BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kale E. Evans San Diego, CA, Respondent.	DECISION Complaint No. 2006005977901 Dated: October 3, 2011

Respondent recommended unsuitable trades, traded excessively, settled a customer's complaint away from his firm, and engaged in unethical conduct. Held, findings affirmed and sanction modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Joel T. Kornfeld, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Kale E. Evans ("Evans") appeals a FINRA Hearing Panel's decision.[1] The Hearing Panel found that Evans recommended unsuitable trades to a customer, traded an account he shared with the customer excessively, paid to settle the customer's complaint away from his firm, and engaged in unethical, business-related conduct when he, among other things, misappropriated funds. The Hearing Panel barred Evans from associating with any FINRA member in any capacity. After a thorough, independent review of the record, we affirm the Hearing Panel's findings and modify the sanction imposed.

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[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

I. Background

The Department of Enforcement ("Enforcement") filed a four-cause complaint initiating disciplinary proceedings on March 10, 2009. In broad terms, Enforcement alleged that Evans, while registered through TD Waterhouse Investor Services, Inc. ("TD Waterhouse"), induced "AV," a young woman who was living with Evans and his family, to open certain joint accounts with him to gain access to life-insurance payments that she received after her father, "JV," unexpectedly died. Enforcement asserted that Evans placed for AV some of the proceeds of the life-insurance money, which AV wanted to safeguard for her education and the educations of her siblings, in a joint brokerage account at his firm. Evans then recommended and executed unsuitable and quantitatively excessive securities trades that caused her to lose a large portion of the life-insurance money. Enforcement further alleged that Evans engaged in unethical conduct by paying AV to settle a complaint without the knowledge or consent of TD Waterhouse and, among other things, transferring significant sums of AV's money from a joint bank account opened to collect her father's life-insurance money to his personal brokerage accounts, bank accounts, and creditors.

With respect to specific infringements of FINRA rules, Enforcement alleged the following: cause one of the complaint alleged that Evans violated NASD Rules 2310 and 2110 when he recommended and effected speculative, reckless securities trades, without having a reasonable basis for believing that such trades suited AV; cause two alleged that Evans recommended and executed excessive and quantitatively unsuitable securities trades for AV, in violation of NASD Rules 2510(a), 2310, 2110, and Interpretive Material ("IM") 2310-2(b)(2); cause three alleged that Evans violated NASD Rule 2110 when he paid to settle AV's complaint away from his firm; and cause four alleged that Evans engaged in a course of conduct that failed to adhere to the high standards of commercial honor and just and equitable principles of trade required under NASD Rule 2110, including that he misappropriated AV's money for his personal benefit.

On April 24, 2009, Evans answered Enforcement's claims and admitted the allegations of misconduct drawn in the complaint. Evans also waived his right to a hearing. The Hearing Panel therefore considered this matter on the basis of the record, including Evans's answer and admissions, supplemented by written submissions and documentary evidence filed by the parties concerning the issue of sanctions. The Hearing Panel issued its decision on October 16, 2009, found that Evans engaged in the alleged misconduct, and imposed a bar.[2]

This appeal followed. Before the National Adjudicatory Council ("NAC"), Evans seeks a reduction of the sanction imposed by the Hearing Panel. Evans did not request oral argument before the subcommittee of the NAC empanelled to consider his appeal. The subcommittee and the NAC therefore judged this matter on the basis of the record, after the parties filed briefs.

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[2] With respect to cause two of the complaint, the Hearing Panel found it unnecessary to find that Evans violated NASD Rule 2510(a), which prohibits excessive trading by a broker vested with discretionary authority over an account. We decline to revisit this finding in our decision.

II. Facts

A. Evans Associates with TD Waterhouse

Evans entered the securities industry in 1992. On June 1, 1998, he registered through TD Waterhouse (now "TD Ameritrade, Inc.") as a general securities representative. He also registered as a general securities sales supervisor through the firm on May 7, 2001. Evans supervised eight to ten registered representatives in TD Waterhouse's institutional equity trading department, overseeing electronic-based broker services. He did not have any direct responsibility for or service customer accounts.

B. AV's Father Dies and She Inherits His Life Insurance

On March 18, 2004, JV died from injuries he suffered in a motorcycle accident in Escondido, California. A few days later, AV, who was then 17 years old, and her three siblings moved into the home of JV's long-time friend, Evans, and Evans's wife in San Diego, California.[3]

In early April 2004, Evans helped AV open a checking account at Washington Mutual Bank (the "WAMU account"). Evans persuaded AV to open the account as a joint account, naming him as a joint customer with AV, so that he could monitor her spending and pay expenses on her behalf.[4] According to Evans, the purpose of this account was to help "take care of [AV's] affairs." Although nominally a joint account holder, Evans understood that the money in the WAMU account was for the use and benefit of AV and her siblings.[5]

On August 1, 2004, AV turned 18 years old. She thereafter received, in two installments, a total of $514,000 as the sole beneficiary of life-insurance policies that JV purchased through his employer.[6] AV deposited all of the life-insurance proceeds into the WAMU account. She intended to use these funds to pay for her college education and the education of her siblings.

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[3] Prior to his death, JV, who was divorced, enjoyed sole custody of the four children. AV's siblings included twin 12-year-old sisters and an eight-year-old brother. Although Evans initiated guardianship proceedings in March or April 2004, he never possessed legal custody of the children.

[4] Evans did not contribute any of the money deposited into this account. As a joint account holder, however, he enjoyed a right of survivorship in the event of AV's death. AV declared that she did not understand the control and other possible interests created by the decision to open the account as a joint account.

[5] AV funded the WAMU account initially with modest charitable donations she and her siblings received after JV died.

[6] AV received $308,000 on September 29, 2004, and $206,000 on November 9, 2004.

C. Evans Opens a Joint TD Waterhouse Account with AV

After AV received the first installment of money from her father's life insurance, Evans suggested that she open an account with him at TD Waterhouse.[7] AV told Evans that she did not want to invest the money in the stock market but wanted to preserve the money, by placing it in an interest-bearing account, for its intended educational purposes. Evans told AV that she could earn more interest by placing the funds in a TD Waterhouse "savings account." After Evans told AV that he would place the money in a savings account and not risk it, she agreed to open an account at his firm.

Evans completed the paperwork necessary to open the account (the "TD Waterhouse account") at his firm, which AV signed on October 19, 2004. Although AV was a student, had no prior investment experience, and enjoyed no meaningful, liquid assets other than the proceeds from her father's life insurance policies, Evans opened the TD Waterhouse account as a margin account.[8] AV did not understand the use of margin, and Evans never discussed with her any intention to trade the TD Waterhouse account on margin.

Without first discussing the matter with AV, Evans also named himself as a joint owner of the TD Waterhouse account on the account-opening documents, indicating that AV and Evans were each joint tenants with a right of survivorship. AV did not understand the ramifications of the decision to open the TD Waterhouse account as a joint account.

Among other things, because the account-opening documents identified Evans as a co-owner of the TD Waterhouse account, the firm treated the account as an employee account, which insulated the account from the oversight normally afforded customer accounts under the firm's procedures.[9] Evans knew that he could self-approve any trades that he executed in the TD Waterhouse account up to his "approval level" as a supervisor, which Evans expressed was "relatively high" and estimated to be at 10,000 shares when trading equities.

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[7] In on-the-record testimony that Evans provided to FINRA staff and elsewhere, he claimed that it was AV's idea to open an account at TD Waterhouse, that he fully discussed the risks of such an account with AV, and that she was generally aware of and understood the actions that he claims he took on her behalf. We do not credit Evans's version of the events at issue in this matter. Instead, we give greater weight to sworn and other statements of the facts provided by AV, which other reliable evidence appearing in the record corroborate. *See Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992) (stating that the factors to consider when determining the reliability of hearsay statements include the possible bias of the declarant, whether the statements are signed and sworn rather than anonymous, and whether the hearsay is corroborated).

[8] In late 2004, AV began attending a community-based junior college.

[9] Evans testified that he opened the TD Waterhouse account without any approval by a firm manager and without anyone at the firm questioning his relationship to AV.

D. Evans Funds the TD Waterhouse Account with Life-Insurance Money and Trades It Away

On October 22, 2004, Evans transferred $250,000 of the life-insurance money from the WAMU account to the TD Waterhouse account. On November 30, 2004, Evans transferred an additional $150,000 of the insurance proceeds from the WAMU account to the TD Waterhouse account. AV did not object to these transfers based upon Evans's continued promise that he would place the money in a "savings account" with no risk of loss. In contrast with AV's expectations, however, Evans intended to "grow" the account for AV and increase AV's assets by trading securities.

Evans made all of the trading decisions for the TD Waterhouse account, and he made those decisions without consulting AV. From October 2004 until March 2005, Evans executed 80 trades in 18 different securities. He often bought and sold the same security on the same day and seldom held a position in a particular security for more than several days.[10]

For example, on December 7, 2004, Evans bought and sold 15,000 shares of Travelzoo, Inc. securities. On December 30, 2004, Evans day traded an additional 3,000 Travelzoo shares. And, he bought and sold another 2,000 shares of Travelzoo on December 31, 2004. In total, over a period of three weeks in December 2004, Evans bought and sold 27,000 Travelzoo shares, losing nearly $37,000. A clear pattern of day trading or short holding periods was further evident in trades that Evans executed for the TD Waterhouse account involving the securities for several other issuers, including: Taser International, Inc.; United Therapeutics Corp.; Autodesk, Inc.; Portalplayer, Inc.; Biogen Idec, Inc.; Overstock Com, Inc.; Veritas Software Corp.; Research In Motion, Ltd.; THQ, Inc.; and Qualcomm, Inc.

Evans also incorporated uncovered short sales of securities in his trading for the TD Waterhouse account.[11] On October 28, 2004, the day on which Evans commenced trading in the account, he sold 1,000 shares of Google, Inc. securities short, at an average price of nearly $185 per share. Evans himself described this trade as "speculative" and "aggressive." On October 31,

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[10] Evans had no trading experience, let alone day-trading experience, when he began trading the TD Waterhouse account.

[11] A "short sale" involves speculation that a particular stock will go down in price and a search for profit from that drop. *Levitin v. Painewebber, Inc.*, 159 F.3d 698, 700 (2d Cir. 1998). A short sale begins with the customer selling stock that he or she does not own. *Id.* Instead, the customer "borrows" the stock, typically from the broker-dealer, who obtains the stock that it loans to the customer either from its own reserves or by borrowing it from other broker-dealers or other customers. *Id.* Later, the customer "covers" the short by buying stock to restore it to the lending broker-dealer. *Id.* When the price of the stock declines, the customer can purchase the stock at a lower price than the one at which she sold the borrowed stock, creating a profit. *Id.* If the price of the stock increases, however, the customer must use funds in excess of the proceeds from the sale to cover. *Id.* "Because the price of a stock may increase very substantially, the potential losses associated with uncovered short sales are also very substantial." *Id.*

2004, this short position had a value of $190,705, which represented 78 percent of the TD Waterhouse account's total portfolio value.[12]

Heavy concentrations in certain individual stocks and the undue use of margin also exemplified Evans's trading. At the end of December 2004, the TD Waterhouse account held long positions in only two securities—Research In Motion and Taylor Devices, Inc. These two positions represented 268 percent of the account's total portfolio value and accounted for a margin-debit balance of $448,166.

On January 31, 2005, the TD Waterhouse account's holdings included 6,000 Research In Motion shares. This lone position accounted for 274 percent of the account's total portfolio value, with a margin-debit balance of $271,536.

At the end of February 2005, Evans again held only two long positions in the TD Waterhouse account—5,500 shares of Research In Motion and 2,000 shares of Comcast Corp. These securities represented 328 percent of the account's total portfolio value, and the account continued to maintain a large margin-debit balance of $290,159.

On March 14, 2005, Evans transferred all but a few of the remaining funds, $109,563, from the TD Waterhouse account to the WAMU account.[13] In less than six months, he lost more than 70 percent of the equity in the TD Waterhouse account on purchases and sales of nearly $12,000,000 worth of securities. This represented a net loss of $290,408, with Evans's Research In Motion trades alone generating a loss of $188,343.

During the five months that Evans actively traded the TD Waterhouse account, AV was unaware of his trading. While AV lived with Evans and his wife, AV's mail was delivered to a locked mailbox outside their home. AV did not receive the TD Waterhouse account statements delivered to this mailbox.[14]

E. Evans Appropriates Funds for His Personal Accounts and Creditors

In addition to the TD Waterhouse account and WAMU account that Evans ostensibly shared with AV, Evans controlled other personal brokerage and bank accounts at TD Waterhouse and Washington Mutual Bank. Between October 2004 and November 2005, Evans transferred $127,647 from the WAMU account to these other accounts and his creditors.

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12 Evans covered this short position on November 9, 2004, earning a nominal profit.

13 This transfer of funds left the TD Waterhouse account with a balance of $28.39.

14 AV recalled reviewing one account statement left on a counter at the home that she says appeared to reflect a negative balance. When AV asked Evans about this statement, he told her that it was an old statement, that he had "taken care of it," and that she should not worry.

On September 2, 2004, without AV's knowledge, Evans wrote a $12,000 check on the WAMU account payable to TD Waterhouse. Evans directed a portion of these funds, $10,000, to provide the initial funding for a TD Waterhouse brokerage account that Evans jointly owned with his wife.[15] Evans claimed that the $10,000 was for "expenses that [he] incurred along the way." He nevertheless traded the funds in an attempt to increase the size of his and his wife's joint account. In September 2004 alone, Evans bought securities worth more than $121,000 on margin, most of which he sold on the same day he purchased them.

On November 30, 2004, the day that he transferred $150,000 from the WAMU account to the TD Waterhouse account, Evans directed an additional $50,000 to a freshly opened trust account that he held with his wife at TD Waterhouse. Evans testified both that AV wanted him to have the $50,000 to repay him for "everything that [he had] done for her brothers and sisters and herself" and "to take care of her affairs in relation to her father's house as far as paying the mortgage and things of that nature."[16] After depositing the $50,000 into the trust account, Evans day traded securities in the account on margin, just as he did with the TD Waterhouse account and with similar results.

Between September 9, 2004, and March 15, 2005, Evans transferred, in nine separate transactions, $32,450 from the WAMU account to an account that Evans and his wife controlled at Washington Mutual Bank. Evans claimed that one such transaction, for $4,400 on November 17, 2004, resulted from an "arrangement" that he had with AV to pay the property taxes on his and his wife's home. Evans further asserted that another of the transactions, a transfer of $13,000 on December 13, 2004, covered payments for orthodontic treatments for AV and her siblings, although he also testified that he arranged the continuation of insurance through JV's employer to pay for such expenses.[17]

Finally, Evans used funds from the WAMU account to pay several of his creditors. Between August 30, 2004, and December 7, 2004, Evans paid personal credit cards and other charges totaling $35,197 with checks drawn on the WAMU account.

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[15] Evans directed that the other $2,000 be apportioned between two accounts that Evans claimed belong to the daughters of a friend who "did some work" at JV's home after his death.

[16] Evans claimed that JV left behind a house that was in serious disrepair and in need of improvements. Evans testified, however, that he and AV paid the mortgage and other expenses for the house from an account that AV had at Mission Federal Credit Union. Evans further acknowledged that, by the time of the $50,000 transfer, JV's house was rented and generating income to cover household expenses.

[17] Evans provided the Hearing Panel copies of certain statements and receipts which purported to show expenses that Evans incurred while AV and her siblings lived in his and his wife's home. For example, Evans included certain statements for what he claims were orthodontic and dental services totaling more than $18,000. Evans nevertheless provided no proof that he paid for these services.

F. AV Learns of Evans's Actions

During the summer of 2005, AV moved out of the Evans home, unaware of the losses caused by Evans's trading in the TD Waterhouse account.[18] In November 2005, AV learned through a friend that Evans and his family planned to move to Texas. AV called Evans and told him that she wanted to move the life-insurance money in the TD Waterhouse account back to the WAMU account. Evans told AV that he had already transferred a large portion of the money from the TD Waterhouse account to the WAMU account.

The next day, AV went to Washington Mutual Bank and reviewed the statements for the WAMU account. She discovered that Evans had only transferred roughly $109,000 from the TD Waterhouse account to the WAMU account, and that transfer occurred in March 2005. AV then called Evans to inquire about the rest of the $400,000 in life-insurance money that she believed was in the "savings account" at TD Waterhouse.

Evans told AV he would meet her at a park to discuss the accounts. AV agreed to meet him and asked that Evans bring receipts and papers concerning the status of the $400,000. At the meeting, Evans cried and apologized, but he provided no receipts or papers and claimed that he did not keep track of the money in the TD Waterhouse account because everything happened "so fast." Evans told AV that he owed her $60,000 and gave AV a personal check for $35,000 when she complained about the apparent losses in the account. AV told Evans she wanted the entire $400,000 returned. Evans told AV he would provide her with more money when she needed it.

After AV and Evans met, she telephoned TD Waterhouse and discussed the TD Waterhouse account with a customer service representative. The customer service representative told AV that the account had been "churned."

Later, AV went to the nearest TD Waterhouse branch and met with a representative of the firm. AV told the representative that she agreed to place her father's life-insurance money in the TD Waterhouse account because it would pay her a higher rate of interest than she was receiving at a bank. AV said that she was unaware of Evans's trading activity and did not understand what had happened to the money. She requested copies of the statements for the account, which the firm's representative reviewed with AV. The representative explained to AV that the account was a joint account and that Evans heavily traded the account over several months with significant losses. When AV asked what, if anything, could be done to recover the lost funds, the representative referred her to the firm's compliance department.

Shortly after AV visited the TD Waterhouse branch, the firm's compliance department questioned Evans about the activity in the TD Waterhouse account. Evans told compliance department personnel that he was trying to increase the account's value, started day trading the account, and suffered great losses after he invested heavily in Research In Motion securities and trading in that issue halted.

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[18] AV's siblings began living with their biological mother in October or November 2004.

TD Waterhouse thereafter permitted Evans to resign for violating "firm policy." The firm terminated his registrations on December 8, 2005.[19] AV was unaware that Evans transferred money from the WAMU account for his personal benefit until after she filed an arbitration claim against the firm and Evans in early 2006.[20]

III. Discussion

The Hearing Panel found that Evans engaged in conduct that violated FINRA rules, as alleged in the complaint. In his appeal to the NAC, Evans does not contest the Hearing Panel's findings of misconduct. We nevertheless briefly discuss and affirm them.

A. Evans Violated FINRA Suitability Standards

Under NASD Rule 2310, a registered representative may recommend the purchase or sale of a security only if he or she "ha[s] reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." NASD Rule 2310(a); *see also* NASD Rule 0115 (applying FINRA rules with equal measure to members and persons associated with a member). A recommendation must be consistent with the customer's best interests and tailored to the customer's financial profile and investment objectives. *Wendell D. Belden*, 56 S.E.C. 496, 503 (2003). A registered representative violates FINRA suitability standards when he or she, among other things, inadequately assesses whether a recommended trade is suitable for the specific customer to whom the representative directs the recommendation. *F.J. Kaufman & Co.*, 50 S.E.C. 164, 168-69 (1989). A violation of NASD Rule 2310 also constitutes a violation of NASD Rule 2110.[21] *F.J. Kaufman & Co.*, 50 S.E.C. at 168-69.

Evans did not possess a reasonable basis for believing that the trades he recommended for the TD Waterhouse account were suitable in light of AV's lack of investment experience, limited financial resources beyond the life-insurance money that she received when her father died, and her conservative objectives.[22] Evans's day trading, his short selling securities, his concentrating

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[19] Evans was associated with another FINRA member firm from March 2006 until January 2010. He is no longer working in the securities industry.

[20] On February 26, 2007, Evans and TD Waterhouse, without admitting liability, agreed to pay AV $400,000 to settle the arbitration claim. The settlement required Evans to pay $40,000 of this sum.

[21] NASD Rule 2110 requires members and persons associated with a member to "observe high standards of commercial honor and just and equitable principles of trade." *See also* NASD Rule 0115.

[22] A transaction not specifically authorized by a customer, but executed on the customer's behalf, is implicitly a recommendation within the meaning of FINRA rules. *Rafael Pinchas*, 54 S.E.C. 331, 341 n.22 (1999).

the account in certain individual stocks, and his undue reliance upon margin, all served to create a volatile, alchemic mix that unnecessarily exposed the TD Waterhouse account and AV's funds to significant losses. *See Dep't of Enforcement v. Kelly*, Complaint No. E9A2004048801, 2008 FINRA Discip. LEXIS 48, at *22-25 (FINRA NAC Dec. 16, 2008) (finding that day trading offered risks incompatible with a customer's limited investment experience and moderate risk tolerance); *Levitin*, 159 F.3d at 700 ("Short sales are extremely risky."); *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *26 (Feb. 10, 2004) ("We have repeatedly found that high concentration of investments in one or a limited number of securities is not suitable for investors seeking limited risk."); *Dep't of Enforcement v. Dunbar*, Complaint No. C07050050, 2008 FINRA Discip. LEXIS 18, at *27-28 (FINRA NAC May 20, 2008) ("Adding yet more risk to his recommendations, Dunbar engaged in a substantial amount of margin trading."). Such trading was demonstrably incompatible with AV's financial profile and investment objectives.[23] *See James B. Chase*, 56 S.E.C. 149, 156 (2003) (finding that a college student, with virtually no income or investing experience, and whose equity account constituted essentially all of her assets, "demanded an investment strategy that limited risk"). We therefore affirm the Hearing Panel's findings that Evans failed to adhere to FINRA suitability standards and violated NASD Rules 2310 and 2110.[24]

B. Evans Engaged in Excessive Trading

The frequency and amount of trading for a customer may also violate FINRA suitability standards. *Kelly*, 2008 FINRA Discip. LEXIS 48, at *21. "Excessive trading" occurs, and is unsuitable under NASD Rule 2310, when a registered representative, while exercising control over a customer's account, recommends a level of trading activity that is inconsistent with the customer's investment needs and objectives.[25] *Harry Gliksman*, 54 S.E.C. 471, 474-75 (1999), *aff'd*, 24 F. App'x 702 (9th Cir. 2001).

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[23] The suitability of trades recommended for a joint account is properly determined on the basis of the circumstances and objectives of the individual or individuals who contribute funds to the account and are intended to benefit from the account's trading. *See Timoleon Nicholau*, 51 S.E.C. 1215, 1219 (1994); *see also David A. Gingras*, 50 S.E.C. 1286, 1289 (1992) (rejecting a respondent's argument that trades recommended for a joint account were suitable in light of the financial situation of each family member named as a joint account holder).

[24] Evans acknowledged that he did not consider whether his admittedly speculative trading was appropriate for AV, and he gave no thought to the impact upon her and her siblings should his trading deplete the life-insurance funds placed in the TD Waterhouse account, funds which AV wanted to preserve for obvious and important purposes. Although Evans believed that he "was doing what [he] thought was best to try to . . . increase the value of the account" for AV, he nonetheless acknowledged that he "didn't have a game plan" to arrest any losses resulting from the trades he alone recommended. By all accounts, he embarked on an aggressive strategy, with seemingly little method.

[25] When considering issues of "quantitative suitability," the focus is not upon the quality of a particular recommendation to trade securities but rather on the number of transactions

[Footnote continued on next page]

Evans excessively traded the TD Waterhouse account.[26] Evans plainly invoked a strategy of "in-and-out trading."[27] Evans repeatedly purchased securities and then sold them after relatively short holding periods—often less than one day—to purchase other securities. As his trades involving Travelzoo show, Evans regularly caused multiple trades in the same or similar securities within weeks, or even days, of one another. Such in-and-out trading is a "hallmark" of excessive trading and is difficult to justify. *Id.* at *47.

A high "turnover rate" further demonstrated the excessive nature of Evans's trading.[28] From October 2004 through March 2005, Evans recommended and effected 80 transactions for the TD Waterhouse account, buying and selling securities worth nearly $12,000,000. This high rate of trading equates to an annualized turnover rate of 116.40 and establishes that the tempo of Evans's trading was extremely swift.[29]

Given AV's nascent financial security and her stated desire to safeguard and preserve her father's life-insurance money, we agree with the Hearing Panel that Evans's frequent trading offered risks incompatible with AV's investment needs and welfare. *See Clyde J. Bruff*, 53 S.E.C. 880, 884 (1998) (finding that a respondent's excessive trading was inconsistent with a customer's stated objective to conserve her principal while receiving marginal returns). We thus

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undertaken within a given timeframe in light of the customer's financial condition and objectives. *Dep't of Enforcement v. Medeck*, Complaint No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at *32 (FINRA NAC July 30, 2009).

[26] Actual or de facto control of a customer's account is necessary to establish that a registered representative engaged in excessive trading. *Richard G. Cody*, Exchange Act Rel. No. 64565, 2011 SEC LEXIS 1862, at *41 (May 27, 2011). Evans clearly controlled the volume and frequency of trading in the TD Waterhouse account.

[27] In-and-out trading is the sale of all or part of the securities in an account, reinvestment of the sale proceeds in other securities, followed by the sale of the newly acquired securities. *Cody*, 2011 SEC LEXIS 1862, at *47 n.39.

[28] Turnover rate reflects the number of times during a year that an account replaces securities with new securities. *J. Stephen Stout*, 54 S.E.C. 888, 910 n.50 (2000). Although there is no single test for determining excessive trading, an account's turnover rate, calculated by dividing the total cost of purchases in the account by the account's average monthly investment or equity, is an objective and reasonable measure of the number and frequency of trades in the account. *Jack H. Stein*, 56 S.E.C. 108, 118 & n.26 (2003).

[29] An annual turnover rate greater than six presumptively reflects excessive trading. *David Wong*, 55 S.E.C. 602, 611 n.18 (2002).

affirm its findings that Evans engaged in excessive and unsuitable trading in violation of NASD Rules 2310, 2110, and IM-2310-2(b)(2).[30]

C. Evans Settled a Complaint Away from His Firm

"Settling a customer complaint without the knowledge of the registered representative's employer is conduct that is inconsistent with just and equitable principles of trade under [NASD] Rule 2110." *Dep't of Enforcement v. Webster*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 (FINRA NAC Mar. 7, 2008). In November 2005, after learning that Evans transferred only a small portion of the life-insurance funds invested in the TD Waterhouse account to the WAMU account, AV met with Evans and demanded an accounting of her money. At the meeting, Evans gave AV a check for $35,000, which Evans does not dispute was an amount he paid to settle AV's complaint without TD Waterhouse's knowledge. We thus affirm the Hearing Panel's findings that Evans violated NASD Rule 2110 by paying to settle AV's complaint away from his firm.

D. Evans Failed to Observe High Standards of Commercial Honor

NASD Rule 2110 reaches beyond legal requirements.[31] *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NASD NAC June 2, 2000). The rule sets forth a standard that encompasses a wide variety of conduct that may operate as an injustice to customers or others in the securities markets. *Id.* Thus, in FINRA disciplinary proceedings, "[t]he analysis that is employed [under the rule] is a flexible evaluation of the surrounding circumstances with attention to the ethical nature of the conduct." *Id.* at *15. FINRA's authority to pursue discipline for violations of NASD Rule 2110 is sufficiently broad to encompass any unethical, business-related misconduct, regardless of whether it involves a security. *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002).

The Hearing Panel found, and Evans does not dispute, that he failed to abide by the fundamental ethical requirements imposed under NASD Rule 2110. Beginning shortly after JV's death, Evans abused the trust placed in him by a vulnerable, young girl, to whom he had no

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[30] IM-2310-2(b)(2) provides that excessive trading unrelated to the objectives and financial needs of a customer violates a registered representative's duty of fair dealing with customers.

[31] Congress recognized that the Securities Exchange Act of 1934 ("Exchange Act") "must be supplemented by regulation on an ethical plane in order 'to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry' and 'to cope with those methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market.'" *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009) (*quoting* VI Louis Loss & Joel Seligman, *Securities Regulation* 2796 (3d ed. 2002)), *cert. denied*, 2010 U.S. LEXIS 3029 (Apr. 5, 2010). NASD Rule 2110 underscores these broad ethical objectives and implements the requirements of Exchange Act Section 15A. *Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994) (table format).

legal ties. AV, unexpectedly tasked with the difficult burden of managing the money that she received from her father's life insurance, well intended to preserve the life-insurance money and use it for her and her sibling's education. Evans, however, induced AV to open an account with him at TD Waterhouse, falsely claiming that he would place the life-insurance money in a "savings account." Although he contributed no money to the TD Waterhouse account, Evans named himself as a joint account holder on the account's opening documents, thus shielding the account from the normal level of supervisory review that it would have received as a typical customer account. Unbridled from close examination, Evans engaged in speculative, leveraged, short-term trading in the TD Waterhouse account, losing the vast majority of the account's funds in a matter of months. Evans knew, or must have known, that such trading was grossly inconsistent with AV's financial needs and objectives.

Evans also contributed no money to the WAMU account, yet he allowed his name to appear as a joint account holder of this account as well. Evans was thus able to control, use, and dissipate its funds, which included proceeds from JV's life insurance, providing himself with substantial, self-serving benefits, and further damaging AV. Between August 2004 and November 2005, Evans transferred more than $127,000 from the WAMU account to personal brokerage accounts, bank accounts, and creditors.[32] Because AV and Evans ostensibly established the WAMU account to take care of AV's affairs, and Evans fully recognized that the funds in this account were intended solely for the use and benefit of AV and her siblings, his transfers of funds from the WAMU account for his apparent benefit were improper.[33] Evans's

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[32] Evans claimed that certain of these transfers were necessary to cover expenses that he incurred for AV and her siblings or to pay other vague expenses as they came due. Evans, however, provided no credible, rational explanation as to why it was necessary for him to transfer funds from the WAMU account to his personal accounts and creditors when he had the authority to pay AV's expenses from the WAMU account and that was the account's stated purpose. Indeed, even were we to accept the statements and receipts that Evans attached to his brief below as proof that he was due some amount of reimbursement from AV, which we do not, they total only $26,871, a small fraction of the $127,000 that Evans took from the WAMU account for personal purposes. By his actions, Evans unnecessarily and irreparably blurred the line between his interests and the interests of AV that he claims, unconvincingly, he was trying to serve.

[33] Enforcement alleged, and the Hearing Panel found, that Evans "misappropriated" AV's funds when he transferred money from the WAMU account to his personal accounts and creditors. As a joint account holder of the WAMU account, Evans possessed the authority to disperse funds from the WAMU account. The record, however, is unclear concerning the extent to which Evans's status as a joint holder of the WAMU account granted him any ownership interests in the funds placed in the account, and we decline to engage in an examination of California law to determine his ownership interests, if any. We find, and Evans does not dispute, that he improperly used WAMU account funds for purposes other than that for which AV intended. This finding, which focuses not upon the legality of Evans's actions but rather upon their ethical shortcomings, suffices to also find that his use of WAMU account funds for personal reasons constituted a misappropriation of funds and, when viewed in concert with his other

[Footnote continued on next page]

actions belie his stated intent to assist AV with the management of her affairs and to monitor and pay expenses on her behalf.

We have no doubt, under the facts presented in this case, that the foregoing course of conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade. Evans's actions were unethical, dishonest, and unfair to AV. We readily affirm the Hearing Panel's findings that Evans violated NASD Rule 2110.

IV. Sanctions

The Hearing Panel barred Evans from associating with any FINRA member in any capacity as a sanction for his misconduct. In his appeal to the NAC, Evans requests that we replace the bar with a period of probation during which Evans would be allowed to work and provide for his family. We decline this request and find that Evans has not offered any grounds upon which to claim mitigation of the imposed sanction. We therefore affirm the Hearing Panel's decision to bar him. We also order that Evans disgorge substantial ill-gotten gains that he retained from his misconduct.

In deciding upon the appropriate sanctions to impose for Evans's misconduct, we have considered the FINRA Sanction Guidelines ("Guidelines").[34] The Guidelines for unsuitable recommendations and excessive trading each recommend a fine of up to $75,000, a suspension in any or all capacities for a period of 10 business days to one year, and, in egregious cases, a longer suspension of up to two years or a bar.[35] For settling customer complaints away from a FINRA member firm, the Guidelines recommend a fine of $2,500 to $50,000, a suspension in any or all capacities for up to two years, and, in egregious cases, a bar.[36] Finally, although the Guidelines contain no specific recommended sanctions for unethical misconduct, the Guidelines involving the improper use of funds recommend a bar, unless mitigation exists, in which case the Guidelines suggest a fine of up to $50,000 and a suspension in any or all capacities for a period

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[cont'd]

actions, caused him to violate NASD Rule 2110. *See Black's Law Dictionary* 998 (6th ed. 1990) (defining misappropriation as the "unauthorized, *improper*, or unlawful use of funds or other property for [a] purpose other than that for which intended") (emphasis added); *see also Dist. Bus. Conduct Comm. v. Pinchas*, Complaint No. C10930017, 1998 NASD Discip. LEXIS 59, at *17-18 & n.13 (NASD NAC June 12, 1998) ("Misappropriation or improper use of customer funds has been found to exist in cases in which a representative used customer funds to pay personal expenses . . . ."), *rev'd in part on other grounds*, 54 S.E.C. 331, 341 n.22 (1999).

34 *FINRA Sanction Guidelines* (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

35 *Id.* at 79, 96.

36 *Id.* at 34.

of six months to two years.[37] These Guidelines are in addition to the principal considerations contained within the Guidelines that apply in every disciplinary case.[38]

The facts of this case are egregious. At the time of JV's death, AV was a teenager with no income, no certain source of support, and no meaningful resources to sustain her and her siblings aside from the expected proceeds of her father's life insurance. AV turned to Evans for guidance and seemingly entrusted him with the entirety of her finances. Evans instead took advantage of her vulnerability and trust, gained control of her funds, misled her, and engaged in speculative and needlessly short-term securities trading that exposed JV's life-insurance money, through the TD Waterhouse account, to significant losses. To compound the severity of his actions, Evans exploited his nominal control of the WAMU account for his personal benefit, supporting his own speculative trading and spending, without AV's knowledge or consent. When AV learned of Evans's malfeasance, he sought to placate her, buy her silence, and conceal his misconduct for a pittance of the losses he had created.

The sad circumstances in which AV found herself called out for prudent management of her unexpected needs by a qualified, trustworthy individual. Evans, it turns out, had neither the trading experience nor the conviction to provide the financial assurance that AV sought. AV's lack of sophistication, the recklessness of Evans's actions, the length, pattern, size, and character of the transactions at issue, the direct and substantial injury Evans caused to AV, the extent of his apparent monetary gain, and his attempts to conceal his activities from his firm, all serve to greatly aggravate Evans's misconduct and further support imposing a bar.[39]

Evans attempts to diminish his culpability by offering various justifications and excuses for his conduct. Although he expresses remorse and claimed that he "did the very best job he could in providing [AV and her siblings] with [a] solid foundation to move forward," Evans downplays the egregious nature of his actions by asserting that he merely used "poor judgment," made some "bad decisions," and that things simply "spiraled out of [his] control." The securities industry, however, "presents a great many opportunities for abuse and overreaching, and depends heavily upon the integrity of its participants." *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995). We conclude that Evans has evinced a complete lack of understanding of his duties as a registered person or of any real appreciation for the financial havoc that he wrought for AV. Accordingly, based upon all of the foregoing facts and circumstances, and the lack of any mitigating circumstances, we find that Evans's misconduct warrants that he be barred from

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[37] *Id.* at 36. The Guidelines for improper use require us to consider whether the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds, which, in this case, we find it did not. *Id.*

[38] *See id.* at 6-7.

[39] *Id.* (Principal Considerations in Determining Sanctions Nos. 8, 9, 10, 11, 13, 17, 18, and 19).

associating with any member in any capacity.[40] *See Mayer A. Amsel*, 52 S.E.C. 761, 768 (1998) (affirming a bar where applicant "exhibited a disturbing disregard for the standards that govern the securities industry").

In addition, we modify the sanction imposed by the Hearing Panel and order Evans to pay disgorgement. To remediate misconduct, the Guidelines instruct us to consider a respondent's ill-gotten gains when fashioning an appropriate sanction.[41] Evans misappropriated $127,647 belonging to AV, but he paid her $35,000 to settle her complaint and agreed to pay her an additional $40,000 to settle her arbitration claim. Evans thus retained substantial ill-gotten gains totaling $52,647.[42] We order the disgorgement of this sum, payable by Evans as a fine to FINRA.[43]

V. Conclusion

We affirm the Hearing Panel's findings that Evans violated FINRA rules by making unsuitable recommendations, excessively trading a customer's account, attempting to settle that customer's complaints away from his firm, and engaging in an unethical course of conduct with respect to his treatment of the customer. For his misconduct, we bar Evans from associating in any capacity with any FINRA member. We also order that he disgorge, as a fine to FINRA,

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[40] We do not accept as a mitigating factor Evans's lack of a disciplinary history. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("Lack of a disciplinary history is not mitigating."). We also do not accept the proposition that we should lessen his sanction because of financial hardships that Evans claims he has suffered because of his misconduct. Any economic hardships that Evans has endured since leaving the securities industry are not mitigating of the sanctions imposed herein. *See Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanction imposed upon [respondent] by the NASD excessive or oppressive").

[41] *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

[42] We may order disgorgement after a reasonable approximation of a respondent's unlawful profits. *Cf. S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). So long as the measure of disgorgement is reasonable, any risk of uncertainty falls upon the wrongdoer whose misconduct created the uncertainty and who bears the burden of proving that the measure is unreasonable. *Id.* We conclude that $127,647 represents a reasonable approximation of Evans's ill-gotten gains, and $52,647 represents a reasonable approximation of the amount therefore that he retained from his misconduct.

[43] Because TD Waterhouse and Evans joined to make AV whole, we require the disgorgement of the unlawful profits Evans retained by fining away this amount. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6); *see also Guidelines*, at 10 (Technical Matters) ("Adjudicators generally should impose a fine and require payment of restitution and disgorgement even if an individual is barred in all sales practice cases if . . . the respondent has retained substantial ill-gotten gains."). We do not order that Evans pay prejudgment interest on this amount.

$52,647. Finally, we affirm the order that Evans pay costs, consisting of an administrative fee, of $750.[44] The bar that we have imposed is effective upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and
Corporate Secretary

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[44] We also have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to FINRA Rule 8320, the registration of any person associated with a 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 revoked for non-payment.

Financial Industry Regulatory Authority

Marcia E. Asquith
Senior Vice President and
Corporate Secretary

Direct: (202) 728-8831
Fax: (202) 728-8300

October 3, 2011

VIA CERTIFIED MAIL:
RETURN RECEIPT REQUESTED/FIRST-CLASS MAIL

Kale E. Evans
9956 Fox Valley Way
San Diego, California 92127

Re: Complaint No. 2006005977901: Department of Enforcement v. Kale Evans

Dear Mr. Evans:

Enclosed is the decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The Board of Governors of the Financial Industry Regulatory Authority ("FINRA") did not call this matter for review, and the attached NAC decision is the final decision of FINRA.

In the enclosed decision, the NAC imposed the following sanctions: (1) a bar from associating in any capacity with any FINRA member, (2) disgorgement, as a fine payable to FINRA, of $52,647, and (3) costs, consisting of an administrative fee, of $750.

Please note that under Rule 8311 ("Effect of a Suspension, Revocation or Bar"), because the NAC has imposed a bar, effective immediately you are not permitted to associate further with any FINRA member firm in any capacity, including a clerical or ministerial capacity.

Pursuant to Article V, Section 2 of the FINRA By-Laws, if you are currently employed with a member of FINRA, you are required immediately to update your Form U4 to reflect this action.

You are also reminded that the failure to keep FINRA apprised of your most recent address may result in the entry of a default decision against you. Article V, Section 2 of the FINRA By-Laws requires all persons who apply for registration with FINRA to submit a Form U4 and to keep all information on the Form U4 current and accurate. Accordingly, you must keep your member firm informed of your current address.

In addition, FINRA may request information from, or file a formal disciplinary action against, persons who are no longer registered with a FINRA member for at least two years after their termination from association with a member. See Article V, Sections 3 and 4 of FINRA's By-Laws. Requests for information and disciplinary complaints issued by FINRA during this two-year period will be mailed to such persons at their last known address as reflected in FINRA's records. Such individuals are deemed to have received correspondence sent to the last known address, whether or not the individuals have actually received them. Thus, individuals who are no longer associated with a FINRA member firm and who have failed to update their addresses during the two years after they end their association are subject to the entry of default decisions against them. See Notice to Members 97-31. Letters notifying FINRA of such address changes should be sent to:

CRD
P.O. Box 9495
Gaithersburg, MD 20898-9401

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the SEC within 30 days of your receipt of this decision. A copy of this application must be sent to the FINRA Office of General Counsel, as must copies of all documents filed with the SEC. Any documents provided to the SEC via facsimile or overnight mail should also be provided to FINRA by similar means.

The address of the SEC is:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090 – Room 10915
Washington, D.C. 20549

The address of FINRA is:

Attn: Gary Dernelle, Esq.
Office of General Counsel
FINRA
1735 K Street, N.W.
Washington, D.C. 20006

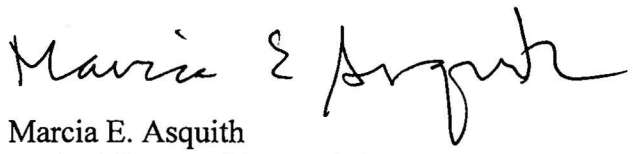
If you file an application for review with the SEC, the application must identify the FINRA case number and state the basis for your appeal. You must include an address where you may be served and a phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and FINRA. Attorneys must file a notice of appearance.

The filing with the SEC of an application for review shall stay the effectiveness of any sanction **except a bar or expulsion. Thus, the bar imposed by the NAC in the enclosed decision will not be stayed pending appeal to the SEC, unless the SEC orders a stay. Additionally, orders in the enclosed NAC decision to pay fines and costs will be stayed pending appeal.**

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is (202) 551-5400.

If you do not appeal this NAC decision to the SEC and the decision orders you to pay fines or costs, you may pay these amounts after the 30-day period for appeal to the SEC has passed. Any fines and costs assessed should be paid (via regular mail) to FINRA, P.O. Box 7777-W8820, Philadelphia, PA 19175-8820 or (via overnight delivery) to FINRA, W8820-c/o Mellon Bank, Room 3490, 701 Market Street, Philadelphia, PA 19106.

Very truly yours,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

Enclosure

cc: Leo F. Orenstein, Esq.
Joel T. Kornfeld, Esq.

FINRA
Financial Industry Regulatory Authority

Gary J. Dernelle
Associate General Counsel

Direct: (202) 728-8255
Fax: (202) 728-8264

October 3, 2011

VIA MESSENGER

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: Complaint No. 2006005977901: Department of Enforcement v. Kale Evans

Dear Ms. Murphy:

Enclosed please find the decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The FINRA Board of Governors did not call this matter for review, and the attached NAC decision constitutes the final disciplinary action of FINRA in the matter.

Very truly yours,

Gary J. Dernelle

Enclosure

cc: Paul Robichaux