

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 6

Complainant,

vs.

Respondent 1

Respondent.

DECISION

Complaint No. C06910024

Dated: August 6, 1999

Matter remanded by SEC for NAC to consider whether respondent had demonstrated that he was unable to pay \$36,746.60 in restitution to customers. Despite repeated requests from NASD Regulation staff, respondent failed to submit current financial information to support his claim of inability to pay restitution. Held: confirm imposition of order to pay \$36,746.60 in restitution to customers.

This remand proceeding resulted from an order entered by the Securities and Exchange Commission ("SEC" or "the Commission") denying the request of NASD Regulation, Inc. ("NASD Regulation") for reconsideration of the Commission's earlier order vacating the restitution order imposed on respondent Respondent 1 and remanding the proceeding for a determination of Respondent 1's financial ability to pay restitution.¹

¹ Respondent 1, who entered the securities industry in 1971, was most recently registered as a general securities representative and principal with Firm A ("the Firm"). He has not been associated with any NASD member firm since October, 1991.

Procedural History

The National Business Conduct Committee ("NBCC")² issued a decision in this matter which affirmed the findings of the District Business Conduct Committee for District No. 6 ("DBCC") that Respondent 1, who during the relevant period was the president and general securities principal of the Firm, a former member of the National Association of Securities Dealers, Inc. ("NASD" or the "Association"), directed that the Firm³ charge excessive mark-ups and was responsible for registration, supervision, and record-keeping violations.⁴ The NBCC also affirmed the sanctions assessed by the DBCC of a censure; \$25,000 fine; one-year principal suspension; requirement to requalify by examination as a principal; and assessment of costs. In addition, the NBCC ordered Respondent 1 to pay restitution of \$40,175⁵ to customers who had been injured by the excessive mark-ups.

Respondent 1 appealed the NBCC's decision to the Commission, which issued a decision, affirming the NBCC's findings of violation and the sanctions imposed, with the exception of the restitution order. See (cite omitted). The Commission remanded the restitution order to the NBCC for reevaluation in light of additional evidence that Respondent 1, for the first time on appeal to the Commission, sought to adduce. Respondent 1 claimed that this additional evidence would demonstrate the nature of his limited ownership interest in the Firm, the Firm's corporate structure, the monetary amount that actually inured to his benefit, and his purported inability to pay the ordered restitution.

On remand before the NBCC, Respondent 1 adduced additional evidence on these topics. Following a remand hearing, the NBCC issued its decision on remand ("the NBCC's Remand Decision"), in which it concluded that the equities favored holding Respondent 1 responsible for restitution. The NBCC noted that its purpose in ordering the payment of restitution to Respondent 1's customers was to make those injured customers whole. The NBCC rejected Respondent 1's argument that he should not be held responsible for restitution because he did not hold a majority ownership interest in the Firm. Moreover, the NBCC concluded that Respondent 1 should not be permitted to avoid responsibility for the restitution award because of his claim of financial limitation. The NBCC

² The National Adjudicatory Council ("NAC"), as approved by the Commission, became the successor to the NBCC on January 16, 1998.

³ The DBCC had dismissed the Firm as a respondent in this disciplinary proceeding because the Firm had been liquidated in bankruptcy.

⁴ This action arose from a routine examination of the Firm in 1990.

⁵ This amount subsequently was recalculated by the Commission to be \$36,746.60. The customers to whom restitution was to be paid were identified by reference to a schedule of excessive mark-up transactions which was attached to the NBCC's 1993 decision.

concluded that there should not be a process for discriminating between wrongdoers who are well-off and those who are not. The NBCC stated that, even if Respondent 1's current liabilities exceeded his current assets, it would be more equitable for the financial burden to fall on him than on the injured customers. Respondent 1 thereafter appealed to the Commission.

In a (date omitted) decision on the appeal from the NBCC's Remand Decision, the Commission characterized the NASD's determination to affirm the restitution order, in the face of Respondent 1's purported inability to pay, as "unduly harsh." (cite omitted) The Commission again vacated the restitution order and remanded the matter to the NASD for consideration of Respondent 1's alleged financial inability to make restitution.

On (date omitted), NASD Regulation filed a Request for Reconsideration of Commission Decision ("Request for Reconsideration") and asked that it be provided an opportunity to address the issue of whether NASD Regulation must consider a respondent's ability to pay before entering a restitution order. On (date omitted), the Commission granted NASD Regulation's request and entered an Order Permitting Filing of Additional Briefs in this matter.

Following briefing by NASD Regulation,⁶ the Commission entered the above-mentioned (date omitted) order denying reconsideration and remanding this matter to NASD Regulation.

Discussion

Attempts to Locate Respondent 1. Following the Commission's (date omitted) order, staff of the Office of General Counsel of NASD Regulation made numerous attempts to contact Respondent 1 in order to obtain current and complete financial information from him. None of these efforts was successful.

On January 27, 1998, staff sent Respondent 1 a letter, enclosing the Commission's (date omitted) order and a Financial Disclosure Statement. Staff informed Respondent 1 of the Commission's denial of NASD Regulation's request for reconsideration, and stated that the matter would proceed on remand before a subcommittee of the NAC to consider the question of Respondent 1's financial ability to pay the \$36,746.60 restitution order that had been imposed. Staff requested Respondent 1 to submit a completed current Financial Disclosure Statement and provided the opportunity to supplement the record further by submitting briefs. The January 27 letter was sent via certified mail and first-class mail, and was addressed to Respondent 1 at both Address 1⁷ and Address 2.⁸ A certified mail receipt,

⁶ Respondent 1 did not make any additional submissions to the Commission.

⁷ This was the address used by the Commission in its (date omitted) order.

dated February 6, 1998, was returned for Address 1, signed by an individual whose surname appears to be "Respondent 1." The first-class letter mailed to Address 1 was not returned. Both the certified and first-class letters to Address 2 were returned, marked "Forward Expired." Staff received no response to the January 27 letter.

Staff sent a second letter, dated July 30, 1998, to Respondent 1, again asking him to complete the enclosed Financial Disclosure Statement and submit any additional briefing. The July 30 letter was also sent, via certified and first-class mail, to Address 1 and Address 2. The certified and first-class July 30 letters to Address 1 were both returned to staff, marked "Attempted, not known." The certified and first-class July 30 letters to Address 2 were returned, marked "Forward Expired." Staff again received no response from Respondent 1 to the July 30 letter.

On August 20, staff sent a third letter to Respondent 1 asking for updated financial information. This letter was sent via certified mail and first-class mail to another possible address that staff had located for Respondent 1 through an August 1998 Internet search – Address 3. Neither the certified mail letter nor the first-class letter mailed to Address 3 was returned.

Staff also made attempts to contact Respondent 1 by telephone. Staff conducted another Internet search for Respondent 1's location in December 1998. A review of United States telephone directories showed Respondent 1 at both Address 1 and Address 3, with the same telephone number listed for both addresses. Calls to that telephone number resulted in the message that the telephone had been disconnected. A Westlaw search of public records provided two telephone numbers for Respondent 1 at Address 3. The first telephone number was disconnected, and the second number rolled over to a voice-mail box for Respondent 1. Staff left a message, which was never returned.

On February 18, 1999, staff again called the number which had the recorded message for Respondent 1's voice-mail. This time, the message referred to yet another telephone number, and staff attempted to reach that number, but got repeated busy signals. On February 19, 1999, staff again called the last-discovered telephone number, and reached a woman, who did not identify herself, but stated that she did know Respondent 1 and that he was in Costa Rica. The woman provided a telephone number in Costa Rica for Respondent 1, but stated that she did not know a mailing address for him. Staff then attempted to contact Respondent 1 using the telephone number given for Respondent 1 in Costa Rica, and reached a voice-mail box. Staff left a message for Respondent 1 to contact NASD Regulation regarding the remanded SEC proceeding and asked for a current address in order to mail him relevant material.

(...continued)

⁸ This is the latest address for Respondent 1 in the Association's Central Registration Depository ("CRD").

On February 19, 1999, at 2:40 p.m., Respondent 1 returned staff's call and left a voice-mail message. That voice-mail message was returned by staff at 2:55 p.m. on that same date and a conversation ensued between Respondent 1 and staff. Respondent 1 indicated that he did not wish to continue to participate in the proceeding, but he was persuaded to provide his current address so that he could be served with the appropriate documents. He then provided the following address: Address 4.

On February 23, 1999, staff sent a letter to Respondent 1, via certified and first-class mail, at Address 4 and Address 3. This letter again requested that Respondent 1 submit current financial information in response to the enclosed Financial Disclosure Statement and set forth a schedule for filing briefs. The last date for submitting briefs was May 6, 1999. The certified mail receipt for Address 3 was returned, dated March 2, 1999, and signed by what appears to be "Person A." The certified mail receipt for Address 4 was returned, dated February 26, 1999, and also was signed by what appears to be "Person A." The first-class letters to both Address 3 and Address 4 were not returned. Staff received no information from Respondent 1 in response to the February 23, 1999 request.

Lack of Evidence to Support Respondent 1's Asserted Inability to Make Restitution. Based upon a careful review of the record on this second remand proceeding, we conclude that there is insufficient evidence to support Respondent 1's assertion that he is financially unable to pay the ordered \$36,746.60 in restitution to the customers injured by the excessive mark-ups for which he was found responsible.

The Commission has held that a respondent "has the burden of producing evidence in support of [such a] claim and of proving bona fide insolvency." (cite omitted); see also In re Michael H. Novick, Exchange Act Rel. No. 37503, at 5 (July 31, 1996). Respondent 1 has failed to meet this burden. Despite repeated requests from staff, by numerous letters and telephone calls, Respondent 1 has not submitted one single item of information relating to his current financial situation. As indicated herein, staff went to great lengths to locate Respondent 1, who never updated his address on CRD, even though he was clearly aware of the pendency of this ongoing proceeding.⁹ Yet Respondent 1 did not

⁹ As previously noted, pursuant to the Commission's decision, Respondent 1 was found to have charged excessive mark-ups and he was censured, fined \$25,000, suspended for one year in all principal capacities, and ordered to requalify by examination as a principal. The question of restitution was remanded to the NASD, and Respondent 1 participated in person at the remand hearing. Despite the fact that this proceeding had obviously not been concluded, Respondent 1 did not fulfill his responsibility to keep the Association apprised of his whereabouts, and he thereafter ceased participating in the process. See In re Ashton Noshir Gowadia, Exchange Act Rel. No. 40410 at 4 (Sept. 8, 1998) (responsibility of respondent to provide current address to CRD).

take advantage of this opportunity -- he did not submit the Financial Disclosure Statement, and he did not submit any additional briefs.

We hold that the information in the record is insufficient to support Respondent 1's claim of inability to pay restitution. The most recent financial records that Respondent 1 supplied were dated July 1993, and included copies of tax returns and Forms W-2 for the years 1988, 1989, 1990, 1991, and 1992. We therefore have absolutely no basis upon which to conclude that Respondent 1 is currently insolvent and unable to pay the previously ordered restitution of \$36,746.60 to the injured customers. In an analogous situation, the Commission rejected a claim of inability to pay and stated:

As we have noted, a [respondent's] ability to pay is peculiarly within his knowledge, and it is appropriate that he bear the burden of demonstrating his inability. Since [respondent] refused to submit additional evidence as requested, he cannot complain that he failed to take advantage of this opportunity.

In re B.R. Stickle & Co., 51 S.E.C. 1022, 1026 (1994) (assertion of inability to pay fine). See also Gerald Cash McNeil,¹⁰ Complaint No. C3B960026 (NAC Jan. 21, 1999) (same); In re John Pearce, Exchange Act Rel. No. 37217 (May 14, 1996) (assertion of inability to pay arbitration award). Consistent with Stickle and the discussion above, we hold that Respondent 1 has not shown that he is unable to pay the ordered restitution.

Accordingly, Respondent 1 is ordered to pay restitution of \$36,746.60 to the customers who suffered losses resulting from Respondent 1's excessive mark-ups, in accordance with the schedule of excessive mark-up transactions that was attached to the NBCC's 1993 decision,¹¹ as recalculated by

¹⁰ We note that both Stickle and McNeil dealt with situations involving respondents who were arguing that they had insufficient funds to pay a monetary fine, directed to be paid to the self-regulatory organizations. The instant matter, however, involves restitution to be paid to injured customers, a circumstance which arguably presents a much less sympathetic case for the respondent. The Commission has long emphasized its support for restitution orders, stating that "[i]n addition to the policy of depriving the wrongdoer of his ill-gotten gains is [the SEC's] desire to see that monetary amounts assessed by the NASD be turned over to wronged customers where they are identifiable." See, e.g., In re Century Capital Corp. of South Carolina, 50 S.E.C. 1280, 1285 n. 13 (1992), aff'd, 22 F.3d 1184 (D.C. Cir. 1994); In re F.B. Horner & Associates, Inc., 50 S.E.C. 1063, 1068-69, n. 19 (1992), aff'd, 994 F.2d 61 (2d Cir. 1993); In re Michael Davis Sweeney, 50 S.E.C. 761, 769 (1991); In re Investment Planning, Inc., 51 S.E.C. 592 (1993).

¹¹ In the event that customers cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of the customer's (continued...)

the Commission in its February 1994 decision and order of remand. (The other sanctions previously imposed on Respondent 1 remain in effect.)¹²

On Behalf of the National Adjudicatory Council,

Joan C. Conley
Senior Vice President and Corporate Secretary

(...continued)
last known address.

¹² We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.