

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Andrew J. Hardin

Greenville, South Carolina,

Respondent.

DECISION

Complaint No. E072004072501

Dated: July 27, 2007

Respondent exercised discretion in a customer account without having prior written authorization and parked certificates of deposit in the account and made false representations to his firm regarding the reasons for purchasing the certificates of deposit. Held, Hearing Panel's findings and sanctions are affirmed.

Appearances

For the Complainant: William Brice La Hue, Esq., Leo Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: Thomas L. Stephenson, Esq.

Decision

We called this decision for review pursuant to NASD Procedural Rule 9312(a)(1) to examine the sanctions imposed by the Hearing Panel. The Hearing Panel found that Andrew J. Hardin ("Hardin") violated Conduct Rules 2510(b) and 2110 by exercising discretion in the account of a customer without prior written authority, parking certificates of deposit ("CDs") in that account,¹ and by misrepresenting to his member firm the reasons for purchasing CDs in the

¹ While the phrase "parking" is sometimes used to refer to the act of temporarily transferring securities from one account to another to artificially inflate a member firm's net capital, as used throughout this decision parking refers to Hardin's temporary use of a customer account to hold CDs for other customers.

account. For the foregoing misconduct, the Hearing Panel censured Hardin, fined him \$10,000, and imposed \$967.25 in costs. After a review of the record in this matter, we affirm the Hearing Panel's findings and sanctions.

I. Background

Hardin entered the securities industry in May 2002. He was associated with member firm Edward Jones ("Edward Jones") as a general securities representative from July 2002 until September 2004. Since September 16, 2004, Hardin has been registered as a general securities representative with another member firm.

II. Facts

A. Hardin's Sale of CDs

Most of the facts are not disputed. At the time Hardin entered the securities industry he was 22 years old. Edward Jones placed Hardin in an office in Greenville, South Carolina, with no other licensed personnel. Hardin received at least six weeks of training at Edward Jones, three of which were at Edward Jones's home office in St. Louis, Missouri. Although there were no other licensed personnel at the Greenville office and Hardin's direct supervisor and branch manager were located in St. Louis, Hardin had access to a local mentor with Edward Jones, an Edward Jones regional leader, and the Investment Representative Development Department at Edward Jones.²

Approximately 15 of Hardin's 100 to 125 customers were retired and invested only in CDs. Although the commissions earned by Hardin on these transactions were minimal, the customers who purchased CDs often referred other customers to Hardin. To service these customers, Hardin would check Edward Jones's computerized inventory system to determine whether any CDs that had been sold back or turned in early to the firm were available.³ These CDs were popular, and typically sold within minutes of being added to Edward Jones's inventory. Unlike other firms, Edward Jones did not have a mechanism for holding a CD until a registered representative could contact a client and confirm that client's desire to purchase a CD. In addition, Edward Jones expressly prohibited representatives from placing customer orders prior to obtaining specific customer authorization.

² Hardin does not allege that his misconduct resulted from inadequate training or any wrongdoing by Edward Jones. To the contrary, Hardin acknowledged that "[t]he training at Edward Jones was great" and that his local mentor and regional leader "were always more than willing to answer questions and . . . support you in any way."

³ Hardin explained that the CDs in question were sold originally to customers, who then sold the CDs back or turned them in prior to maturity. The CDs were then reoffered as part of Edward Jones's inventory at rates that were typically above market.

CDC and his wife were life-long friends and customers of Hardin. Hardin explained to CDC that Edward Jones lacked a mechanism to hold a CD pending customer approval. To assist Hardin, CDC orally offered the use of his account to hold CDs once they became available while Hardin confirmed with his other customers whether they wished to purchase the CDs. Beginning in September 2003, Hardin purchased eight CDs over a span of approximately 10 months, initially placing each CD in CDC's account. The eight CDs placed in CDC's account ranged in size from \$10,000 to \$30,000, and totaled \$149,000. Hardin would only purchase and place a CD in CDC's account if he could not contact an intended customer in person, and he always had a specific customer and CD amount in mind when initially purchasing a CD and placing it in CDC's account. Hardin would leave a message for the intended customer alerting such customer to the availability of a particular CD, and purchase and place the CD in CDC's account. The customer would later return Hardin's call confirming his or her interest in the CD, and Hardin would rebill the purchase to the intended customer and cancel the purchase order in CDC's account.

In order to process the rebilled transactions, Edward Jones's wire system required that Hardin correct the original purchases and reassign them from CDC's account to the account of the intended customer. In connection with the eight transactions at issue, Hardin gave the following explanations for the corrections on Edward Jones's wire system: (1) "entered the order in the wrong account"; (2) "I was in a great hurry and was looking for CDs for both accounts and put in the wrong acct number"; (3) "In a hurry and put wrong acct number in"; (4) "I was in a hurry and put the wrong amount of CD needed in the wrong account"; (5) "Wrong acct number - sorry I was in a hurry"; (6) "Customer called back and could not come up with the money at this time, so I sold it to another client"; (7) "I was in a great hurry and put in the wrong acct number and hit transmit"; and (8) "Put order in under wrong account number." Hardin admitted that all but one of the representations were inaccurate because he intended to purchase and place the CDs in CDC's account.⁴ No customer lost money as a result of the foregoing transactions, although at one point CDC's account was placed on restriction for 90 days. Hardin earned approximately \$174 in total net commissions in connection with these transactions, and viewed the purchase of CDs for his customers as a beneficial service primarily aimed at generating customer goodwill.

B. Discovery of Hardin's Misconduct

In the summer of 2004, Edward Jones conducted a routine, surprise audit at Hardin's office. After the audit was complete and as the auditor was leaving Hardin's office, Hardin mentioned that he had purchased CDs for several customers by temporarily parking the CDs in CDC's account. Hardin told the auditor, "[t]his is what I've been doing. Is there a better way to

⁴ Hardin's statement that "Customer called back and could not come up with the money at this time, so I sold it to another client" was made in connection with a message Hardin left for a customer (other than CDC) who later informed Hardin that she did not wish to purchase the CD Hardin had placed in CDC's account. Instead, this CD was transferred to CDC's brother, another one of Hardin's customers.

do it?” The auditor told Hardin to immediately stop the practice. Soon thereafter a senior compliance officer at Edward Jones contacted Hardin regarding the transactions. A subsequent investigation by Edward Jones led to Hardin’s termination. Hardin was immediately hired by his current member firm.

NASD’s Department of Enforcement (“Enforcement”) subsequently investigated the matter and filed its complaint on March 9, 2006. In his answer to the complaint, Hardin admitted that: (1) certain of his customers wanted to purchase CDs; (2) CDs were routinely purchased by other customers as soon as they became available; (3) because he could not always first contact his customers, he would, with the verbal permission of CDC, purchase CDs in CDC’s account; (4) he then confirmed with the intended customer that they wanted to purchase the CD at issue; and (5) he then transferred the CDs from CDC’s account to the intended customer’s account and submitted to Edward Jones the explanations for each transfer set forth above.

On June 27, 2006, a Hearing Panel conducted a one-day hearing. In a decision dated September 8, 2006, the Hearing Panel found that Hardin exercised discretion in CDC’s account without CDC’s prior written authority, parked CDs in CDC’s account prior to reassigning them to other customers, and misrepresented to Edward Jones that the original purchases were mistakes. For this misconduct, the Hearing Panel censured Hardin, imposed a \$10,000 fine, and ordered him to pay costs totaling \$967.25.

On October 19, 2006, we called this matter for review to examine the sanctions imposed by the Hearing Panel. Enforcement argues (as it did before the Hearing Panel) that a \$10,000 fine and a 60-day suspension are appropriate sanctions for Hardin’s misconduct. Hardin argues that the sanctions imposed by the Hearing Panel should be affirmed.

III. Analysis of Violation

Although neither Hardin nor Enforcement contests the Hearing Panel’s findings of violations (and, in fact, Hardin acknowledges that he committed the violations), we will briefly review them before discussing sanctions.

The complaint charged Hardin with violating Conduct Rules 2510(b) and 2110 by exercising discretion in CDC’s account without his prior written authority, and violating Conduct Rule 2110 by parking CDs in CDC’s account until Hardin could resell them to other customers and misrepresenting to Edward Jones that the original purchases were mistakenly placed in CDC’s account. With respect to the charge that Hardin exercised discretion without prior written authorization, Conduct Rule 2510(b) requires that a registered representative obtain written authorization from his or her customer, and written acceptance by such representative’s member, prior to the representative’s exercise of any discretionary power in a customer’s account. Hardin acknowledged that he exercised discretion in CDC’s account while having only oral authority from CDC. Further, Edward Jones expressly prohibited representatives from maintaining

discretion over customer accounts under any circumstance. We therefore affirm the Hearing Panel's finding that Hardin violated Conduct Rules 2510(b) and 2110.⁵

We further affirm the Hearing Panel's findings that Hardin parked CDs in CDC's account and misrepresented to Edward Jones that the CDs were mistakenly purchased for CDC's account, in violation of Conduct Rule 2110. Conduct Rule 2110 provides that every "member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Conduct Rule 2110 allows NASD to regulate broker-dealers under ethical standards, as well as legal standards.⁶ Indeed, the SEC has consistently construed Conduct Rule 2110 broadly to apply to all business-related misconduct, including misrepresentations made to a member firm by a registered representative. *See James A. Goetz*, 53 S.E.C. 472, 477-78 (1998) (holding that representative's misrepresentations to his firm in connection with firm's charitable donation matching gifts program violated high standards of commercial honor and just and equitable principles of trade); *see also DWS Sec. Corp.*, 51 S.E.C. 814, 822 (1993) ("We have repeatedly held that a self-regulatory organization's disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."); *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *17-18 (NAC June 2, 2000) ("Thus, it is clear that misconduct that is not securities-related is prohibited by Conduct Rule 2110 if it occurs in the conduct of the respondent's business.").

In this case, there is no dispute that Hardin's parking of CDs in CDC's account and admitted misrepresentations to Edward Jones over a period of 10 months occurred in the conduct of Hardin's business and contravened high standards of commercial honor and just and equitable principles of trade. Hardin purchased CDs and parked them in CDC's account for other potential customers without the customers' express and prior approval, despite his knowledge that Edward Jones specifically prohibited representatives from placing an order for a customer prior to obtaining that customer's approval. Further, in the course of moving the CDs from CDC's account to the account of the ultimate purchaser, Hardin made false representations to Edward Jones as to the initial purchases. Thus, we affirm the Hearing Panel's findings that Hardin violated Conduct Rule 2110.

⁵ A violation of Conduct Rule 2510 is also a violation of Conduct Rule 2110. *Michael F. Flannigan*, Exchange Act Rel. No. 47142, 2003 SEC LEXIS 40, at *20 (Jan. 8, 2003). In addition, NASD Rule 0115(a) imposes upon associated persons all duties and obligations of members.

⁶ *See Jones v. SEC*, 115 F.3d 1173, 1182 (4th Cir. 1997) (holding that the Maloney Act of 1938, which authorized the creation of self-regulatory organizations, allowed NASD "to regulate itself by prohibiting and preventing fraud and unethical conduct by its members and by promoting in them professionalism and technical proficiency").

IV. Sanctions

For exercising discretion without prior written authorization in violation of Conduct Rule 2510(b), NASD's Sanction Guidelines (the "Guidelines") suggest a suspension of 10 to 30 business days in egregious cases, and a fine of \$2,500 to \$10,000.⁷ For negligent misconduct in violation of Conduct Rule 2110, the Guidelines suggest a suspension of up to 30 business days and a fine of \$2,500 to \$50,000. For intentional or reckless misconduct, the Guidelines suggest a suspension of 10 business days to two years and a bar in egregious cases, and a fine of \$10,000 to \$100,000.⁸

In connection with Hardin's misconduct, the Hearing Panel censured Hardin, imposed a \$10,000 fine, and ordered that he pay costs totaling \$967.25. In assessing sanctions, the Hearing Panel aggregated Hardin's misconduct for purposes of imposing an appropriate sanction, as it found that the violations all arose out of a common underlying cause. In addition, the Hearing Panel batched the eight transactions because it found that Hardin's misconduct did not result in injury to public investors and resulted from a single, systemic cause.⁹ Further, the Hearing Panel found the following factors to be mitigating: (1) Hardin self-reported the violations to an Edward Jones auditor; (2) he immediately complied with the auditor's directive to stop using CDC's account to hold CDs; (3) he was cooperative during investigations by Edward Jones and NASD and readily admitted what he had done; (4) he accepted responsibility for his misconduct and was forthright, candid and credible; (5) he utilized CDC's account with oral discretion; (6) Hardin's motivation for his actions was to benefit his customers and not to enrich himself; and (7) neither customers nor Edward Jones lost money because of Hardin's misconduct.

The Hearing Panel also determined that while Hardin's misconduct was serious, his violations were not egregious and that the imposition of a suspension under the circumstances would be punitive. In making this determination, the Hearing Panel noted that Edward Jones terminated Hardin's employment as a result of his misconduct. Further, the Hearing Panel took note of testimony from Hardin's current supervisor that a suspension would do irreparable harm to Hardin's career because he works in a small, tight-knit community "where any cloud of doubt would be extremely difficult to dissipate over time."

⁷ NASD Sanction Guidelines 90 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*]. In addition to the General Principles and Principal Considerations applicable to all sanction determinations, the Guidelines state that adjudicators should consider whether the customer's grant of discretion was express or implied and whether the firm's policies prohibit discretionary trading or whether the firm prohibited the respondent from exercising discretion in customer accounts. *Id.*

⁸ *Id.* at 93.

⁹ *Id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4).

As an initial matter, we agree with the Hearing Panel's imposition of a single sanction for Hardin's violations, as Hardin's misconduct stemmed from a continuous course of action (i.e., parking CDs in CDC's account, transferring such CDs, and misrepresenting to Edward Jones the reason for each transfer). *See Dep't of Enforcement v. J. Alexander Sec., Inc.*, Complaint No. CAF010021, 2004 NASD Discip. LEXIS 16, at *69 (NAC Aug. 16, 2004) (holding that it was appropriate to aggregate the misconduct alleged because it stemmed from a continuous course of action). Further, we agree with the Hearing Panel's batching of the eight transactions for purposes of assessing an appropriate sanction, as Hardin's conduct did not appear to result in injury to his customers and the violations all arose from a single course of conduct.¹⁰

In addition, we agree that certain factors cited by the Hearing Panel are mitigating. For example, Hardin immediately stopped the practice of parking and transferring CDs when the Edward Jones auditor told him to do so.¹¹ Further, we agree with the Hearing Panel's assessment that Hardin accepted responsibility for his misconduct and expressed contrition.¹² Moreover, we note that Hardin acted with CDC's oral permission and while misguided, Hardin's misconduct appeared to stem primarily from his desire to assist his customers.¹³

¹⁰ *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4).

¹¹ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 12).

¹² *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2). In addition, we note that while the auditor's visit caused Hardin to disclose what he had "been doing," the circumstances surrounding such disclosure are unclear. For example, it is unclear whether Hardin made his disclosure in reaction to something the auditor said or did during the audit, or why Hardin waited until the auditor had completed the audit and was leaving Hardin's office before revealing his misconduct. Further, it is unclear whether Hardin disclosed to the auditor that in addition to parking the CDs, he made misrepresentations regarding the subsequent transfers on Edward Jones's wire system. Thus, unlike the Hearing Panel, we do not consider Hardin to have self-reported his misconduct to Edward Jones for purposes of mitigation.

¹³ *Id.* at 90. Further, although Hardin's misconduct resulted in the potential for monetary gain through additional referrals by existing customers and commissions on the sale of CDs, Hardin's gross commissions on such sales totaled only \$174. *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17). We also note that while none of Hardin's customers appeared to be harmed by Hardin's misconduct, generally the absence of customer harm is not a mitigating factor. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). Likewise, Hardin's lack of a disciplinary record is not a mitigating factor. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006).

We further agree with the Hearing Panel that Hardin's misconduct, while serious, was not egregious. Hardin made false statements to Edward Jones to justify the transfer of CDs from CDC's account to the accounts of his other customers. Instead of disclosing to Edward Jones the true reason for each transfer—that this was the only way Hardin thought he could hold a popular product while he sought customer approval to purchase the product—he made misrepresentations that he erroneously placed the CDs in CDC's account. Such misrepresentations were deceptive.¹⁴ Further, Hardin purchased CDs without the prior express approval of his customers and used CDC's account in violation of Conduct Rule 2510 and Edward Jones's policies. Hardin admittedly did not carefully read his firm's compliance manual prior to his misconduct, and although Hardin was in an office by himself, he could have asked one of his mentors how to properly address these issues. Instead, he chose a course of conduct that required him to violate several NASD rules and only stopped such misconduct after the auditor's visit. Hardin's misconduct, however, was not egregious, particularly in light of the mitigating factors discussed herein. Consequently, we agree with the Hearing Panel that a censure, a \$10,000 fine, and the imposition of costs are appropriate sanctions under the circumstances. Such sanctions will serve to deter future violations by Hardin and to convey the seriousness of such violations to Hardin and other registered representatives.

Finally, although we are not suspending Hardin for his misconduct, the Hearing Panel's emphasis on the harm that would ensue if it suspended Hardin was misplaced, as the geographic location of a registered representative should not impact an adjudicator's determination to impose a particular sanction. *See Dist. Bus. Conduct Comm. v. Holland*, Complaint No. C3B930015, 1995 NASD Discip. LEXIS 247, at *30-33 (NBCC Feb. 17, 1995) (affirming sanctions and rejecting, among other things, respondent's argument that a five-business-day suspension should be decreased because of the harmful effects that publicity of the matter would have in respondent's small town), *aff'd*, 52 S.E.C. 562 (1995). Further, the fact that Edward Jones terminated Hardin would not make a suspension punitive, particularly in light of the fact that Hardin's current firm hired him immediately after his termination. Thus, while we are not suspending Hardin because the sanctions imposed are sufficiently remedial, we did not consider these factors in assessing sanctions.

V. Conclusion

We find that Hardin exercised discretion in a customer account without prior written authorization, in violation of Conduct Rules 2510(b) and 2110, and parked CDs in that account and misrepresented to his member firm the reasons for purchasing such CDs, in violation of Conduct Rule 2110.

¹⁴ *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10 and 13).

Accordingly, we censure Hardin, impose a \$10,000 fine, and impose \$967.25 in costs.¹⁵

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

¹⁵ We have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to NASD Procedural Rule 8320, any member that 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 registered 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.