

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-16 (C02980034).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	
	:	
v.	:	Disciplinary Proceeding
	:	No. C02980034
	:	
	:	
Respondents.	:	
	:	
	:	Hearing Officer - EBC
DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	
	:	
Respondent.	:	

**ORDER DENYING MOTION FOR ENTRY OF DEFAULT DECISION
AGAINST RESPONDENT AND GRANTING
ENFORCEMENT LEAVE TO RE-SERVE THE COMPLAINT**

Introduction

The Department of Enforcement’s Complaint alleges that Respondent _____, in connection with the offer and sale of units in a contingent private placement offering of an entity known as Tilfer Street Trust (“Tilfer”), failed to deposit and retain customer funds in separate escrow accounts until the minimum number of units had been sold. According to the Complaint, before the minimum number of units had been sold, customer

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funds were transmitted to bank accounts of Tilfer's affiliates, commingled with funds from other sources, and used to pay operating costs of Tilfer's affiliates and fund interest payments to investors in other private placements. Although the Complaint is not entirely clear, it appears that _____ is charged with violating SEC Rules 10b-9 and 15c2-4, and NASD Conduct Rules 2120 and 2110.¹

The Department of Enforcement (Enforcement) moved for entry of a default decision based on _____ failure to answer the Complaint.² The Hearing Officer has determined to deny the motion because Enforcement failed to properly serve _____ with the Second Notice of Complaint. Enforcement is granted leave to re-serve the Complaint, or to re-file and re-serve the Complaint, in accordance with this Order.

Discussion

The evidence Enforcement submitted in support of its default motion³ establishes that it sent both notices of complaint (along with a copy of the Complaint) to _____, via conventional first class and certified mail, at his last known residential address as reflected in the Association's Central Registration Depository (the "CRD Address").⁴ (_____ ¶¶ 2-3; CX 1, 3.) The Postal Service returned both mailings of the original Notice of Complaint with the notation "Attempted Not Known." (_____ ¶ 2; CX 1.) When _____ failed to

¹ Of the four causes of action in the Complaint only the first cause applies to _____. The sub-heading that appears under the "First Cause of Complaint" refers to escrow violations and misuse of customer funds in violation of "Securities Exchange Act Rules 10b-9 and 15c2-4 and Conduct Rules 2110 and 2120," and paragraph 8 of the Complaint also states that _____ conduct violated SEC Rules 10b-9 and 15c2-4. However, the final paragraph of the first cause charges _____ only with violations of NASD Conduct Rules 2110 and 2120.

² The other four Respondents, _____, _____, _____, and _____, agreed to settle this proceeding.

³ Enforcement submitted a Declaration of _____ at the District 2 Office of NASD Regulation, Inc., and three exhibits pertaining to its service of the Complaint. All references to Enforcement's exhibits are cited as "CX ____."

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answer and his time to do so had expired, Enforcement sent him a Second Notice of Complaint and a copy of the Complaint. The Postal Service returned both mailings with the notation “Forwarding Order Expired.” (_____ ¶ 3; CX 3.)

Prior to the August 1997 amendments to the Code of Procedure, Rule 9134 provided that “[a]ny person shall be deemed to have received notice to which he is entitled . . . by the mailing of the notice to that person at his last known address as reflected on the Association’s records.” Present Rule 9134(b) likewise authorizes Enforcement to serve a natural person at his or her last known recent residential address, as reflected in the CRD. However, under the present Rule, if Enforcement has “actual knowledge” that the person’s CRD address is “out of date,” it is required to serve “duplicate copies” at the person’s last known residential address⁵ and, if applicable, “at the business address of the entity with which [the respondent] is employed or affiliated,” as reflected in the CRD. (Emphasis added.) The amendments to the Code’s service rule are intended to enhance the fairness of the disciplinary process.⁶

In this case, when Enforcement served the Second Notice of Complaint, it had actual knowledge that _____ CRD Address was no longer accurate. The Postal Service previously returned the Notice of the Complaint that Enforcement sent to that address with the notation “Attempted Not Known.” The presence of this marking on the returned materials is sufficient to impute to Enforcement “actual knowledge” that _____ CRD address was no

⁴ _____ (CX 2.)

⁵ A person’s last known residential address may, or may not, be the same as his or her CRD address.

⁶ This is not to say that the August 1997 amendments to the Code’s service rule diminish – either expressly or implicitly – the continuing duty and obligation of a person subject to the Association’s jurisdiction to keep his or her CRD address current. See, e.g., In re William T. Banning, 50 S.E.C. 415, 416 (1990). Any other rule would permit “an individual purposely to evade jurisdiction simply by moving without leaving a forwarding address.” In re Alan Howard Gold, 51 S.E.C. 998, 1001 (1994) (applying NYSE rule).

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longer accurate at the time it attempted to serve the Second Notice of Complaint.⁷ Further,

_____ CRD record reflects that _____ was employed at _____, an NASD member firm, when Enforcement effected service of the Second Notice of Complaint, and it includes an address for the firm. (CX 2.)

Based on the foregoing, the Hearing Officer concludes that, under Rule 9134(b), Enforcement was required – but failed – to serve _____ with the Second Notice of Complaint at his then current business address.⁸ Because service of the Second Notice of Complaint was defective, Enforcement’s default motion must be denied.

Enforcement’s failure to comply with the Code’s provisions pertaining to service is particularly disturbing in this case. Had Enforcement properly served _____ with the Second Notice of Complaint at his business address, he presumably would have received actual notice of

⁷ Cf., e.g., Ufkes v. Rosengarten, 1996 CFTC LEXIS 117 (June 27, 1996) (the notation “Attempted – Not Known,” which the Postal Service placed on returned certified mail sent to the respondent’s last-known registered address, demonstrated that the respondent failed to keep his registered address current as required by CFTC regulation and, therefore, was subject to entry of a default order for failing to answer the complaint in a reparation proceeding). The relevant CFTC regulation, 17 C.F.R. § 3.30(b), provides: “[e]ach registrant, while registered and for two years after termination of registration, . . . must notify in writing the National Futures Association [NFA] of any change of the address in the application for registration, biographical supplement, or other address filed with the [NFA] for the purpose of receiving communications from the Commission or the [NFA]. Failure to file a required response to any communication sent to the latest such address . . . which is caused by a failure to notify in writing the [NFA] of an address change may result in an order of default and award of claimed monetary damages or other appropriate order in any [NFA] or Commission proceeding”

The Hearing Officer also notes that courts, in a variety of contexts, have recognized that when the Postal Service returns mail with the notation “Attempted Not Known,” it means that the address is not current or is wrong. See, e.g., In re Robert Earl Mitchell, C-99-2369, 1999 U.S. Dist. 9327 (N.D. Cal. June 22, 1999) (in the context of a disbarment proceeding, where a copy of an order sent to the attorney was returned to the court with the notation “attempted not known,” the court removed the attorney from the roll of attorneys entitled to practice to law, but provided that the attorney could apply for reinstatement “upon notification to the court of a current address”); United States v. Curtis, No. 94-5729, 1996 U.S. App. LEXIS 3926 (4th Cir. March 6, 1996) (“[t]he computer store mailed an invoice to SAMS [a purported government agency], but the invoice was returned stamped ‘attempted, not known,’ indicating that the address was wrong.”).

⁸ There is no explanation in the record for Enforcement’s failure to serve _____ at his business address.

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the pendency of this proceeding and could have made a knowing decision to either litigate or default. However, the Hearing Officer has ascertained, based on an independent CRD search, that _____ was terminated from _____ soon after the Second Notice of Complaint was served, and that the CRD does not list any entity with which he is currently employed or affiliated and reflects the same out-dated residential address to which Enforcement previously sent both notices of complaint. Thus, under the present circumstances, Enforcement would be required to do no more than re-serve _____ at his out-dated CRD Address to comply with Rule 9134(b), which is unlikely to accomplish actual notice.

Order

Enforcement shall, within 10 days after the issuance of this Order, either: (a) re-serve the Complaint in accordance with the Code of Procedure; or (b) withdraw the Complaint, and re-file and re-serve it in accordance with the Code of Procedure. To ameliorate the potential inequity resulting from Enforcement's initial failure to comply with Rule 9134(b), prior to re-serving the Complaint, Enforcement shall make diligent efforts to obtain a current residential and/or business address for _____ and shall be required to document those efforts in connection with any subsequent default motion against _____ that it may file.⁹ If Enforcement fails to either re-serve the Complaint, or to re-file and re-serve the Complaint,¹⁰ within 10 days after the issuance

⁹ The Hearing Officer does not intend to imply that Rule 9134 (b) typically requires Enforcement to undertake extensive efforts to locate a current address for a respondent. However, given that Enforcement's prior failure to comply with Rule 9134(b) likely deprived _____ of actual notice of this proceeding, the Hearing Officer believes that Enforcement should be required to exercise due diligence in locating a valid, current address for him.

¹⁰ Given the ambiguity in the pleading and other potential pleading problems, Enforcement may be well served by filing an amended Complaint.

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of this Order, the Hearing Officer will conclude that Enforcement is not interested in pursuing this action against _____ and will dismiss the proceeding as to him.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
September 23, 1999