

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,
Complainant,

v.

DOUGLAS J. TOTH
(CRD No. 2332079),

Respondent.

Disciplinary Proceeding
No. E9A2004001901

Hearing Officer – AWH

HEARING PANEL DECISION

August 9, 2006

Formerly registered representative willfully caused the filing of a Form U-4 that contained a misrepresentation of material fact, in violation of NASD Conduct Rule 2110 and IM-1000-1. Respondent suspended from associating with any member firm in any capacity for one year.

Appearances:

Thomas K. Kilkenny, Esq., and David F. Newman, Esq., for
the Department of Enforcement

Robert G. Stevens, Esq., for Douglas J. Toth

DECISION

Introduction

On October 18, 2005, the Department of Enforcement issued a Complaint against Douglas J. Toth (“Toth” or “Respondent”), alleging that he willfully caused a member firm to file a Form U-4 to register him that failed to disclose that he was named as a defendant in an action seeking relief for, among other things, fraud in the offer and sale of securities. On December 22, 2005, Respondent filed an Answer denying any wrongdoing, and requested a hearing. A hearing was held on May 2, 2006, in Philadelphia, Pennsylvania, before a Hearing Panel composed of the Hearing Officer and

two current members of the District 9 Committee. The parties filed post-hearing briefs on June 7, 2006.

Findings of Fact¹

Respondent

Douglas J. Toth was first registered as a General Securities Representative in April 1993. In March 1999, he became registered as a General Securities Representative, a General Securities Principal, and an Options Principal, through Somerset Financial Group, Inc. (“Somerset Financial”), a member firm of which he was the Chief Executive Officer. He voluntarily terminated his registration with Somerset Financial in October 2002.² On October 30, 2002, Somerset Financial’s NASD membership lapsed due to a failure to pay required fees.³

Toth, Nicholas Thompson, and William Schloth were shareholders and officers of Somerset Financial Partners, Inc., of which Somerset Financial was a wholly owned subsidiary. On July 3, 2003, the Attorney General of New Jersey filed a civil action Complaint against Toth, Thompson, Schloth, and Somerset Financial, alleging fraud in connection with the offer, sale or purchase of securities in 2001.⁴ The Complaint was later dismissed.

Registration Through Bedminster Financial

Robert VanPelt is the president of Bedminster Financial Group, Ltd. (“Bedminster Financial”), an NASD member firm. He owns 76 percent of the firm. James Solakian, a

¹ References to the Department of Enforcement’s exhibits are designated as CX_, and the transcript of the hearing, as Tr._. Respondent did not offer any exhibits.

² Tr. 64; CX-24.

³ CX-1, p. 2. Toth is presently a business consultant and is not associated with any NASD member firm. Tr. 63.

⁴ CX-1. The Complaint also named three other wholly owned subsidiaries of Somerset Financial Partners, Inc.

passive investor in Bedminster Financial, owns the remaining 24 percent. In 1998, Solakian, who later invested approximately \$150,000 in Somerset Financial and was attempting to recoup his investment, introduced Toth to VanPelt. Solakian told VanPelt that Toth had the potential to be a rainmaker. Toth was looking into either forming his own securities firm or joining Bedminster Financial. However, nothing resulted from that initial meeting.⁵

In May 2003, Toth and VanPelt again met to discuss the possibility of Toth and some of his associates joining Bedminster Financial. Toth told VanPelt that he had suffered severe monetary losses when Somerset Financial ceased operations, but that he had some potential investment banking deals which might make him whole.⁶

On two other occasions, most likely in July 2003, Toth and Nicholas Thompson met with VanPelt to discuss a possible association.⁷ VanPelt asked Toth if he had any problems with NASD or any other regulatory bodies. Toth responded that he was named as a respondent in one arbitration claim and a civil lawsuit.⁸

VanPelt testified that, at those meetings, Toth did not inform him of the suit filed by the New Jersey Attorney General on July 3, 2003, against Toth, Thompson, and Somerset Financial. Both Toth and Thompson testified that Toth disclosed the suit by the

⁵ Tr. 13-14, 65-67.

⁶ Tr. 15.

⁷ Tr. 15, 36. VanPelt testified that the later meetings were “I believe, in Princeton or in that area. . . . [s]omewhere in central New Jersey north or Princeton, I believe, across from an airfield I remember.” Toth testified that the meetings were in his office in Flemington, New Jersey, and that they could not have occurred in his former office in Princeton because Somerset Financial had been evicted from that location. Toth argues that VanPelt’s testimony is not credible. The location of the meeting is not a material fact. Moreover, VanPelt’s recollection was not certain, and, even if the Hearing Panel were to conclude that VanPelt’s testimony that the meeting took place in an office across from an airfield was erroneous, it was not so significant that it would affect his credibility. Finally, VanPelt later testified that he met Toth and Thompson in Flemington. Tr. 40, 68.

⁸ VanPelt testified that Toth told him about two arbitration claims. However, one of the claims was actually a civil lawsuit by persons who loaned money to Somerset Financial. Tr. 16, 82.

New Jersey Attorney General. For the reasons detailed below, the Hearing Panel finds VanPelt's testimony to be credible.

In the second week of August 2003, Toth contacted VanPelt, telling him that he had a deal with GMAC and needed a broker-dealer to register him and to put the deal through. After agreeing to register Toth through Bedminster Financial, VanPelt asked Toth if there would be anything different on his Form U-4 than what was on the current Form U-4 that he had seen on record with NASD. Toth said that there were only the two items that he had disclosed to VanPelt in May. On August 13, 2003, Van Pelt then electronically filed a Form U-4 for Toth, registering him through Bedminster Financial. VanPelt electronically signed the Form U-4 with both his and Toth's name. No disclosure was made of the suit by the Attorney General of New Jersey because VanPelt was unaware of it. On the same day, VanPelt faxed a copy of the Form U-4 to Toth for his signature and review for accuracy.⁹

On August 14, 2003, VanPelt executed an agreement necessary to complete the GMAC deal. Toth received a gross commission of \$456,500 for the deal, although he testified that he only netted approximately \$6,000.¹⁰

⁹ Tr. 16-20; CX-6, CX-25. Toth testified that he does not think that he received the fax from VanPelt. He stated that the fax number "was an old fax number that in August of 2003 was not in service. It was a fax number for Somerset, an old number, I believe. I'm not positive, but I don't recognize the number. It never made it to me." Tr. 88, 90. On June 7, 2006, Enforcement filed an unopposed motion to supplement the hearing record, a motion that the Hearing Panel hereby grants. Attached to the motion is evidence that the fax number in question did not belong to Somerset Financial Group, which had been evicted from its offices in Princeton, New Jersey, late in 2002. Declaration of Donald K. Litteau; Tr. 96-97. The fax number in question belonged to the Flemington, New Jersey branch office of vFinance Investments, which was managed by Nicholas Thompson and was the location of meetings attended by VanPelt, Toth, and Thompson. *Id.* Thompson, who testified in this proceeding, never claimed any problem with the fax machine in his office.

¹⁰ Tr. 76; CX-20, CX-22.

Termination of Toth's Association with Bedminster Financial

On September 17, 2003, VanPelt received a written request from the State of New Jersey for complete explanations of all outstanding complaints against Toth in the State of New Jersey. On several occasions VanPelt unsuccessfully attempted to get Toth to return a signed copy of the Form U-4 he had sent on August 13, 2003. On Friday, October 3, 2003, VanPelt met Toth at Toth's office in Flemington, New Jersey. Among other documents, VanPelt brought another copy of the Form U-4 that VanPelt had filed with NASD on Toth's behalf. Toth said that he would like to review the documents over the weekend.¹¹

On Monday, October 6, 2003, Toth informed VanPelt that he was uncomfortable at Bedminster Financial and would resign from the firm because of litigation between himself and Solakian that arose as a result of Solakian's earlier investment in Somerset Financial. VanPelt told Toth that he would file a Form U-5 indicating that Toth's resignation was voluntary, provided Toth sign the Form U-4 and other documents that he had been reviewing over the weekend. VanPelt also informed Toth of the inquiry that VanPelt had received from the State of New Jersey. On October 7, 2003, VanPelt sent Toth by FedEx another copy of the documents he was to sign, along with a letter indicating that, if Toth failed to sign the documents, VanPelt would file a Form U-5 stating that his termination was for cause for "failure to sign documents, failure to send fingerprint cards, and failure to respond to the request from the State of New Jersey."¹²

Not having heard from Toth, on October 24, 2003, VanPelt filed a Form U-5 terminating Toth for cause, as he had told Toth he would do more than two weeks before.

¹¹ Tr. 21-23.

¹² Tr. 22-24; CX-14.

Finally, VanPelt received two emails from Toth on October 27, 2003. The first purported to respond to the inquiry from the State of New Jersey, but it mentioned only pending arbitrations, and did not disclose the action against him by the State of New Jersey. The second email purports to be a resignation from Bedminster Financial, but with an effective date of August 31, 2003, two months earlier than the email. VanPelt never received the signed Form U-4 or the other documents he had requested from Toth.¹³

Responses to Investigatory Inquiries

As a result of a routine examination of Bedminster Financial, on July 26, 2004, NASD staff sent Toth a request for information, including the following:

A description of all information you provided the firm about matters requiring disclosure on your Form U-4. Include a specific discussion of what you informed the firm about the Civil Complaint filed on July 3, 2003 in Essex County, NJ by the New Jersey Attorney General and the New Jersey Bureau of Securities against you, William Schloth, Nicholas Thompson, Somerset Financial Group, Inc., Somerset Investment Management, LLC, Somerset Venture Partners, LLC and Somerset Venture Partners I, LLC.¹⁴

On August 9, 2004, Toth replied to that request, and, in response to the specific request noted above, Toth wrote:

I don't recall all that was discussed, but we had many meetings about Somerset and the problems arising from my association with that firm. In addition, all arbitrations and civil cases were discussed and disclosed. Also, James Solakian first hand knowledge [sic] of Somerset and my litigations and was actively helping me to resolve them.¹⁵

NASD staff found that response to be incomplete. On August 16, 2004, the staff sent a second request for information to Toth, including the following summary of the item it considered to be incomplete:

¹³ Tr. 26; CX-11, CX-13.

¹⁴ CX-16.

¹⁵ CX-17.

You state that there were many meetings regarding Somerset and that all arbitrations and civil cases were disclosed. Please provide a more complete response. What specific information did you provide the firm and its principals regarding the civil suit filed by the New Jersey Bureau of Securities on July 3, 2004 [sic] against you, other former Somerset principals, and four Somerset entities which alleged fraud in connection with the offer, sale, or purchase of securities? Indicate which Bedminster principals you discussed this case with and when those discussions took place. Please confirm whether you provided the firm a copy of the suit and when this was done. If a copy was not submitted, explain how you provided sufficient details on the suit so that the matter could be reviewed and accurately reflected on your Form U-4 application.¹⁶

Toth responded to the August 16, 2004, request for further information by submitting another copy of his August 9, 2004, response to the first request for information. The original response had not been signed. This second copy was signed by Toth. The NASD staff received it on August 31, 2004.¹⁷

Credibility of VanPelt's Testimony

During the hearing, VanPelt consistently and credibly testified that Toth never disclosed, orally or in written form, the suit against him and others by the State of New Jersey. The documentary evidence demonstrates that, on August 13, 2003 he sent a copy of Toth's Form U-4 by fax to him for review for accuracy and signature. On October 3, 2003, VanPelt gave Toth another copy of the Form U-4 when he went to Toth's office in Flemington. The documentary evidence also demonstrates that, on October 7, 2003, VanPelt sent a letter and package of documents to Toth by FedEx, asking again for a signed copy of the Form U-4, and calling Toth's attention to an enclosed letter to VanPelt from the State of New Jersey requesting details for all charges against Toth.

On the other hand, Toth admits that he never reviewed or signed a copy of the Form U-4. He knew that disclosure of the suit by the State of New Jersey was required

¹⁶ CX-18.

¹⁷ Tr. 60-61; CX-19.

by the Form U-4, and he knew the consequences of omitting required disclosures.¹⁸ His claim that he never received a copy of it to review is not credible. He admitted that VanPelt sent him by FedEx a package of various documents, but testified that none of the documents was a Form U-4. The Hearing Panel finds his testimony to be equivocal:

Q. What documents did he send you to review or sign?

A. I believe after my termination he FedEx'd a package to me that had various documents. None of them were a U4. They were documents that related to other business activities and – I don't remember the numbers on the forms, but there were fingerprint cards, things like that, that he sent over for me to complete.

Q. Well, you were here this morning when he testified that after filing the Form U4 to register you in August, he sent you various documents including the U4, the outside business activity letter . . . the fingerprint card . . . request from the New Jersey Bureau of Securities for additional information . . . the 1099 agreement . . . Rule 3040 document . . . was he just making that up?

A. He did send me that. He sent it to me in a FedEx.

Q. After he filed the U4, not after your termination

A. Right. I did not get those copies. That's why he sent it to me in the FedEx. I did not get anything prior to that FedEx. Not that I remember getting or they were misplaced, I did not get them.

Q. Well, he had also testified that beyond his initial request at the time he filed the Form U4, he followed that up on several occasions and that you said you would sign them but you didn't. Was he wrong about that?

A. I don't remember him giving me any documents, except for that FedEx package, which he said I did not sign but I believe I did sign those and returned them to him when I received that FedEx package, and I don't know the date of that FedEx.¹⁹

There is no documentary evidence that Toth signed or returned any of the documents that were included in the FedEx package. Moreover, Toth's credibility was

¹⁸ Tr. 73-74, 80.

¹⁹ Tr. 84-85.

undermined by two other matters. First, Nicholas Thompson attempted to corroborate Toth's testimony that he disclosed the suit by the State of New Jersey to VanPelt. However, Thompson's own credibility was impeached when, although he claimed that he had disclosed the New Jersey suit on his U-4 that was filed by vFinance in July 2003, testimony and documentary evidence established that his U-4 did not disclose that suit until his U-4 was amended in January 2004, after vFinance first learned of the omission from NASD, not from Thompson.²⁰ Second, Toth's lack of a full and candid response to NASD's requests for information is consistent with his vague and evasive answers to questions put to him during the course of his testimony.

Discussion and Conclusions

NASD, state regulators, and broker-dealers utilize the Form U-4 to determine and monitor the fitness of securities professionals.²¹ Therefore, applicants for NASD registration must fully and accurately disclose all information required by that form, including any criminal history. An applicant's failure to do so violates Conduct Rule 2110 and IM-1000-1.²²

Enforcement alleges that Toth's failure to disclose to VanPelt the civil action by the State of New Jersey, and the consequent omission of it on the Form U-4, were willful. A finding of willfulness has serious collateral consequences. Section 15(b)(4)(A) of the Securities Exchange Act of 1934 states that a person who files an application for association with a member of a self-regulatory organization and who "willfully" fails to

²⁰ Tr. 100, 105-06; CX-26, CX-27.

²¹ See *Rosario R. Ruggiero*, Exchange Act Release No. 37,070, 1996 SEC LEXIS 990, at **8-9 (Apr. 5, 1996).

²² See *Dist. Bus. Conduct Comm. v. Prewitt*, No. C07970022, 1998 NASD Discip. LEXIS 37, at **5, 7 (NAC Aug. 17, 1998) (finding that an associated person violated Rule 2110 by providing false information on his Form U-4). See also *Thomas R. Alton*, Exchange Act Release No. 36,058, 1995 SEC LEXIS 1975, at *4 (Aug. 4, 1995) (stating that a material misrepresentation on a Form U-4 is a serious offense that is inconsistent with the just and equitable principles of trade which NASD members must uphold).

disclose “any material fact which is required to be stated” in that application is statutorily disqualified from participating in the securities industry. Similarly, Article III, Section 4 of NASD By-Laws states that a person is disqualified from association with a member firm if he or she has “willfully” omitted “any material fact” required by an application for registration.

Willfulness is defined as the intent to commit the act that constitutes the violation.²³ The respondent need not intend to violate a specific rule or law. Rather, the relevant inquiry is “whether the respondent knew or reasonably should have known under the particular facts and circumstances that his conduct was improper.”²⁴

Here, a preponderance of the credible evidence demonstrates that (1) Toth failed to disclose to VanPelt the existence of the of the action against him by the State of New Jersey; (2) he knew that failure to disclose that suit was material and was required to be disclosed on the Form U-4; and (3) he never reviewed or signed the Form U-4 that VanPelt filed on his behalf, either before or after that Form was filed with NASD. Accordingly, the Hearing Panel concludes that Toth willfully caused a member firm to file a Form U-4 to register him that failed to disclose that he was named as a defendant in an action seeking relief for, among other things, fraud in the offer and sale of securities. By so doing, Toth violated NASD Conduct Rule 2110 and IM-1000-1.

²³ See *Dep’t of Enforcement v. Nelson C. Onyejiaka*, No. C10990121, 2000 NASD Discip. LEXIS 22, at *11 (OHO, Oct. 20, 2000).

²⁴ *Christopher LaPorte*, Exchange Act Release No. 39,171, 1997 SEC LEXIS 2058, at *8 n.3 (Sept. 30, 1997).

Sanctions

For filing a false, misleading, or inaccurate Form U-4, NASD 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.²⁵ Enforcement does not seek a fine because Toth is the subject of a pending bankruptcy proceeding in which the court lifted the automatic stay provisions of the Bankruptcy Act, conditioned upon Enforcement's waiving all forms of financial sanction. However, Enforcement seeks the imposition of a one-year suspension in all capacities.

The Hearing Panel finds that the nondisclosure of the civil action alleging fraud in the offer and sale of securities was 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. Toth's willful failure to disclose that information is an aggravating circumstance that makes his conduct egregious. However, the Hearing Panel notes that the failure to disclose the state action did not result in a statutorily disqualified individual associating with a firm, nor did Toth's conduct result in any customer harm.²⁶ Accordingly, the Hearing Panel will suspend Toth in all capacities for one year, as requested by the Department of Enforcement.

²⁵ NASD SANCTION GUIDELINES, at 73-74 (2006 ed.).

²⁶ See, e.g., *Dep't of Enforcement v. Paul Zdzieblowski*, No. C8A030062, 2005 NASD Discip. LEXIS 3 (NAC, May 3, 2005).

Conclusion

Douglas J. Toth is suspended in all capacities for one year for willfully causing a member firm to file a Form U-4 that failed to disclose that he was named as a defendant in an action seeking relief for, among other things, fraud in the offer and sale of securities. If this decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on October 2, 2006, and end at the close of business on October 1, 2007.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Via Overnight and First Class Mail

Douglas J. Toth

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