

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	
	:	
v.	:	Disciplinary Proceeding
	:	No. C8A990032
	:	
	:	Hearing Officer—AHP
	:	
	:	
Respondents.	:	
	:	
	:	

**ORDER VACATING DEFAULT AGAINST RESPONDENT _____, GRANTING
COMPLAINANT LEAVE TO RE-SERVE THE COMPLAINT, AND SETTING A
BRIEFING SCHEDULE ON THE ISSUE OF JURISDICTION**

By order dated December 22, 1999, the Hearing Officer, pursuant to Code of Procedure Rule 9215(f), held _____ in default for his failure to answer the Complaint. On February 7, 2000, a Hearing was held in Chicago before a Hearing Panel comprised of the Hearing Officer and two current members of the District Committee for District 8. _____ did not appear, and the Department of Enforcement (“Enforcement”) presented evidence in support of its request that a Default Decision be entered against him.¹ However, based upon a review of the record, the Hearing Officer finds that _____ was not properly served with the Complaint and Notice of Complaint. If he was not served properly, he cannot

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be held in default. Accordingly, the Hearing Officer vacates the order holding ____ in default and grants the Department of Enforcement leave to re-serve the Complaint pursuant to Code of Procedure Rule 9134.

Discussion

Although never registered with the National Association of Securities Dealers, Inc. (“NASD”), ____ served as a Director and Officer of _____, Inc. (“_____”), a former NASD member firm. (CX 34.) Enforcement alleges that ____ was associated with _____ from December 1995 to May 1997. (Compl. ¶ 2.) The record also shows that ____ acted as a “financial consultant” for _____ customers while he was associated with the firm. (CX 59, at 59.) Thus, Enforcement charged ____ with effecting securities transactions without being registered in violation of NASD Conduct Rule 2110 and NASD Membership and Registration Rule 1031. (Compl. ¶¶ 16-17.)

Enforcement filed the Complaint on April 7, 1999, and served ____ with the Complaint and Notice of Complaint by mailing them to him on April 5, 1999, by first-class mail and by certified mail, return receipt requested. (CX 77.) When ____ did not answer the Complaint within the time allowed under Code of Procedure Rule 9215(f), Enforcement served ____ with a Second Notice of Complaint by mailing it to him by first-class mail and by certified mail, return receipt requested. (CX 76.) ____ also did not respond to the Second Notice of Complaint.

¹ Enforcement’s exhibits are referenced as “CX ____.” At the conclusion of the hearing, Enforcement was permitted to move orally for entry of a default decision and to submit testimony in support thereof in lieu of filing a separate motion with supporting affidavits.

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Enforcement mailed the Complaint, Notice of Complaint, and Second Notice of Complaint to the following two addresses: (1) _____,² and (2) his address in the Central Registration Depository (“CRD”), _____. The evidence shows, however, that none of the mailings was delivered. The certified mailing for the Complaint was returned to Enforcement by the US Postal Service with the notation “No Such #,” and the first-class mailing was returned with the notation “Attempted—Not Known.” (CX 77.) Likewise, the certified mailing containing the Second Notice of Complaint was returned by the US Postal Service with the notation “No Such Number,” and the first-class mailing was returned with the notation “NSN” and “Insufficient Address.” (CX 76.) The Hearing Officer therefore finds that ____ did not receive actual notice of this proceeding. Accordingly, Enforcement must rely on the constructive service provisions of Code of Procedure Rule 9134(b)(1).

A. Constructive Service Provisions of Rule 9134

To obtain constructive service on a natural person under Rule 9134, Enforcement must mail the Complaint to one of the following addresses: (1) the individual’s residential address as reflected in CRD; (2) the individual’s business address as reflected in CRD; or (3) the individual’s business address where

² Although it is not clear from the record, it appears that this was ____ home address at the time he was associated with _____. But by the time Enforcement filed the Complaint it knew ____ no longer lived at this address. (Hearing Tr. 71.) Enforcement’s efforts to obtain a better address were not fruitful. (Id.)

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the person is physically located during the business day.³ Thus, where the respondent is unemployed, to obtain valid constructive service by mail, the Complaint must be mailed to the respondent's residential CRD address. Otherwise, service must be accomplished by one of the other methods specified in Rule 9134(a), such as actual personal service.

The NASD and the Securities and Exchange Commission ("SEC") have upheld the constructive service provisions of the NASD's procedural rules because they are consensual.⁴ By filing a Uniform Application For Securities Industry Registration Or Transfer (Form U-4), registered persons obligate themselves to "comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations" of the NASD. Form U-4 further provides that the NASD may serve registered individuals with notice of disciplinary proceedings by "regular, registered or certified mail" addressed to their "most recent business or home address as reflected in this Form U-4, or any amendment thereto."

³ Rule 9134(b)(1) provides in pertinent part as follows:

Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated. Papers may also be served at the business address of the entity with which the natural person is employed or affiliated, as reflected in the Central Registration Depository, or at a business address, such as a branch office, at which the natural person is employed, or at which the natural person is physically present during a normal business day.

⁴ See Lubeck v. SEC, No. 97-70537, 1998 U.S. App. LEXIS 18849, at *19 (9th Cir. Aug. 12, 1998). Cf. Gold v. SEC, 48 F.3d 987, 992-93 (7th Cir. 1995) (fairness standard met because registered person consented to similar constructive notice provision under the rules of the New York Stock Exchange).

B. Service of the Complaint

In this case, however, ____ never submitted a Form U-4. His CRD record—including the address used for service of the Complaint—was created by the NASD solely to record disciplinary information. (CX 2, at 1.) The CRD address was not supplied by ____,⁵ and he has not consented to receiving notices from the NASD at that address. Consequently, Enforcement cannot use the CRD address to effect service of the Complaint on _____. And, because Enforcement has failed thus far to perfect service by any other method, ____ is not in default under Rule 9215(f) for failure to file a timely Answer.

C. Conclusion

For the foregoing reasons, the Hearing Officer finds that Enforcement did not properly serve ____ with copies of the Complaint, Notice of Complaint, and Second Notice of Complaint in compliance with Code of Procedure Rule 9134. Accordingly, the Hearing Officer vacates the December 22, 1999, Order Holding Respondent _____ in Default and Precluding him from Participating in the Hearing. The Hearing Officer further orders that Enforcement shall have 21 days to proceed with alternative service of the Complaint on ____ pursuant to Rule 9134. If Enforcement does not initiate service of the Complaint within this period, this proceeding will be dismissed as to Respondent _____.

If Enforcement does serve ____, it is further ordered that Enforcement shall file a brief on the issue of jurisdiction within 21 days of the date ____ answers or, if he defaults, at the time Enforcement

⁵ At the hearing, Enforcement counsel represented that the address had been obtained by Enforcement from the United States Postal Inspector's office. Subsequently, counsel telephoned the Hearing Officer's assistant to indicate that the address in ____ CRD record had been supplied by the State of Illinois. The documents filed by Enforcement, including the excerpt of ____ CRD record (CX 2), do not reflect the origin of the information in his CRD record.

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files its motion for entry of a default decision. The brief should address the NASD's basis for jurisdiction over ____ in light of the fact that he never filed a Form U-4 subjecting himself to the NASD's jurisdiction.

SO ORDERED.

Andrew H. Perkins
Hearing Officer

Dated: Washington, DC
March 9, 2000