

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement,

Complainant,

vs.

Bernard San Juan Rondez
Marina, California,

Respondent.

DECISION

Complaint No. C01990002

Dated: April 10, 2000

Held: Hearing Officer decision denying Complainant's motion for default decision and dismissing amended complaint reversed; default motion granted finding that Respondent failed to respond to Association requests for information; Respondent barred in all capacities.

Pursuant to Procedural Rule 9311, the Department of Enforcement ("Enforcement") of NASD Regulation, Inc. ("NASD Regulation") has appealed an October 13, 1999 Hearing Officer Decision Denying Complainant's Motion for Default Decision and Dismissing the Complaint (the "Decision"). After a review of the entire record, we reverse the Decision and grant Complainant's Motion for Default Decision. We find that Bernard San Juan Rondez ("Rondez") failed to respond to NASD Regulation staff requests for information in violation of NASD Procedural Rule 8210(a)(1). We hereby impose a bar in all capacities.

Facts

Rondez was employed by PFS Investments, Inc. ("PFS") from August 1996 to May 27, 1997. He was registered with the NASD as an investment companies and variable contracts products limited representative from November 4, 1996 until June 27, 1997, when the NASD received a Uniform Termination Notice for Securities Industry Registration ("Form U-5") from PFS reflecting that Rondez had been terminated on May 27, 1997. The Form U-5 stated that "Agent misappropriated client funds." An NASD Regulation, Inc. ("NASD Regulation") investigation ensued. This complaint arose as

the result of Rondez' failure to respond to NASD Regulation requests for information regarding his termination from PFS.

The NASD had two addresses for Rondez: (1) Rondez' address as reflected in the Central Registration Depository ("CRD") -- 3114 Carmello Circle, Marina, California 93933 (referred to as the "CRD/Marina Address"); and (2) Rondez' last-known current address -- 9484 Queensbury Court, Elk Grove, California 95758-4318 (referred to as the "Elk Grove Address"), which NASD Regulation obtained from PFS during its investigation of Rondez' termination. NASD Regulation staff ("Staff") sent four separate communications to Rondez during the course of its investigation, as described below.

June 12, 1998 Letter. On June 12, 1998, NASD Regulation staff ("Staff") sent a request for information to Rondez at the Elk Grove Address that did not state that it was being made pursuant to Rule 8210. The letter asked Rondez for information relating to a customer complaint that Rondez had used the customer's name and Social Security number to open a credit card account and to charge items without the customer's authorization. The letter also advised Rondez that he was responsible for notifying the Staff of NASD District 1 of any address change. The letter was sent by regular first-class mail and certified mail. Neither copy was returned. The certified receipt for the copy sent by certified mail was returned reflecting that it had been accepted on June 15, 1998.

On June 15, 1998, NASD Regulation Examiner Mike Martin ("Martin") received a telephone call from Rondez, in which Rondez confirmed receipt of the June 12, 1998 letter and indicated that certain documents that Martin had requested had been destroyed. In a subsequent telephone call, Martin asked Rondez to explain in writing the circumstances under which the documents had been destroyed.

NASD Regulation subsequently received a four-page letter from Rondez dated June 20, 1998, in which Rondez admitted to having obtained a credit card in his customer's name and to using the credit card to purchase goods and take cash advances. The letter contained the identifying number of the investigation (E01970484) that was referenced in Staff's June 12, 1998 letter, but it did not have a return address.

November 19, 1998 Letter. Staff sent a letter dated November 19, 1998, via certified and regular mail, to Rondez at the Elk Grove Address asking for additional information pursuant to Rule 8210. The letter gave Rondez until November 30, 1998 to respond. The certified copy was returned marked "Unclaimed." The copy sent via regular mail was not returned. Rondez did not respond.

December 4, 1998 Letter. On December 4, 1998, Staff sent Rondez a second letter pursuant to Rule 8210 to the Elk Grove Address via first-class and certified mail. Staff attached the November 19 letter and gave Rondez until December 16, 1998 to respond. The certified copy was returned marked "Unclaimed." The copy sent via regular mail was not returned. Rondez did not respond.

December 18, 1998 Letter. On December 18, 1998, Staff sent Rondez a third letter (with the November 19 letter attached) pursuant to Rule 8210 to the CRD/Marina Address via first-class and certified mail. The letter stated:

On November 19, 1998, we wrote you requesting additional information regarding your written response of June 20, 1998 (see attached) to be received in this office no later than November 30, 1998.

To date, we have not received a response from you. Accordingly, this letter serves as our second and final request for information pursuant to NASD Procedural Rule 8210. Please be advised that failure to respond to NASD Regulation, Inc.'s requests for information may, in and of itself, result in disciplinary action against you

Rondez did not respond, and both the first-class and certified mail letters were returned marked "Moved Left No Address."

Procedural Background

On January 19, 1999, Enforcement filed a Complaint against Rondez alleging that he had failed to respond to the November 19, December 4, and December 18 requests.¹ When Rondez did not file an answer or otherwise respond to the Complaint, Enforcement filed a Motion for Default on July 29, 1999. On August 26, 1999, Enforcement filed and served an Amended Complaint and a Notice of Amended Complaint. On August 30, 1999, the Hearing Officer conducted a Pre-Hearing Conference to discuss issues relating to the Motion for Default, including her preliminary decision that Enforcement had not properly served Rondez with the Rule 8210 requests that are the subject of the Complaint.

On September 1, 1999, Enforcement filed a Motion for Permission to File Second Amended Complaint. The Second Amended Complaint sought to add some additional facts that were not set forth either in the original Complaint or the Amended Complaint. On September 8, 1999, Enforcement filed a Motion to Supplement the Record Following Pre-Hearing Conference, in which Enforcement sought to amend the Amended Complaint to eliminate any suggestion that Rondez had ignored three separate requests for information, when in reality each request asked for the same information. The Motion also stated that the December 18 letter had been sent to the CRD/Marina Address to satisfy the constructive notice requirements of Rule 8210.

On September 14, 1999, another Pre-Hearing Conference was held to clarify Enforcement's position as to service of the Rule 8210 requests on Rondez. On September 17, 1999, the Hearing Officer issued an Order Denying Complainant's Motion for Permission to File Second Amended Complaint. In a Default Decision issued on October 13, 1999, the Hearing Officer denied

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The Complaint mistakenly alleged that the December 18 letter was served on Rondez at the Elk Grove Address.

Enforcement's Motion for Default Decision and dismissed the Complaint on the basis that no underlying violation was charged to serve as a basis for the Complaint.

The Hearing Officer found that Staff did not properly serve Rondez with the Rule 8210 requests as required by Rule 8210(d). The Hearing Officer based her decision on a finding that Rule 8210(d) provides:

A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Adjudicator or Association staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to: (1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository, and (2) any other more current address of the member or the person known to the Adjudicator or Association staff who is responsible for mailing or otherwise transmitting the notice.

The Hearing Officer concluded that none of the Staff's efforts to serve Rondez met the Rule's requirement that Rondez be served both at his CRD address and other more current address. The Hearing Officer found that the November 19 and December 4 requests were served on Rondez at the Elk Grove Address, but not at the CRD/Marina Address. She found that the December 18 request was sent to the CRD/Marina Address, but not the Elk Grove Address. In addition, the Hearing Officer found that the December 18 request was, in and of itself, defective because it did not specify a time for responding, and the time for responding to the attached November 19 request already had expired. She stated:

Mailing a request for information to an alternate address after the period for response already has expired cannot reasonably be construed to be service of a copy of an earlier request. Consequently, none of the staff's efforts to serve [Rondez] with the Rule 8210 requests meets the two-pronged requirement of Rule 8210(d).

The Hearing Officer rejected Enforcement's arguments that Rule 8210(d) does not state that the requests have to be sent simultaneously to the CRD address and the more current address. She stated that Enforcement's position might have some merit if Enforcement learned of an additional address after it had sent the Rule 8210 request, and then served the same letter at the new address before the response deadline in the request had passed.

The Hearing Officer also rejected Enforcement's position that mailings asking for the same information, sent seriatim to a respondent's CRD address and last known address, could be treated as one request for purposes of satisfying the notice requirement of Rule 8210(d). She stated that this argument might have some validity if seriatim mailings provided the recipient with a reasonable period to respond before the response deadline. In the instant case, she noted, the December 18 request did not give Rondez time to respond, but merely restated the November 30 response time indicated in the attached November 18 letter. The Hearing Officer concluded: "Under these circumstances, Enforcement cannot rely on a later invalid Rule 8210 request together with an earlier invalid Rule 8210 request to satisfy the notice requirements of the Rule."

Discussion

After a thorough review of the record, including Enforcement's submission on appeal and oral argument, we reverse the Hearing Officer's decision and grant Enforcement's Motion for Default Decision. We have carefully considered the entire record in this proceeding in reaching our independent determination. The threshold issue is whether Rondez can be deemed to have received Staff's request for information under Rule 8210(d).

If Staff has actual knowledge that an individual's CRD address is out of date or inaccurate, it is required under Rule 8210(d) to transmit the request to the more current or last known address and the CRD address. In the instant matter, Enforcement served the November 19 and December 4 requests on Rondez at the Elk Grove Address because Enforcement knew that Rondez had received correspondence from Enforcement at that address in June. When Rondez did not respond to the November 19 and December 4 Rule 8210 requests and did not claim the certified letters, Enforcement served the same request on Rondez at his outdated CRD address.

Enforcement has not contended that Rondez actually received the November 19 and December 4 letters at the Elk Grove Address. Rondez did not sign a certified mail receipt, he did not respond to the letter, and Enforcement submitted no evidence that he was living at that address at the relevant time. Enforcement has relied on having effected "constructive" notice of its Rule 8210 requests.

It is undisputed that the November 19 and December 4 letters contained identical requests for information, and that the December 18 letter did not contain a separate request with a separate due date, but merely attached the November 19 letter. It is also undisputed that Staff did not mail any of these letters to Rondez simultaneously at the Elk Grove and CRD/Marina addresses. The Hearing Officer concluded that none of these mailings constituted a valid Rule 8210 request because: (1) the November 19 and December 4 letters were not simultaneously transmitted to Rondez at the Elk Grove and CRD/Marina Addresses; and (2) the December 18 letter also was not simultaneously transmitted to both addresses. In addition, the December 18 letter did not give Rondez a new date by which to respond.

We first address the question of whether Rule 8210(d) requires simultaneous transmission to the member's or person's CRD address and more current address. Rule 8210(d) does not impose such a

requirement. What the Rule does require is transmission of each request to both addresses if Staff has actual knowledge of a more current address. In this case, the December 4 and December 18 letters asked Rondez to respond to the questions asked in the November 19 letter. The November 19 letter was transmitted seriatim to the Elk Grove and CRD/Marina Addresses. Although we believe that it is the better practice to serve Rule 8210 requests on both addresses simultaneously when required by Rule 8210(d), we find in this case that Staff fulfilled the requirements of Rule 8210(d) because its requests for information were transmitted to Rondez at both his more current address and his CRD address.²

We next address the question of whether the December 18 request was invalid on the basis that the letter did not give Rondez a new response date. Providing a specific response date is the only mechanism that allows Staff to determine whether it has received a timely response; nevertheless, Rule 8210 does not actually require Staff to give an individual or firm a specific time in which to provide information. In the instant matter, the December 18 letter did not have a specific response date, but it did put Rondez on notice that Staff's November 19 request was still unanswered. Thus, we find that the December 18 letter was a valid Rule 8210 request for information.

The purpose of Rule 8210(d) is to provide a mechanism by which NASD Regulation will determine if a person subject to the Rule 8210 obligation to provide information to NASD Regulation upon request receives a notice transmitted by NASD Regulation staff. Rule 8210(d) requires NASD Regulation staff to transmit a Rule 8210 request for information to an individual's more current address as well as the individual's CRD address, when staff has reason to believe that the CRD address is inaccurate or out-of-date. In the instant matter, Rondez received Staff's request for information at both addresses as required by Rule 8210(d). When Rondez failed to respond to a request sent to his Elk Grove Address, Staff transmitted the same request to his out-of-date CRD address, thereby fulfilling the constructive notice requirements of Rule 8210(d). Under the facts of this case, simultaneous transmission would not have furthered the purpose of Rule 8210(d), which is to allow NASD Regulation to deem a Rule 8210 request to have been received by an individual when such notice has been transmitted both to the more current address and the out-of-date or inaccurate address.

²We note that Rule 8210 does not require that any particular number of requests be transmitted before a complaint can be issued.

On the basis of the foregoing, we reverse the Hearing Officer's dismissal of the Amended Complaint with prejudice and grant Complainant's Motion for Default Decision. We impose a bar in all capacities.³ Pursuant to Rule 9360, the bar shall be effective upon service of this decision.⁴

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and Corporate Secretary

³The recommended sanction is consistent with applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1998 ed.) at 31 (Failure to Respond).

⁴We 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.