

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
for District No. 10

Complainant,

v.

David A. Blech
New York, New York

and

New York, New York,

Respondent.

DECISION

Complaint No. C10960019

District No. 10 (NY)

Dated: December 1, 1997

This matter was appealed by respondent David A. Blech ("Blech") pursuant to NASD Procedural Rule 9310. For the reasons discussed below, we hold that Blech violated Article III, Section 1 ("Section 1") and Article IV, Section 5 ("Section 5") of the Association's Rules of Fair Practice (now Conduct Rule 2110 and Procedural Rule 8210) by not responding to the Association's requests for information as alleged in the complaint. We order that Blech be censured; fined \$20,000; barred from associating with any member firm in any capacity; and assessed appeal costs of \$750.

Background

Blech first became associated with a member of the Association in January 1990. At all times relevant to the complaint, Blech was associated with D. Blech & Company, Incorporated ("D. Blech & Co." or "the Firm"), then a member firm and was registered as a general securities representative and general securities principal. Blech currently is registered with the Association as a general securities representative and general securities principal and according to the

Association's records, is employed by D. Blech & Co. The membership of D. Blech & Co. was cancelled in June 1995 for failure to pay fees.

Facts

D. Blech & Co. was a member firm with approximately 400 employees and offices in New York, Florida, and Boston. On September 22, 1994, D. Blech & Co. ceased doing business and closed its offices. Blech was at all times relevant to the complaint the custodian of records for D. Blech & Co. and was the sole owner, chairman and chief executive officer of the Firm.

Association staff initiated an investigation into seven customer complaints against various registered representatives who were employed by D. Blech & Co. These customers alleged that the registered representatives had engaged in unauthorized trading and had failed to execute orders to sell securities. As part of that investigation, staff sent a written request for information and documentation, dated April 24, 1995, via first class mail to Blech's home address as reflected in the Association's records, and to the Firm's main office (_____, New York, New York _____).

After receiving no response, staff again sent a written request, dated May 15, 1995, via certified and first class mail, to Blech's home address as well as the Firm's main office. The certified mail sent to Blech's home address was returned with a U.S. postal indication of "unclaimed." The certified mail sent to the Firm was forwarded to: _____, New York, New York _____ ("_____ address"), and was eventually returned with a U.S. postal indication of "unclaimed." The first class mailings were not returned.

On May 30, 1995, staff again forwarded copies of its previous letters to Blech at the _____ address. A certified receipt signed by "Arthur Tacopino" was received by the Association evidencing receipt of staff's letter on June 6, 1995.

Arthur Tacopino ("Tacopino") worked in the operations section of the syndicate department at D. Blech & Co. and was one of two employees retained after the Firm ceased doing business. At the hearing held before a hearing panel of the District Business Conduct Committee for District No. 10 ("DBCC"), Tacopino claimed that it was not his signature on the certified mail receipt. Tacopino testified that he forwarded any registered letters from the NASD to the Firm's attorney. An Association Staff Examiner ("Examiner") testified that a few days after receiving the certified receipt, he called the _____ address and spoke with Tacopino. The Examiner testified that he and Tacopino discussed the Association's written requests and Tacopino stated that he had given the requests to Blech. The DBCC credited this testimony.¹

¹ While we will not disturb the DBCC's credibility determination regarding this issue, we note that the only conclusion that can be drawn from such credibility determination is that Tacopino told the Examiner that he gave the requests to Blech. This is not conclusive proof that Tacopino actually did give the requests to Blech.

After receiving no response, on August 11, 1995, staff again forwarded a package containing copies of its previous letters, via hand delivery, to Blech at his last known address as reflected in the Association's records (_____, _____, New York, New York _____). The staff obtained a signature for the package by the building's doorman, "J. Zieris." Blech failed to respond to staff's requests. Consequently, on April 3, 1996, the DBCC issued a single-cause complaint that alleged violations of Section 1 and Section 5 against Blech.

In addition to sending these written requests, the Examiner attempted five or six times to reach Blech by telephone. Although he left messages, his calls were not returned.

A few days after D. Blech & Co. closed its doors on September 22, 1994, Blech entered the hospital due to an emotional breakdown. He never returned to the Firm's offices. Within days of the Firm's collapse, Blech's wife filed for divorce. Due to this, Blech moved from his residence of _____, _____ and did not notify the Association of his new address. Blech's wife did not give Blech mail received at the _____ address.

Blech testified that he never received staff's requests for information and that Tacopino never told him about the requests. According to Blech, the landlord for the Firm's _____ - address locked the Firm's employees, including himself, out of its offices. With regard to the books and records sought by the Association, the landlord either placed them in unmarked boxes or destroyed them. The landlord for the Firm's Florida office also locked the office doors and moved the firm's records. Later, those records could not be located.

Tacopino testified that prior to the landlord locking the Firm's employees out of the _____ office, the employees destroyed the office by knocking down file cabinets, breaking computers and throwing papers everywhere. Tacopino did not actually see the destruction take place; however, he saw the destruction after it occurred and was told by the Firm's president that the employees had done it. Tacopino also observed staff for the landlord come into the Firm's office with dumpsters and discard the Firm's records. According to Tacopino, he packed about 25 boxes of the Firm's accounting and compliance records and arranged for those boxes to go to a storage center.²

Customer account records such as trade tickets, new account forms and customer confirmations, however, were discarded by the landlord. After September 22, 1994, Tacopino

² The DBCC seemed to discredit Tacopino's testimony regarding the destruction of the Firm's books and records on the basis that Tacopino did not personally witness the destruction. We do not agree with the DBCC's finding regarding Tacopino's observations. According to Tacopino's testimony, he did not see the destruction in progress and thus he could only rely on Mr. Ross, the Firm's president, for information regarding who caused the destruction; however, he did personally observe the destruction the next morning. Tacopino also testified that he personally observed the landlord come through with dumpsters and throw away documents.

and the one other employee maintained by the Firm could not handle opening and sorting the Firm's mail, since two four-foot high sacks of mail were delivered to the Firm each day. Initially, the Firm's clearing agent, Bear Stearns, sorted through the mail looking for client checks. Otherwise, the Firm's mail was left unopened.

The Firm filed a Uniform Request for Withdrawal From Broker-Dealer Registration ("Form U-5") in November 1994. That request designated Blech as the custodian of records and listed the _____ address. Thus, Blech continued in the role of custodian of records even after the Firm's collapse. Blech admitted that prior to the issuance of the complaint, the Association was not notified that the Firm's landlord had interfered with his ability to produce documents. Blech, however, claimed that the documents requested by the Association no longer existed at the time the Association requested them.

Discussion

In his request for review by the NBCC, Blech appealed only the sanctions imposed by the DBCC. Blech did not deny the allegations in the complaint and admitted that he did not respond to the Association's requests for information. Blech argued that the DBCC imposed the maximum sanctions and failed to consider the evidence of mitigation. He stated that he was willing to accept sanctions; however, a complete bar was excessive considering the collapse of D. Blech & Co., the fact that he had only two employees left after the collapse, the destruction of records, and Blech's mental condition after the Firm's collapse.

Pursuant to the NASD Sanction Guideline applicable to Blech's violation,³ a bar and \$20,000 fine is standard when an individual received the request for information but did not respond in any manner. Where mitigation exists, a suspension of six months to two years can be considered. We find that Blech did not establish mitigation sufficient to warrant a reduction in the sanctions imposed by the DBCC. Blech's failure to respond in any manner to the requests for information demonstrated a lack of concern for the NASD in its function of protecting the investing public.

Even if we credit Blech's explanation regarding the destruction of the Firm's documents, that does not excuse Blech's failure to respond, nor does it provide mitigation. Blech failed to inform staff that the documents were destroyed until after the complaint was issued. Staff sent four separate requests to Blech during the period from April 24 through August 11, 1995, and received no response at all from Blech until after a complaint was issued. The NASD should not have had to resort to filing a complaint in order to have received a response from Blech. Moreover, the requests for information not only requested documents, they also requested a statement regarding the customers' allegations against the former D. Blech & Co. brokers. Blech might have been able to respond by providing an answer even without access to the documents.

³ See Guidelines (1993 ed.) at 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

Blech, however, failed to make a good faith effort to respond in any manner. Blech cannot shift to his attorneys, accountants, or anyone else his responsibility to comply with the Association's requests. In re Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F. 3d 99 (2d Cir. 1994); In re Mark Allen Elliott, 51 S.E.C. 1148 (1994).

While we take cognizance of Blech's mental condition after the collapse of the Firm, the record shows that within a month after the collapse he was working from his attorney's office on various Firm issues. The Association's requests for information were not sent until approximately six months after the Firm's collapse, at which time Blech was no longer hospitalized. It also appears that Blech responded to arbitrations and requests for information from the Securities and Exchange Commission, but not to the NASD's requests.

We also find that it was completely irresponsible of Blech, as the Firm's custodian of records, to permit mass amounts of the Firm's mail to remain unopened. Additionally, the record established that Blech failed to respond to the NASD's telephone calls. This again shows a lack of concern and due diligence on Blech's part with respect to the NASD's requests.

Consequently, we affirm the DBCC's findings of violation of Section 1 and Section 5 and affirm the sanctions imposed.

Accordingly, Blech is censured; fined \$20,000; barred from associating with any member firm in any capacity; and assessed \$750 in appeal costs.⁴ The bar imposed herein is effective immediately upon the issuance of his decision.⁵

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

⁴ The recommended sanctions are consistent with the applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1993 ed.) at 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

⁵ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistently 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.