mailing to the Fowler Address was returned to the Staff marked that it had been forwarded to the Albion Address and was then marked "Returned to Sender - Unclaimed."

11. On or about October 27, 2004, having not received a response from Respondent Thelen, the Staff sent him a request marked "Second Request," seeking the more specific documents and information related to the misuse of customer premiums and also requested additional information, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail and by certified mail, return receipt requested, to Respondent Thelen's CRD Addresses and to his Fowler Address. A response was due by November 12, 2004. The first class mailing to Respondent Thelen's CRD Address was not returned to the Staff. The certified mailing to Respondent Thelen's CRD

2 The Staff learned of Respondent Thelen's Fowler Address from a search on Switchboard.com.

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Address was returned marked "Return to Sender Unclaimed." The first class mailing sent to the Fowler Address was returned to the Staff with a sticker stating that the "Forwarding Time" had expired for Respondent Thelen's address at [REDACTED] ("Albion Address"). The certified mailing to the Fowler Address was returned to the Staff with handwritten markings showing that it had been forwarded to the Albion Address and was then marked "Returned to Sender - Unclaimed."

12. On or about November 8, 2004, the Staff sent to Respondent Thelen another request marked "Second Request" that he provide more specific documents and information related to the misuse of customer premiums and also requested 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 Thelen's CRD Address, to his Fowler Address and to his Albion Address. A response was requested by November 22, 2004. The first class mailings to Respondent Thelen's CRD Address and his Albion Address were not returned to the Staff. The first class mailing to Respondent Thelen's Fowler Address was returned to the Staff with a sticker stating that the "Forwarding Time" had expired for Respondent Thelen's Albion Address. The certified mailings that were mailed to Respondent Thelen's CRD Address and his Albion Address were returned marked "Return to Sender - Unclaimed." The certified mailing that was mailed to Respondent Thelen's Fowler Address was returned marked that it was forwarded to Respondent Thelen's Albion Address and then marked "Return to Sender - Unclaimed."

13. Respondent Thelen failed to respond to each and all of the requests for documents and information described in paragraphs 8, 9, 10, 11 and 12 above, and the time for Respondent Thelen to respond has passed.

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14. The aforementioned acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by Respondent Thelen.

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,

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D. An order imposing any other fitting sanction.

NASD DEPARTMENT OF ENFORCEMENT

November 17, 2005

Date



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