

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MOUSTAFA M. ZAYED
(CRD No. 2284697),

Respondent.

Disciplinary Proceeding
No. 2006003834901

Hearing Officer – AWH

HEARING PANEL DECISION

December 11, 2008

Formerly registered representative and principal suspended in all capacities for nine months and fined \$10,000 for three willful failures to disclose material information on U4 Forms, in violation of NASD Conduct Rule 2110 and IM-1000-1. Respondent also assessed costs.

Appearances:

Noel C. Downey, Esq., and Lynn M. Kasetta, Esq., for the Department of Enforcement.

Moustafa M. Zayed, *pro se*.

DECISION

I. Background

On January 14, 2008, the Department of Enforcement filed a Complaint against Respondent Moustafa M. Zayed, alleging that, on three occasions, he willfully failed to disclose material information on U4 Forms. Zayed filed an Answer to the Complaint on February 12, 2008, denying certain facts alleged in the Complaint, asserting that he did not intentionally violate Rule 2110 and IM-1000-1, and requesting a hearing. A hearing was held in Woodbridge, New Jersey, on July 22, 2008, before a Hearing Panel composed of the Hearing Officer and two current members of the District 9 Committee. The parties were granted an extension of time to file post-hearing submissions.

Enforcement timely filed its post-hearing submission on October 23, 2008. Zayed filed a

response to that submission on November 12, 2008. Enforcement filed its Reply on November 20, 2008.

II. The Respondent¹

Moustafa M. Zayed first became registered with FINRA through a member firm on October 5, 1992, as a General Securities Representative. In January 1999, he became registered as a General Securities Principal. As pertinent to the Complaint, Zayed was registered as a General Securities Representative and as a General Securities Principal through member firm Skyebanc, Inc., from January 19, 2005, to October 10, 2007.²

Zayed has not been associated with a member firm since his termination from Skyebanc.

III. The Violations

Article V, Section 2(c) of FINRA's By-Laws requires that associated persons keep their Form U4s "current at all times by supplementary amendments," and that such amendments shall be filed "not later than 30 days after learning of the facts or circumstances giving rise to the amendment." Section 15A of the Form U4 requires those applying for registration to swear or affirm that: 1) they read and understood the items and instructions on the Form U4; 2) their answers are true and complete to the best of their knowledge; 3) they agree to update the form by causing amendments to be filed on a timely basis whenever changes occur to answers previously reported; 4) they authorize their employer to file electronically any required information or amendment on

¹ References to the Department of Enforcement's exhibits are designated CX-, and the transcript of the hearing, as Tr.-. Respondent did not offer any exhibits. Five days after the conclusion of the hearing, Respondent filed a motion "to remove certain exhibits from the exhibit list." The motion seeks to remove unspecified exhibits that relate to the civil litigation at issue in this proceeding, based on Respondent's disagreement with rulings limiting cross-examination on those documents. The motion is denied as untimely and vague. No specific documents are designated in the motion. Objections to exhibits not raised prior to, or during, the hearing are waived. Rulings on relevance of testimony cannot be reconsidered after the close of the hearing.

² In his Answer, Zayed denied that he was registered in any principal capacity with Skyebanc. Answer ¶ 2. However, CX-1 clearly shows that he was so registered.

their behalf, and 5) they certify that they will review and approve all disclosure information that will be filed electronically on their behalf.³

A. Failure to Disclose Civil Litigation

Form U4 Question 14 I (1) asks whether the person filing the Form has “ever been named as a respondent/ defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that [the person was] *involved* in one or more *sales practice violations* and which: (a) is still pending . . .” (Emphasis in the original). The instructions to the Form U4 state that “investment-related” pertains to securities, commodities, banking, insurance, or real estate, and “[s]ales practice violations include any conduct directed at or involving a customer which would constitute a violation of: any rules for which a person could be disciplined by any self regulatory organization. . . .”⁴

On August 2, 2004, four months before he submitted his initial Form U4 through Skyebanc, Zayed and his wife were named as defendants in a civil complaint filed in the United States District Court for the District of New Jersey (the “civil litigation”). The civil complaint alleged numerous sales practice violations, including breach of contract, fraud, misrepresentation, and conversion. The complaint alleged a monetary loss of \$277,000, arising out of an agreement between the parties that Zayed would invest the plaintiffs’ funds in the stock market.⁵

On August 30, 2004, the attorney for the plaintiffs in the civil litigation sent correspondence to Zayed and his wife which included a cover letter, stating that it enclosed a Notice of Lawsuit and Request for Waiver of Service, and “a copy of the Complaint that *has been filed* against you in the United States District Court, District of

³ CX-1A, pp. 12, 13.

⁴ CX-1A, p. 10; *Instructions Form U4*, at 2.

⁵ CX-4, CX-4B; tr. 62-71, 130, 145, 192.

New Jersey.” (Emphasis added). The cover letter also states that “this action arises out of the various transfers of money that your aunt and uncle made to you over a number of years for the purpose of investing that money for them. It appears that you failed to make the investments for them and indeed kept the money for yourself.” The letter states that the plaintiffs would prefer not to pursue litigation against family, but they would proceed to do so unless, by September 13, 2004, Zayed and his wife supplied certain documents that “refer, reflect, or relate to the investments made by you on behalf of your aunt and uncle.” The Notice of Lawsuit states that a “lawsuit has been commenced against you . . . and has been assigned docket number 04-3695.”⁶

At the hearing, Zayed admitted receiving the cover letter, but claimed that the letter did not include a copy of the Notice of Lawsuit or the Complaint.⁷ The Hearing Panel does not find credible Zayed’s testimony that he did not receive a copy of the Notice of Lawsuit or the Complaint. His testimony is contradicted by three sworn statements that he filed with the District Court in the civil litigation at issue:

1. On May 31, 2005, Zayed submitted a signed certification to the District Court stating:

I received from the Plaintiff a copy of the Complaint and a request for waiver of service of summons on or about August 31, 2004. I contacted the Plaintiff’s counsel to discuss the matters contained in the Complaint. At that time, I refused to execute the requested Waiver.⁸

2. On January 9, 2006, Zayed submitted a signed declaration to the District Court, in which he admitted receiving the August 30, 2004 letter and immediately calling the plaintiffs’ attorney to discuss the matter. There is no claim in the declaration that any attachments were missing from the letter.⁹

3. On January 26, 2006, Zayed submitted a Reply Declaration to the District Court in which he again admitted receiving and reviewing the

⁶ CX-4, CX-4A.

⁷ Tr. 274-76.

⁸ CX-9, p. 1. The certification was filed in support of Zayed’s motion to vacate the default judgment that was issued against him in the civil litigation. CX-8. The second cause in this disciplinary proceeding concerns the failure to disclose that judgment.

⁹ CX-12, p. 7.

August 30, 2004 letter. Zayed cites the language of the letter indicating that the plaintiffs “would prefer not to pursue litigation against family,” but he omits to refer to earlier language in the letter that refers to “the Complaint that *has been filed* against you in the United States District Court, District of New Jersey.” (Emphasis added). Again, there is no claim that the Complaint was not attached to the letter.¹⁰

Even if Zayed had not received the Complaint as an attachment to the August 30, 2004 letter, it is clear from his testimony that he understood the nature of the plaintiffs’ Complaint from the cover letter itself.¹¹ Moreover, as noted previously, the cover letter states:

*As detailed in the enclosed Complaint, this action arises out of . . . transfers of money . . . for the purpose of investing that money. . . It appears you failed to make the investments . . . and indeed kept the money for yourself.*¹²

The cover letter alone, then, put Zayed on notice, as of his receipt of that letter, of a pending investment-related, consumer-initiated civil litigation alleging that he was involved in one or more sales practice violations. That notice triggered the requirement that he disclose the litigation on his Form U4.¹³

Zayed testified that the civil litigation was frivolous and was instituted by his relatives to pressure Zayed’s father in Egypt to cooperate with them on a real estate transaction there. However, the impetus for the lawsuit and its ultimate merits are not relevant to the requirement that litigation be disclosed on the Form U4. Question 14I (1) requires only that the person filing the form answer “yes” or “no” to the question whether that person has been named as a defendant in an investment-related, consumer-initiated civil litigation alleging sales practice violations. The Disclosure Reporting Pages allow reporting persons to provide a summary of the circumstances leading to the litigation, as

¹⁰ CX-13.

¹¹ Tr. 274-76.

¹² CX-4.

¹³ There is no question that the civil litigation Complaint had, in fact, been filed in the United States District Court as alleged in the cover letter.

well as its current status. The cover letter and the Complaint show clearly that the litigation involves Zayed's investment in the stock market of funds received from his relatives in Egypt. His testimony confirms that (1) his relatives sent him funds for the purpose of producing income; (2) he commingled their funds with those in his and his wife's securities accounts; (3) he invested those funds; and (4) he, his wife, and his relatives "lost a lot of money" as a result of those investments.¹⁴ The Complaint states that (1) Zayed convinced Plaintiffs to send him money so he could invest it for them; (2) Zayed told Plaintiffs that because they were not residents of the United States, it would be illegal for them to invest directly in the stock market; (3) Plaintiffs sent money to Zayed and his wife, and explained that the money was their retirement money and they did not want to invest in anything that was high risk; (4) Zayed told Plaintiffs that their investments were "100% risk free" and their money was invested in "Microsoft bonds"; and (5) Zayed told Plaintiffs that he lost a great majority of their money in an "unexpected stock drift," but that he would invest the remaining money in an IPO in an effort to regain the losses.¹⁵

Zayed argues that he had no knowledge of the lawsuit because there is no proof that he was ever served with process after he refused to sign the Request for Waiver of Service. However, the Final Judgment that was entered by the District Court on April 11, 2005, notes that "service of a copy of the Complaint upon [Zayed and his wife had] been effectuated on October 9, 2004."¹⁶ Moreover, in the Opinion and Order issued by the Court on October 23, 2006, which vacated the Default Judgment and reopened the case against Zayed and his wife, the Court stated:

Defendants continue to attribute [their] inaction prior to Plaintiffs' motion for default to their ignorance of legal proceedings and consequences, and

¹⁴ Tr. 234-36, 250-52.

¹⁵ CX-4B, pp. 3-6.

¹⁶ CX-8.

this Court continues to look upon this excuse with disfavor. In the briefing of the instant motion, Defendants argue that Plaintiffs might have served Defendant [Zayed's wife] at the wrong address and therefore that service might be defective. Even so, Defendant Zayed certainly had notice of the Complaint and these proceedings, refused to return the waiver of service sent by Plaintiffs, and Defendants fail to explain away the failure of Plaintiffs' process server to serve Defendants despite attempting service on four occasions.¹⁷

The Hearing Panel concludes that Zayed knew that he had been named as a defendant in an investment-related, consumer-initiated civil litigation which alleged that he committed sales practice violations and which was pending at the time he submitted his initial and five subsequent U4 Forms, but, on each of them, he failed to disclose that he had been so named.¹⁸ Membership Rule IM-1000-1 prohibits the filing of information so incomplete or inaccurate as to be misleading, and requires that such a filing be corrected upon notice thereof. Form U4 is used by FINRA and other self-regulatory organizations to determine the fitness of applicants for registration as securities professionals. The candor and forthrightness of applicants is critical to the effectiveness of the screening process. Misrepresentations on Form U4, in addition to violating that Membership Rule, violate the standard of just and equitable principals of trade to which each person associated with a FINRA member is held.¹⁹ Here, Zayed willfully caused his firm to file inaccurate U4 Forms because he failed to supply the firm with information, of which he had knowledge, regarding the civil litigation in which he had been named as a

¹⁷ CX-15, pp. 12-13.

¹⁸ CX-1A-1E, CX-14, CX-14A-14B.

¹⁹ See, e.g., *Douglas J. Toth*, Exchange Act Release No. 58,074, 2008 SEC LEXIS 1520 (July 1, 2008) (citations omitted).

defendant, in violation of IM-1001-1 and Conduct Rule 2110, as alleged in the Complaint.²⁰

B. Failure to Disclose Default Judgment in New Jersey Civil Litigation

Form U4 Question 14 M asks whether the person filing the form has “any unsatisfied judgments or liens” against that person. Zayed submitted three U4 Forms between October 10, 2005 and October 11, 2006, on which he answered “no” to Question 14 M.²¹

On April 11, 2005, the United States District Court entered a default judgment in the amount of \$286,155.53 against Zayed in the New Jersey civil litigation case.²² Zayed learned of the default judgment no later than May 26, 2005, when his attorney filed Zayed’s signed Certification in support of his motion to vacate the default judgment and permit the defendants to file an answer out of time.²³ Zayed filed two other affidavits in January 2006, seeking to have the default judgment vacated. However, he failed to disclose the default judgment until October 12, 2006, after FINRA began an investigation into the matter.²⁴

Question 14 M does not restrict the nature or type of unsatisfied judgment that must be disclosed. Zayed asserts that (1) he was not aware of the default judgment until November 21, 2005, when he learned from Richard Galterio, the chief operating officer

²⁰ A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F. 3d 408, 414 (D.C. Cir. 2000). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearheart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)). Moreover, Article III, Section 4 of FINRA’s By-Laws provides that “[a] person is subject to a ‘disqualification’ ... if such person is subject to any ‘statutory disqualification’ as such term is defined in Section 3(a)(39) of the [Securities Exchange] Act [of 1934].” Under Section 3(a)(39)(F) of the Securities Exchange Act of 1934, an applicant is subject to statutory disqualification if the applicant has willfully made a false statement on an application to become associated with a member firm, such as a Form U4.

²¹ CX-1C, CX-1D, CX-1E.

²² CX-8.

²³ CX-9.

²⁴ CX-12, CX-13, CX-14, CX-14A, CX-14B.

of Skyebank, that the Plaintiffs' attorney inquired about garnishing Zayed's commissions to satisfy the default judgment; and (2) at the time he learned of the default judgment, he recollected that the Form U4 required only disclosure of felonies or bankruptcies.²⁵ The Hearing Panel does not find those assertions to be credible. In November 2004, a year before Zayed had his conversation with Galterio, the Plaintiffs in the civil litigation filed their motion for entry of a default, serving a copy on Zayed by regular mail.²⁶ Three weeks before the District Court entered the default judgment, Zayed wrote to his attorney, attaching "brief answers to all claims in the complaint," with the goal of vacating a default judgment.²⁷ On April 5, 2005, Zayed's attorney wrote to Plaintiffs' attorney stating that he had been retained by Zayed and noting that Plaintiffs "have a pending motion to enter final judgment based upon default."²⁸ On May 31, 2005, Zayed filed his signed certification in support of his motion to vacate the April 11, 2005 default judgment.²⁹ Clearly, the evidence demonstrates that Zayed had knowledge of the motion for default and the entry of the default judgment long before he had the conversation with Galterio. Moreover, the Hearing Panel cannot credit the assertion by a person registered as a General Securities Representative since 1992 and as a General Securities Principal since 1999 that he was under the impression that the Form U4 required disclosure only of felonies or bankruptcies. The Form, of course, is not so restrictive. There is no claim or evidence that, at the time he learned of the default judgment, he checked the Form U4 or consulted with a compliance officer or anyone else about what was required to be disclosed on that Form. Under the circumstances, his failure to disclose the default

²⁵ Zayed's Post-Hearing Submission, p. 6 of the unpaginated document.

²⁶ CX-5D.

²⁷ CX-12, p. 36.

²⁸ CX-12, p. 38.

²⁹ CX-9.

judgment until FINRA began its investigation was a willful violation of NASD Conduct Rule 2110 and IM-1000-1.

C. Failure to Disclose Default Judgment in Illinois Attorney Fees Litigation

On June 15, 2004, a law firm in Illinois brought a civil suit against Zayed for failure to pay attorney fees earned by the firm when it represented Zayed in civil litigation in Illinois. On September 23, 2004, the Circuit Court of Du Page County entered an \$18,063.97 default judgment against Zayed in the suit brought by the law firm.

On October 11, 2005, Zayed filed a *pro se* motion to vacate the default judgment, asserting that the plaintiff had not properly served him.³⁰ Notwithstanding Zayed's claim that the plaintiffs had not properly served him, Zayed executed an affidavit in the attorney fees case, stating that on "August 27, 2004, I became aware of the present lawsuit, as my children, then aged 9 and 10, discovered a Summons and Complaint on a porch at my residence the prior night." The affidavit then states: "In or about July 2005, while checking my credit, I discovered that a judgment had been entered against me."³¹

Zayed submitted three U4 Forms between October 10, 2005 and October 11, 2006, on which he answered "no" to Question 14 M, indicating that he had no outstanding judgments or liens against him.³² In his post-hearing submission, Zayed states that, had he believed that "private business transaction issues were reportable" on the Form U4, he would have updated it for the judgment in the attorney fees case. He then asserts that "he had no recollection" that the judgment was reportable, and that, when he discovered the default judgment, "he had no application in his hand to read from

³⁰ CX-22.

³¹ CX-19.

³² CX-1C, CX-1D, CX-1E.

word for word, neither he was (sic) required nor was he expected to have memorized the U4 form application verbatim.”³³

As with his failure to report the default judgment in the New Jersey litigation, there is no claim or evidence that, at the time he learned of the Illinois default judgment, he checked the Form U4 or consulted with a compliance officer or anyone else about what was required to be disclosed on that Form. His failure to do so in the face of his clearly erroneous interpretation of Question 14 M displays a calculated indifference to his responsibilities as a securities professional. Accordingly, the Hearing Panel concludes that his failure to disclose the default judgment in the attorney fees case, which was entered shortly after the default judgment in the New Jersey litigation, was a willful violation of NASD Conduct Rule 2110 and IM-1000-1. He knew what he was doing when he did not report it, even if he was not aware that he was violating NASD Rules by not reporting it.³⁴

IV. Sanctions

For filing a false, misleading, or inaccurate Form U4, FINRA Sanction Guidelines recommend a fine of \$2,500 to \$50,000. The Guidelines also recommend a suspension in any or all capacities for five to 30 business days, except that, in egregious cases, such as those involving false, inaccurate, or misleading filings, the Guidelines recommend consideration of a longer suspension of up to two years or a bar.³⁵ The principal considerations in determining sanctions for this violation are (1) the nature and significance of the information at issue, and (2) whether the failure resulted in a statutorily disqualified individual becoming or remaining with a firm. Enforcement requests that Zayed be fined \$5,000 and suspended for a period of nine months.

³³ Zayed’s Post-Hearing Submission, p.7 of the unpaginated document.

³⁴ *Wonsover v. SEC*, *supra*.

³⁵ FINRA SANCTION GUIDELINES, at 73-74 (2007 ed.).

The Hearing Panel finds that the nondisclosure of the civil action alleging breach of contract, fraud, misrepresentation, conversion, and a monetary loss of \$277,000 was significant and material. The default judgments in the amounts of \$286,155.53 and \$18,063.97 were also significant and material. Full and accurate disclosure is vital to regulatory authorities and broker-dealers who use the information to determine the fitness of an applicant for registration as a securities professional. Zayed's willful failure to disclose three reportable events is an aggravating circumstance that makes his conduct egregious, even though those failures did not result in a statutorily disqualified individual remaining with a firm. And while his failure to make the disclosures did not result in injury to the investing public or his firm, he has failed to accept responsibility for his repeated misconduct which was the result of intentional acts.³⁶ Accordingly, to remediate his misconduct and ensure effective deterrence, the Hearing Panel will fine Zayed \$10,000 and suspend him in all capacities for a total of nine months.

V. Conclusion

Moustafa M. Zayed is fined \$10,000 and suspended in all capacities for nine months for willfully causing a member firm to file U4 Forms that failed to disclose that (1) he was named as a defendant in a pending investment-related, consumer-initiated civil litigation which alleged that he was involved in breach of contract, fraud, misrepresentation, and conversion; and (2) he had two unsatisfied default judgments against him. He will also be assessed costs in the total amount of \$1,034.20, consisting of a \$750 administrative fee and a \$284.20 transcript fee.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this decision becomes FINRA's final disciplinary action in this matter, except that if this decision becomes FINRA's final disciplinary action, Zayed's

³⁶ *Id.*, at 6-7 (Principal Considerations in Determining Sanctions).

suspension shall begin at the opening of business on February 2, 2009, and end at the close of business on October 30, 2009.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:

Moustafa M. Zayed (*via first class mail & overnight courier*)

Noel C. Downey, Esq. (*via first class mail & electronic mail*)

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