

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LESLIE GEORGE MARKUS, JR.
(CRD No. 2688964),

Respondent.

Disciplinary Proceeding
No. 2015047069701

Hearing Officer–CC

HEARING PANEL DECISION

Date: July 16, 2018

Respondent entered a series of 11 unauthorized mutual fund purchases in the account of one customer, misled his firm about the trades, and included inaccurate information in response to a FINRA request for information. For executing 11 unauthorized mutual fund purchases, Respondent is fined \$5,000 and suspended for three months. For misleading a member firm, Respondent is fined an additional \$5,000 and suspended for two years. For including inaccurate information in response to a FINRA request for information, Respondent is suspended for two years. The suspensions will run concurrently. Thus, in total, Respondent is fined \$10,000 and suspended from associating with any FINRA member firm in any capacity for two years.

Appearances

For the Complainant: Matthew M. Ryan, Esq., and Ian J. McLoughlin, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Richard A. Levan, Esq., and Jon-Jorge Aras, Esq., Levan Legal.

DECISION

I. Introduction

In this case, Respondent Leslie George Markus, Jr. (“Markus”) purchased mutual funds for a customer account without prior authorization, misrepresented information about the trades to the member firm with which he was associated, and included inaccurate information in response to a FINRA Rule 8210 request for information. Respondent admits most of the misconduct alleged, but requests that we consider extenuating circumstances to be mitigating as

to sanctions. FINRA's Department of Enforcement ("Enforcement") argues that Respondent's misconduct is egregious and seeks to bar him from associating with any member firm.

II. Procedural History

Enforcement filed a three-cause Complaint on November 17, 2017. Cause one alleges that Markus executed 11 unauthorized mutual fund purchases in the account of customer JW on August 4, 2015, in violation of FINRA Rule 2010. Cause two alleges that, also on August 4, 2015, Markus inaccurately identified the mutual fund purchases as authorized in the client note software system known as "SmartPad," utilized by his employer, member firm Ameriprise Financial Services, Inc. ("Ameriprise"). Cause two alleges that, when Markus reversed the unauthorized trades on August 5, 2015, he entered a second false statement in the firm's trade correction forms. Cause two alleges that, in doing so, Markus violated FINRA Rule 2010. Cause three alleges that, in response to FINRA's request for information, while Markus admitted that he did not obtain prior authorization for the mutual fund purchases, he also stated that he had time and price discretion (not reduced to writing) in the client's account, which was not true. Cause three alleges that Markus violated FINRA Rules 8210 and 2010.

Markus admits in his Answer that he entered unauthorized mutual fund purchases in JW's account. He seeks mitigation with respect to sanctions, however, because, he understood that his customer wanted and needed to remain fully invested in mutual funds and also wanted to avoid large cash positions in his account. Markus was unaware that JW had liquidated all of his securities positions without involving Markus. When Markus saw that JW's account was predominantly cash, he panicked and quickly re-invested JW's cash in mutual funds similar to those he previously held, without first obtaining authorization.

Markus admits that he entered in SmartPad a false notation indicating that JW authorized the trades. Markus also admits that his Rule 8210 response falsely stated that he had time and price discretion, but he contends that he did not fully understand the meaning of time and price discretion and he included it in his Rule 8210 response on the advice of his former counsel. Markus argues that his misrepresentation in the Rule 8210 response was *de minimis* compared with his honest admission that the mutual fund purchases were unauthorized.

The parties participated in a two-day hearing in April 2018.

III. Facts

A. Respondent's Background

Markus is a 58-year-old man who has worked in the securities industry for 22 years.¹ Before entering the industry, he worked as a finance manager for automobile sales and began

¹ April 10-11, 2018 Hearing Transcripts ("Tr.") 338-39.

selling insurance products in the early 1990s.² He became registered as an investment company and variable contracts products representative in 1996.³ He later also registered as a corporate securities representative and a general securities representative.⁴ Markus joined Ameriprise in May 2012.⁵ After the occurrences that are the subject matter of this action, Ameriprise terminated Markus in September 2015.⁶ Markus thereafter joined another member firm, where he remains associated under heightened supervision.⁷

B. JW's Account

Markus met his customer JW when JW attended a workshop on estate planning.⁸ JW is a 68-year-old computer professional who hopes to retire in the near future.⁹ In 2005, JW's employer underwent restructuring, and he lost his job.¹⁰ At that time, he moved his money from a company-sponsored 401K plan to an individual retirement account ("IRA") at another broker-dealer.¹¹ He lost a significant amount of money in 2008, and moved his account to Ameriprise (and Markus) in December 2012.¹² JW's IRA application for Ameriprise stated JW's investment timeframe was "11+" years. The IRA application reported that JW required liquidity, had a "Conservative/Moderate" risk tolerance, and his objectives were capital preservation primarily, tax considerations secondarily, and lastly growth with income.¹³ JW opened the account with an initial investment of \$100,000 and requested automatic reinvestment of his dividends.¹⁴ He scheduled regular monthly withdrawals of five to eight percent from the account to cover living expenses.¹⁵ During certain months, JW withdrew additional funds to cover credit card debt and additional living expenses.¹⁶ Markus testified that JW's needs and objectives were somewhat

² Complainant's Exhibit ("CX-") 15, at 8-9.

³ Tr. 339; CX-15, at 6.

⁴ CX-15, at 5.

⁵ CX-15, at 4-7.

⁶ CX-15, at 4-5.

⁷ Tr. 339-40.

⁸ Tr. 342.

⁹ Tr. 32.

¹⁰ Tr. 32.

¹¹ Tr. 32-33.

¹² Joint Exhibit ("JX-") 1; Tr. 33-34, 41.

¹³ JX-1, at 4; Tr. 343.

¹⁴ Tr. 275, 358.

¹⁵ Tr. 40, 343; JX-1, at 4.

¹⁶ Tr. 40, 65, 343.

inconsistent because, although JW was conservative with a low risk tolerance, he required that his account generate significant income to fund his regular cash withdrawals.¹⁷

JW's IRA account at Ameriprise was invested primarily in a "fund of funds" mutual fund, meaning the fund invested in a mix of other mutual funds.¹⁸ JW did not invest in equities in his Ameriprise account.¹⁹ Markus described the mutual fund as moderately conservative, tilted towards income.²⁰ JW had initiated only two securities transactions through Markus during their 2 ½-year relationship, and Markus and JW talked before each of those trades.²¹ Markus did not have discretion in JW's account.²² JW testified that he expected Markus to be his "advisor" and make recommendations, but that all trading decisions would be his own. JW expected Markus to discuss every trade with him before execution.²³

C. The Unauthorized Trades

Markus's SmartPad notes indicate that Markus and JW met in January 2015 to discuss JW's investments.²⁴ JW generally indicated to Markus that he was considering selling his mutual fund holdings and investing in an indexed annuity.²⁵ In early July 2015, JW became increasingly concerned about fluctuations in the stock market. He had recently learned from another financial advisor about indexed annuities as an option to avoid market fluctuations.²⁶ He determined that he could purchase an annuity away from Ameriprise that would guarantee a five percent return.²⁷ On July 8, 2015, JW emailed Markus, expressed his concern over fluctuations in the market, and asked about "indexed fixed annuity type products that could start paying immediately that would still give an upside if the market does well, but no loss if not."²⁸ Markus responded that indexed annuities were not a good value at the time: fixed annuities paid only two to three percent, and fixed annuities locked the investor in for seven to 15 years.²⁹ Markus recommended JW

¹⁷ Tr. 343-44.

¹⁸ Tr. 344-45.

¹⁹ Tr. 345.

²⁰ Tr. 345.

²¹ Tr. 346.

²² Tr. 38-39.

²³ Tr. 37-38.

²⁴ JX-5, at 5.

²⁵ Tr. 67-68, 286-87.

²⁶ Tr. 40.

²⁷ Tr. 43-44.

²⁸ Tr. 42; CX-14, at 2.

²⁹ CX-14, at 2.

determine his annual withdrawal needs and decide how long he could tie up his money before he made any investment changes.³⁰

JW liquidated his mutual fund holdings at Ameriprise without involving Markus.³¹ On July 29, 2015, JW contacted the Ameriprise customer support center to order the liquidation of his mutual fund holdings.³² He thereafter monitored his account on line to determine when cash from the liquidation would become available for transfer to purchase an annuity. On August 5, 2015, JW learned that his available cash had been used to purchase 11 mutual funds.³³ He immediately contacted Ameriprise's customer support center because he had not authorized mutual fund purchases in August 2015.³⁴

Markus testified that, although JW emailed him in July to discuss annuity options, JW never said in those emails that he was considering moving his money elsewhere or that he had located a particular annuity he wanted to purchase.³⁵ Markus did not expect JW to liquidate his holdings without Markus's involvement.

So on August 4, 2015, Markus was shocked to discover JW's account comprised almost exclusively of cash.³⁶ The cash position of approximately \$135,000 alarmed him. He did not know how it had occurred, and it ran counter to JW's stated goal of generating income by keeping his money fully invested.³⁷ Markus was concerned that the firm may have made a mistake that caused JW's liquidation and that JW would be upset.³⁸

³⁰ CX-14, at 2. JW testified that besides exchanging email correspondence, he and Markus also spoke in July 2015. Tr. 48, 73. The timeline that JW prepared for Enforcement's investigation stated that JW recalled visiting Markus in his office in July, but JW could not find an entry in his calendar to confirm this. CX-14, at 4. Markus had no recollection of meeting or talking to JW in July and found no indication of such a meeting in his day planner. Tr. 347-49. Markus also stated that he generally documented his conversations and meetings with JW in SmartPad, but SmartPad did not include any such entry in July 2015, either. Tr. 349; JX-5. On this issue, we find Markus's recollection to be more reliable. Documentary evidence supports Markus's recollection that his only interaction with JW in July 2015 was an email exchange, and JW admitted that he could not find any documentary evidence supporting his recollection.

³¹ Tr. 44.

³² Tr. 44-45; JX-3; JX-4, at 5.

³³ Tr. 47-48.

³⁴ Tr. 47-52.

³⁵ Tr. 351-54; CX-14.

³⁶ Tr. 357. During JW's more than two years as a client at Ameriprise, JW had never executed transactions by himself, without consulting Markus. Tr. 66, 359. Markus testified that he talked with JW about every change in his account and about staying fully invested. It was unusual for JW to act without talking with Markus. Tr. 346, 358-60.

³⁷ Tr. 288-92, 358-59. Markus testified that finding a large cash position in JW's account also confused him because he had not received anything from the trading desk alerting him to JW's sales. Tr. 359, 365.

³⁸ Tr. 361.

Markus testified that he immediately attempted to reach JW and left two or three voice mail messages asking JW to return his calls.³⁹ He did not email JW.⁴⁰ According to Markus, on August 4, after not hearing back from JW, he left JW another message stating that he intended to purchase mutual funds in JW's account that day and that JW could call and reverse the trades.⁴¹ Prior to liquidating his account, JW had held C shares. On August 4, 2015, Markus purchased C shares of 11 different mutual funds in JW's account without JW's authorization.⁴² Markus testified that because the fund in which JW previously had been invested was no longer highly rated, he instead purchased C shares in similar funds with identical fee structures to mimic the performance and costs associated with JW's prior investment.⁴³ He chose these investments to ensure that JW's risk profile did not change.⁴⁴ Markus admitted he entered the transactions without JW's authorization, and that he did not have discretionary authority in JW's account. He also acknowledged that his conduct was wrong.⁴⁵ Markus testified that his motive was to keep JW happy, but admitted he acted improperly.⁴⁶

JW denies that he received any calls or voice mail messages from Markus on or around August 4, 2015.⁴⁷ JW testified that he checked his account on August 5, 2015, to determine if it held cash ready for transfer, and instead learned that it held C shares in mutual funds.⁴⁸ JW immediately contacted the customer support center to complain about unauthorized purchases in his account.⁴⁹ Later on August 5, JW talked with Markus and told him to reverse the trades immediately.⁵⁰ JW testified that Markus agreed to reverse the trades, but told JW that it was his job to keep JW's cash invested so that it generated income. JW did not believe that response and

³⁹ Tr. 360-62.

⁴⁰ Tr. 362.

⁴¹ Tr. 362-64.

⁴² Tr. 363-66.

⁴³ Tr. 365-66, 378.

⁴⁴ Tr. 364.

⁴⁵ Tr. 260, 276, 288, 338, 363, 384-85, 407-08, 414.

⁴⁶ Tr. 367-68.

⁴⁷ Tr. 48-50, 73-74. On the issue of whether or not Markus left voice mail messages for JW on and around August 4, 2015, we find JW more credible. Markus offered no telephone records to substantiate his claim that he attempted to reach JW and left voice mail messages. JW's testimony that he was unaware that Markus intended to reinvest the cash in his account is consistent with JW's conduct when he learned of the sales. On August 5, 2015, he immediately contacted Ameriprise's customer service department and Markus to question the purchases. This suggests to us that JW was watching the account closely and, had he received a voice mail indicating that Markus intended to reinvest all of the cash in the account, he would have acted swiftly to stop Markus, as he did on August 5, 2015, when he first discovered the purchases. *See* CX-14, at 4.

⁴⁸ Tr. 47-48; JX-6.

⁴⁹ Tr. 51-52.

⁵⁰ Tr. 53.

concluded that Markus was just trying to tie up his money so he would not leave Ameriprise.⁵¹ JW emailed Markus later on August 5, 2015, to confirm that Markus would reverse the trades at no cost to JW.⁵²

Markus was not in the office on August 5, 2015, when JW's call came in. He learned of JW's call in a text from an office assistant.⁵³ He returned JW's call and realized that JW was very displeased. Markus immediately entered trade corrections to reverse the purchases.⁵⁴ Markus stated that JW asked why Markus entered the unauthorized trades, and Markus responded, "because you had always told me that we needed to reinvest dividends, don't let cash build up, keep income generating in your account for your withdrawals."⁵⁵ Markus testified that his intent was never to profit from unauthorized trading in JW's account, and he denied that he was trying to prevent JW from leaving Ameriprise.⁵⁶ He testified that he was sincerely trying to further JW's objective of generating income.⁵⁷

D. Markus's Communications with Ameriprise

Before Markus entered unauthorized mutual fund purchases in JW's account on August 4, 2015, he wrote in SmartPad, "Spoke to [JW] about making purchases of mutual funds with cash in his account. He understood and agreed with purchases."⁵⁸ Markus admitted the note was not truthful, and it was wrong to enter a false note.⁵⁹ He testified that Ameriprise did not require registered representatives to enter notes about client contacts in SmartPad. Entering notes was voluntary, and he did it in this instance by force of habit.⁶⁰

After Markus spoke with JW on August 5, he completed trade correction forms to reverse the 11 mutual fund purchases he had placed on August 4.⁶¹ From a drop-down menu, Markus chose "Advisor Error" as the error source.⁶² In the section calling for the cause of the error,

⁵¹ Tr. 53-54.

⁵² JX-2.

⁵³ Tr. 271.

⁵⁴ Tr. 272-73, 368-72, 375.

⁵⁵ Tr. 374.

⁵⁶ Tr. 376.

⁵⁷ Tr. 377.

⁵⁸ Tr. 268-70; JX-5, at 5.

⁵⁹ Tr. 269, 413.

⁶⁰ Tr. 413.

⁶¹ Tr. 133-34, 160, 272-73; JX-7.

⁶² Tr. 273, 299; JX-7.

Markus wrote, "Trade was placed, but should not have been."⁶³ Markus also wrote in the notes section:

Client was deciding between buying an annuity with another advisor and keeping his account here. He moved monies to cash himself. I offered to reinvest. I understood this to be mandate but he has decided with other advisor and was told he could undo trades by home office.⁶⁴

Markus admitted that he knew when he wrote this that he did not have an explicit mandate from JW to enter the 11 mutual fund purchases at issue.⁶⁵ He stated that, based on his previous discussions with JW and his knowledge that JW's mutual fund investments were all set to reinvest, he wrongly concluded that the best way to proceed was to reinvest JW's cash in mutual funds without JW's authorization.⁶⁶

Markus's branch manager, Thomas Bradshaw ("Bradshaw"), testified that he had just returned to the office on August 7, 2015, from an off-site conference when his assistant reported JW's complaint to him.⁶⁷ On Monday, August 10, Bradshaw contacted JW, and JW reported that Markus's August 4 purchases of 11 mutual funds in his account were unauthorized.⁶⁸ Bradshaw thereafter escalated JW's complaint to more senior individuals in the compliance department at Ameriprise and sought to speak to Markus and obtain a written statement from him.⁶⁹ Later on August 10, Bradshaw called Markus to conduct a fact-finding conversation.⁷⁰ Bradshaw testified that Markus told him he (Markus) believed there was an understanding "between himself and the client that those trades were to be completed."⁷¹ Markus also told Bradshaw he spoke with the client after the trades, and the client was unhappy, so he initiated the correction process to reverse the trades.⁷² Markus's written statement to Bradshaw, which Bradshaw received on August 11, 2015,⁷³ included the following:

⁶³ Tr. 273; JX-7.

⁶⁴ Tr. 274-75; JX-7.

⁶⁵ Tr. 274-76.

⁶⁶ Tr. 274-76.

⁶⁷ Tr. 80-82, 85-86; CX-1.

⁶⁸ Tr. 83-86; CX-1.

⁶⁹ Tr. 91-93.

⁷⁰ Tr. 379.

⁷¹ Tr. 95; *see also* CX-2, at 2 (Bradshaw notes stating Markus "thought he and the client had an agreement" to invest cash into mutual funds and that Markus "did not specify as to whether or not a conversation ever happened").

⁷² Tr. 95.

⁷³ Tr. 156-57.

On August 4, 2015, while working on trades, I saw that [JW's] account had an unusually high money market balance. . . . I later called him about my discovery and he told me that he had traded out of many of his investments without informing me in order to purchase a Lincoln Life Annuity. . . . I did suggest that he come in to discuss his portfolio in person, to which he agreed, and to stay invested in mutual funds, to which he temporarily agreed.⁷⁴

Bradshaw and other supervisors at Ameriprise used an electronic system to document the firm's process for reviewing JW's complaint.⁷⁵ On August 18 and 19, 2015, a senior compliance manager exchanged email correspondence with Markus, and asked him a series of questions about the August 4, 2015, trades in JW's account.⁷⁶ In the email exchange, Markus indicated that he spoke to JW on August 4, 2015, before he entered the trades, and he "thought [he was] to re-deploy funds which had gone to cash."⁷⁷ Markus admitted he made false statements in this document.⁷⁸ He testified that he was very scared during Ameriprise's investigation and that he deeply regretted not answering truthfully.⁷⁹

Bradshaw next spoke with Markus in person on August 21, 2015.⁸⁰ In this meeting, Markus admitted to Bradshaw that he never spoke with JW on August 4, 2015, and did not have authorization to enter the 11 mutual fund purchases at issue. He also admitted he entered a false statement into SmartPad.⁸¹ Bradshaw summarized his conversation with Markus in an email to a senior compliance manager, and he provided a copy to Markus. Bradshaw specifically stated that JW had not authorized Markus's August 4, 2015, mutual fund purchases in JW's account.⁸² Markus responded to the group email the same day stating, "This is accurate. I concur."⁸³

Ameriprise discharged Markus on September 2, 2015.⁸⁴

⁷⁴ JX-9, at 1.

⁷⁵ Tr. 99-102; CX-13.

⁷⁶ Tr. 107-10; CX-13, at 10-11.

⁷⁷ CX-13, at 11.

⁷⁸ Tr. 281-84.

⁷⁹ Tr. 383.

⁸⁰ Tr. 111-12.

⁸¹ Tr. 113, 384-86.

⁸² Tr. 114-15; CX-13, at 14.

⁸³ CX-13, at 14.

⁸⁴ CX-15, at 4-5.

E. FINRA's Rule 8210 Request

Enforcement's principal examiner, Eric Bickhardt ("Bickhardt"), testified that Ameriprise's discharge of Markus triggered Enforcement's investigation.⁸⁵ In October 2015, Enforcement issued its first request for information to Markus, asking in part for a signed statement in response to the allegations that he entered unauthorized mutual fund purchases.⁸⁶ Markus responded with an October 16, 2015 letter in which he stated, in part:

I was informed that I was cited by the firm for an instance of unauthorized trading in one account for one client, [JW]. My client of three years provided me with time and price discretion to purchase mutual funds. He asked me to keep him invested whenever he had a large sum of cash exceeding \$10,000 not invested, in order to place him in an income earning position as he did relied [sic] on earnings with his income needs and withdrawal plans. . . . Mistakenly, I did not obtain this authorization in writing and I did not get approval prior to entering the trades in his account. . . . I did make a note that I had discussed the trade with the client in the Firm's system, which I later retracted and corrected in writing. I did have time and price discretion with the client. I was solely acting on idle cash so that he had income on every dollar. . . . This is the only incident that this [sic] occurred. I regret my decision and did not intend any harm. . . . This was an isolated incident, which I truly regret and from which I have learned.⁸⁷

Markus admits that stating in his Rule 8210 response that he had time and price discretion in JW's account was false.⁸⁸ Markus testified that he prepared the initial draft himself and discussed it with his current branch manager and his compliance officer. He also discussed the draft with an attorney (who no longer represents him).⁸⁹ Email exchanges with his former counsel suggest that the lawyer introduced the idea of stating that Markus had time and price discretion based on conversations the attorney previously had with Markus.⁹⁰ Markus testified that at the time he did not fully understand the significance of time and price discretion, so when the lawyer directed him to include the language, he did.⁹¹ Markus testified that he believed

⁸⁵ Tr. 186-87.

⁸⁶ Tr. 187-88; JX-12.

⁸⁷ JX-13, at 2-3.

⁸⁸ Tr. 313.

⁸⁹ Tr. 317, 402-03.

⁹⁰ Tr. 319, 400-01, 403-04; JX-20, at 2.

⁹¹ Tr. 322-25, 403-05. Enforcement offered into evidence printouts of Markus's attestation forms in which Markus indicated that he read and understood the firm's compliance manual, which explained time and price discretion, and he agreed to abide by the firm's procedures, including procedures for time and price discretion. Tr. 119-21; CX-17.

when he responded to FINRA's request for information that he was being honest about his lack of authorization to purchase mutual funds for JW's account. Markus stated he never intended to mislead FINRA.⁹²

IV. Findings of Violation

A. Cause One – Unauthorized Mutual Fund Purchases

Cause one of the Complaint alleges that Markus executed 11 unauthorized mutual fund purchases in JW's account, in violation of FINRA Rule 2010. Markus admitted the misconduct alleged.⁹³

FINRA Rule 2010 imposes a duty on associated persons to observe high standards of commercial honor and just and equitable principles of trade. Unauthorized trading is a serious breach of this duty.⁹⁴ Markus admits he entered 11 unauthorized mutual fund purchases, and his contention that he believed himself to be acting in JW's best interests does not negate that the trades admittedly were unauthorized.⁹⁵

Accordingly, we find that Markus violated FINRA Rule 2010 as alleged in cause one of the Complaint.

B. Cause Two – Misrepresentations to Ameriprise

Cause two of the Complaint alleges that Markus violated FINRA Rule 2010 by misrepresenting facts to Ameriprise on two occasions. First, on August 4, 2015, Markus misrepresented in SmartPad that he had spoken to JW, and JW had authorized Markus's 11 mutual fund purchases. Second, on August 5, 2015, when reversing the 11 mutual fund

Given Markus's many years of experience in the securities industry, we find it difficult to conceive that Markus did not understand the significance of suggesting he had time and price discretion on August 4, 2015. In any event, he should have discussed his confusion with his attorney or branch manager.

⁹² Tr. 406-07.

⁹³ See Tr. 260-63, 276-77, 288, 338, 363, 384-85, 407-08.

⁹⁴ See *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *31-32 (July 2, 2013) (stressing the seriousness of unauthorized trading), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *72 (Feb. 1, 2010) (holding that unauthorized trading goes to the heart of whether a securities professional is trustworthy); *Dep't of Enforcement v. Griffith*, No. 2010025350001, 2015 FINRA Discip. LEXIS 55, at *15 (NAC Dec. 22, 2015) (holding that an associated person is responsible for obtaining customer consent and authorization before purchasing a security).

⁹⁵ See, e.g., *Murphy*, 2013 SEC LEXIS 1933, at *35-36 (finding that the customer's demand for a particular outcome did not justify unauthorized trading in pursuit of that goal); *Katz*, 2010 SEC LEXIS 994, at *74 (finding that post-trade approval or ratification of an unauthorized transaction does not negate the violation); *Dep't of Enforcement v. Sears*, No. C07050042, 2009 FINRA Discip. LEXIS 4, at *11 (NAC July 23, 2009) (finding violation of Rule 2010 even though there was no evidence that respondent gained monetarily from the trades or was motivated by selfish interests).

purchases in JW’s account, he misrepresented on trade correction forms that he understood he had a “mandate” to enter the trades. Markus admitted that both representations were false.⁹⁶

We find that, by simultaneously stating in SmartPad that he “spoke” to JW about purchases that were in actuality unauthorized, and subsequently stating—cryptically—on trade correction forms that he had a mandate, Markus was intentionally concealing his misconduct from the firm. Providing false information to an associated person’s member firm is inconsistent with high standards of commercial honor and just and equitable principles of trade and violates FINRA Rule 2010.⁹⁷ Member firms rely on the accuracy of the information contained in their records to supervise their associated persons and protect their customers. By misrepresenting information in firm records, Markus interfered with Ameriprise’s ability to do both. An associated person’s entering false information into firm records contravenes ethical business practices and hinders supervision and customer protection.⁹⁸

Accordingly, we find that Markus violated FINRA Rule 2010 as alleged in cause two of the Complaint.

C. Cause Three – Providing False Information to FINRA

Cause three of the Complaint alleges that Markus violated FINRA Rules 8210 and 2010 by falsely representing to FINRA, in response to a Rule 8210 request for information, that JW had granted Markus time and price discretion when, in fact, he had not. Markus admitted that the representation that he had time and price discretion was not truthful.⁹⁹ He claimed that the misrepresentation resulted from his misunderstanding of the term and his reliance on the advice of counsel.

FINRA Rule 8210 requires member firms and associated persons to provide information to FINRA in the course of an investigation. Because FINRA does not have subpoena power, it “must rely on [FINRA] Rule 8210 to obtain information . . . necessary to carry out its

⁹⁶ See Tr. 269, 274-75, 413.

⁹⁷ See *Dep’t of Enforcement v. Mathieson*, No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at *17-18 (NAC Mar. 19, 2018) (“FINRA Rule 2010 includes the obligation to disclose truthfully material information to an associated person’s firm.”); *Dep’t of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *16 (NAC Mar. 9, 2015) (holding that registered representative who misleads his member firm by providing false information violates FINRA Rule 2010); *Dep’t of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *90 (NAC Oct. 1, 2013) (same).

⁹⁸ See *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *19 (finding that a registered representative’s false representations to his member firm called into question “the registered representative’s ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public”) (citing *Dep’t of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *30 (NAC Feb. 24, 2011), *aff’d*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012)).

⁹⁹ See Tr. 313.

investigations and fulfill its regulatory mandate.”¹⁰⁰ It is well settled that “[a]n associated person who provides false or misleading information to [FINRA] in the course of an investigation violates [FINRA] Rule[s] 8210” and 2010.¹⁰¹

Markus asserts as a defense to his misconduct his reliance on the advice of former counsel and his misunderstanding of the concept of time and price discretion. Neither is a defense to Markus’s rule violations. *Scienter* is not an element of a FINRA Rule 8210 violation and, accordingly, we are not required to find that Markus intentionally provided false information to FINRA.¹⁰² As such, Markus’s purported lack of understanding of the concept of time and price discretion and his alleged reliance on former counsel do not enable him to escape liability for providing false information to FINRA.¹⁰³

Accordingly, we find that Markus violated FINRA Rules 8210 and 2010 as alleged in cause three of the Complaint.

V. Sanctions

We begin our consideration of sanctions by consulting the FINRA Sanction Guidelines (“Guidelines”).¹⁰⁴ As recommended in the Guidelines, we give mitigative weight to Ameriprise’s prior termination of Markus, in part, for the misconduct at issue.¹⁰⁵ The Guidelines advise that adjudicators “consider whether a respondent has demonstrated that the termination qualifies for

¹⁰⁰ *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 30, 2009).

¹⁰¹ *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008); *see also Dep’t of Enforcement v. Merrimac Corp. Sec.*, No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at *11-12 (NAC May 26, 2017) (affirming a violation of FINRA Rules 8210 and 2010 where an associated person made false statements during on-the-record testimony), *appeal pending*, No. 3-18045 (June 26, 2017); *Dep’t of Enforcement v. Walker*, No. C10970141, 2000 NASD Discip. LEXIS 2, at *26-27 (NAC Apr. 20, 2000) (same).

¹⁰² *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008) (holding that *scienter* is not an element of a Rule 8210 violation); *Merrimac Corp. Sec.*, 2017 FINRA Discip. LEXIS 16, at *12 (same).

¹⁰³ *See Merrimac Corp. Sec.*, 2017 FINRA Discip. LEXIS 16, at *12 (holding that, because *scienter* is not an element of a Rule 8210 violation, there is no requirement for finding that false information was intentionally submitted to FINRA); *Dep’t of Enforcement v. Walblay*, No. 2011025643201, 2012 FINRA Discip. LEXIS 68, at *18 (NAC Nov. 1, 2012) (holding that, “because there is no state of mind requirement for a Rule 8210 violation, reliance on advice of counsel does not excuse” a rule violation).

¹⁰⁴ FINRA Sanction Guidelines (2018), http://www.finra.org/industry/sanction_guidelines. In May 2018, FINRA revised its Guidelines by amending General Principle No. 2 to instruct adjudicators in disciplinary proceedings to consider customer-initiated arbitrations that result in adverse arbitration awards or settlements when assessing sanctions. These revisions apply only to complaints filed on or subsequent to June 1, 2018. *See* Guidelines at 2-3. FINRA made no other revisions to the Guidelines in May 2018. *See* FINRA Regulatory Notice 18-17 (May 2, 2018), <http://www.finra.org/industry/notices/18-17>. Accordingly, we rely on General Principle No. 2 as it read prior to the May 2018 revision.

¹⁰⁵ Guidelines at 5 (General Principle No. 7).

any mitigative value, keeping in mind the goals of investor protection and maintaining high standards of business conduct,” and whether the respondent has demonstrated that the termination “has materially reduced the likelihood of misconduct in the future.”¹⁰⁶ We find that Markus has demonstrated that his termination reduced the likelihood that he will repeat this misconduct. Markus misled Ameriprise when he executed unauthorized trades, during the trade-correction process, and during the commencement of the firm’s investigation. Before Ameriprise terminated Markus, however, he fully confessed his misconduct to Bradshaw and members of the compliance department at Ameriprise. Although Markus’s subsequent truthful admissions to Ameriprise are not mitigating (and, as discussed in detail below, his attempts to conceal misconduct are aggravating), they suggest to us that Markus appreciates the significance of his misconduct and is not likely to repeat similar misconduct. Accordingly, we have given some mitigative weight to Ameriprise’s termination of Markus.

We find Markus’s initial efforts to conceal his misconduct aggravating.¹⁰⁷ When Markus executed 11 unauthorized trades in JW’s account and when he attempted to reverse the trades, he entered false information into firm records to conceal that the trades were not authorized. Similarly, when Bradshaw asked Markus to provide a written statement about the events at issue, Markus was evasive and did not admit that he acted without authorization.¹⁰⁸ Similarly, when questioned in an email exchange with an Ameriprise compliance official, he misrepresented that he spoke to JW on August 4, 2015, before he entered the trades.¹⁰⁹ Even Markus’s initial response to Enforcement’s Rule 8210 request for information contained false information. Although Markus admitted he did not have JW’s approval for the August 4, 2015, mutual fund purchases in JW’s account, he suggested he had (unwritten) time and price discretion.¹¹⁰ Clearly, Markus initially intended to conceal his misconduct, and we find this factor aggravating.

A. Sanctions – Unauthorized Trading

The Guidelines for unauthorized transactions recommend we consider a suspension for a period of one month to two years and a fine of \$5,000 to \$110,000. Where aggravating factors predominate, the Guidelines recommend we consider a bar.¹¹¹ Here, we find that aggravating factors exist, but do not necessitate a bar to remediate Markus’s misconduct.

We find it aggravating that Markus acted intentionally. He knew without question that he did not have authorization to execute 11 mutual fund purchases in JW’s account, yet he

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 7 (Principal Consideration No. 10).

¹⁰⁸ *See* JX-9.

¹⁰⁹ Tr. 281-84; CX-13, at 10-11. Markus immediately thereafter admitted to Bradshaw that he acted without authorization and falsified firm records. Tr. 113, 384-86; CX-13, at 14.

¹¹⁰ JX-13.

¹¹¹ Guidelines at 99.

nonetheless executed the trades.¹¹² Although he contended that he attempted to reach JW before executing the trades, he provided no phone records to evidence these calls, JW denied receiving voice mail messages, and Markus did not email JW. Additionally, by entering false notes in SmartPad and on the trade correction forms, Markus sought to conceal his misconduct.¹¹³ We also have considered that Markus initially sought to evade the firm's regulatory investigation and FINRA's investigation before ultimately admitting his misconduct.¹¹⁴ We have considered that Markus did not execute unauthorized trades to generate commissions for himself and ultimately did not cause injury to JW.¹¹⁵ We also considered that Markus did not believe JW would benefit from purchasing an annuity and attempted to dissuade JW from such a purchase. But the correct response to such a concern would have been to continue to attempt to reach JW, leave voice mail messages for JW, email JW, and speak to the trading desk (to confirm that JW requested the sales), not to enter unauthorized purchases. Even if Markus had JW's best interest in mind, the securities industry cannot allow registered representatives to substitute their judgment for customer consent. This is particularly so where, as here, Markus concealed the unauthorized trades from the firm, thereby preventing Ameriprise from carrying out its supervisory duties. Finally, we note that Markus's misconduct appears to be aberrant, in that he does not have a history of such misconduct.¹¹⁶

Balancing these factors, for misconduct alleged in cause one, we fine Markus \$5,000 and suspend him from associating in any capacity with any FINRA member firm for three months.¹¹⁷

¹¹² *Id.* at 99 (Unauthorized Transactions, Principal Consideration Nos. 1, 2).

¹¹³ *Id.* at 7-8 (Principal Consideration Nos. 10, 13); *id.* at 99 (Unauthorized Transactions, Principal Consideration No. 5).

¹¹⁴ *Id.* at 99 (Unauthorized Transactions, Principal Consideration No. 5).

¹¹⁵ *Id.* at 99 (Unauthorized Transactions, Principal Consideration No. 3).

¹¹⁶ *See id.* at 8 (Principal Consideration No. 15); *id.* at 99 (Unauthorized Transactions, Principal Consideration No. 3).

¹¹⁷ Markus requests that we factor into our consideration of sanctions the FINRA National Adjudicatory Council ("NAC") decision in *Dep't of Enforcement v. Griffith*, 2015 FINRA Discip. LEXIS 55. In *Griffith*, the NAC found that Griffith exercised time and price discretion in a customer's account without written authorization and engaged in an unauthorized trade. The Hearing Panel fined Griffith \$5,000 for improperly exercising discretion and suspended him for 20 business days. For entering an unauthorized trade, the Hearing Panel fined Griffith an additional \$5,000 and imposed a concurrent two-month suspension. The NAC reduced the sanctions imposed by the Hearing Panel to eliminate both suspensions. *Id.* at *16, *21. The NAC reduced the sanctions imposed for Griffith's unauthorized trade because Griffith's misconduct was not accompanied by aggravating factors, such as efforts to conceal, attempts to evade regulatory investigative efforts, customer loss, a history of similar misconduct, quantitative unsuitability, or qualitative unsuitability (because it resulted from a mistake or oversight, not bad faith). *Id.* at *22-23. The *Griffith* decision is distinguishable from this case because we find that, unlike Griffith, Markus acted intentionally, engaged in efforts to conceal his misconduct, and initially evaded FINRA's and Ameriprise's investigative efforts.

B. Sanctions – Providing False Information to Ameriprise

There are no Guidelines directly applicable to providing false information to a member firm. For misconduct for which they do not provide recommended sanctions, the Guidelines direct that we consider the Guidelines for analogous violations.¹¹⁸ Here, we considered the Guidelines for providing false information in response to a Rule 8210 request for information and the principal considerations applicable to all sanctions determinations.¹¹⁹

We find Markus's misconduct under cause two to be egregious. Markus intentionally misled Ameriprise, both when he entered the trades and when he reversed them.¹²⁰ We also find aggravating the importance of the false information that Markus provided to Ameriprise.¹²¹ By concealing that the mutual fund purchases in JW's account were unauthorized, Markus prevented Ameriprise from properly supervising his activities. He further aggravated his initial misrepresentation by making a similar false statement in the trade correction form. This too prevented the firm's supervisory systems from protecting JW. Then Markus interfered with the firm's investigation by misleading his branch manager and the firm's compliance department before ultimately admitting his misconduct. Additionally, Markus initially was not completely transparent with FINRA during its investigation.

Proper supervision is a cornerstone of the securities industry's self-regulatory system.¹²² Markus's misconduct undermined Ameriprise's supervision of his activities. For misconduct alleged in cause two, we fine Markus an additional \$5,000 and suspend him from associating with any FINRA member firm in any capacity for two years.

C. Sanctions – Providing False Information to FINRA

The Guidelines for violations of Rule 8210 address various types of offenses, including a failure to respond truthfully and a partial but incomplete response. We find that Markus's violation falls in between these two categories.¹²³ FINRA's October 6, 2015, Rule 8210 request for information contained the following questions and requests:

¹¹⁸ Guidelines at 1.

¹¹⁹ *Id.* at 7-8, 33.

¹²⁰ *Id.* at 8 (Principal Consideration No. 13).

¹²¹ *Id.* at 33 (Failure to Respond Truthfully, Principal Consideration No. 1).

¹²² *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *33 (Dec. 19, 2008) ("Assuring proper supervision is a critical component of broker-dealer operations."); *Dep't of Enforcement v. Rooney*, No. 2009019042302, 2015 FINRA Discip. LEXIS 19, at *59-60 (NAC July 23, 2015) (same).

¹²³ The Guideline for failure to respond truthfully recommends a fine of \$25,000 to \$73,000, and where mitigation exists, a suspension of up to two years. *See* Guidelines at 33. The Guideline for providing a partial but incomplete response recommends a fine of \$10,000 to \$73,000, and a bar. If the respondent can demonstrate that the information provided substantially complied with FINRA's request, a suspension can be considered in lieu of a bar. *See id.*

- A signed statement in response to the allegations that Markus entered unauthorized mutual fund transactions in a client account;
- Whether he sought approval from the client before entering the trades; and
- When he entered the trades into the firm's systems, did he enter an attestation indicating that he discussed the trades with the customer?¹²⁴

Markus's October 16, 2015 response addressed his trading in JW's account.¹²⁵ While he admitted that he did not "obtain his authorization in writing" and "did not get approval prior to entering the trades in JW's account," he falsely stated that he had (unwritten) time and price discretion.¹²⁶ Markus did not suggest that time and price discretion exonerated him of liability, however.¹²⁷ For purposes of sanctions, we treat Markus's response as partial but incomplete because he answered Enforcement's questions, but included a misrepresentation that was not responsive and could be seen as an attempt to mitigate his misconduct.

Markus claimed that he reasonably relied on the advice of legal counsel when he claimed he had time and price discretion in his Rule 8210 response.¹²⁸ He stated that he did not understand what time and price discretion meant in this context. As such, when his attorney suggested the language, he accepted it. In the context of FINRA disciplinary proceedings, to assert reliance on the advice of counsel successfully, a respondent must establish that he or she made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice.¹²⁹ While we have considered Markus's reliance on counsel claim, we do not find it mitigating. Markus waived attorney-client privilege and produced a number of written communications between himself and his former counsel.¹³⁰ The production, however, appears incomplete because it refers to communications between Markus and his attorney that are not included.

Most importantly, in the communication in which Markus's former attorney suggests the language at issue, he qualifies the advice as being "based on what you told me."¹³¹ Although

¹²⁴ JX-12.

¹²⁵ JX-13, at 2-4.

¹²⁶ JX-13, at 2-3.

¹²⁷ Tr. 230 (Bickhardt testimony that Markus never suggested to Enforcement that he had not acted wrongly); Tr. 230-31 (Bickhardt testimony that, although Markus stated he had time and price discretion, he also stated that it was not in writing and that he had not talked to the customer before entering the trades); Tr. 239 (Bickhardt testimony that, in June 2017 on-the-record testimony, Markus admitted he did not have time and price discretion).

¹²⁸ See Guidelines at 7 (Principal Consideration No. 7); *id.* at 33 (Partial but Incomplete Response Principal Consideration No. 3).

¹²⁹ See *Leslie Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *52-53 (Sept. 13, 2010).

¹³⁰ See JX-20.

¹³¹ JX-20, at 2.

Markus testified that he did not tell his attorney he had time and price discretion, there appear to be gaps and missing attachments in the written communications produced. Additionally, if Markus did not understand the significance of time and price discretion, notwithstanding his 22 years of industry experience, the burden was on him as a registered person to question his attorney's advice and clarify his response to FINRA so that it included only language that he did understand. Markus was not entitled to shift his regulatory responsibility for responding fully and truthfully to FINRA information requests to his attorney.¹³²

As directed by the Guidelines, we also have considered the importance from FINRA's perspective of the inaccurate information Markus provided to Enforcement.¹³³ We do not find that Markus misled Enforcement as to whether JW authorized the mutual fund purchases executed in JW's account, because Markus admitted that he had not talked to JW before entering the trades. We also find, however, that his lengthy response, which included two references to time and price discretion, was unclear and evasive. Balancing these factors, we conclude that Markus substantially complied with Enforcement's requests for information. Accordingly, we suspend Markus for two years from associating with any FINRA member firm in any capacity for the misconduct alleged in cause three.¹³⁴ This two-year suspension will run concurrently with the suspensions imposed for misconduct alleged in causes one and two.

VI. Order

We suspend Respondent Leslie George Markus, Jr. for two years from associating with any FINRA member firm in any capacity and fine him \$10,000. If this decision becomes FINRA's final disciplinary action, the suspension shall become effective with the opening of business on Monday, September 17, 2018.

We impose these sanctions as follows: for executing 11 unauthorized mutual fund purchases in a customer account in violation of FINRA Rule 2010, as alleged in cause one, we fine Markus \$5,000 and suspend him from associating in any capacity with any FINRA member firm for three months. For providing false information to a member firm in violation of FINRA Rule 2010, as alleged in cause two, we fine Markus \$5,000 and suspend him from associating in any capacity with any FINRA member firm for two years. For including inaccurate information

¹³² See *Toni Valentino*, 57 S.E.C. 330, 338-39 (2004) (finding reliance on counsel defense unavailing for registered representative who failed to appear for on-the-record testimony after FINRA warned her that the failure to appear could result in a bar in all capacities); *Sundra Escott-Russell*, 54 S.E.C. 867, 872 (2000) (stating that reliance on advice of counsel does not relieve an associated person of her obligation to respond to FINRA information requests); *Walblay*, 2012 FINRA Discip. LEXIS 68, at *18-19 (holding that a registered representative is not entitled to shift his regulatory responsibility to his attorney).

¹³³ Guidelines at 33 (Failure to Respond Truthfully Principal Consideration No. 1; Partial but Incomplete Response Principal Consideration No. 1).

¹³⁴ The Guidelines for partial but incomplete responses recommend, in addition to a suspension, a fine of \$10,000 to \$73,000. *Id.* at 33. In light of our imposing a total fine of \$10,000 for misconduct alleged under causes one and two, we conclude that no remedial purpose would be served by imposing an additional fine for violations alleged in cause three.

in his response to a FINRA Rule 8210 request for information, in violation of FINRA Rules 2010 and 8210, as alleged in cause three, we suspend Markus from associating in any capacity with any FINRA member firm for two years. The suspensions will run concurrently.¹³⁵

Markus is also ordered to pay the costs of the hearing in the amount of \$4,177.62, which includes a \$750.00 administrative fee and a \$3,427.62 fee for the cost of the hearing transcript. The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.



Carla Carloni
Hearing Officer
For the Hearing Panel

Copies: Leslie George Markus, Jr. (by first-class mail and overnight courier)
Richard A. Levan, Esq. (by email and first-class mail)
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Jeffrey D. Pariser, Esq. (by email)

¹³⁵ The Hearing Panel considered and rejected without discussion all other arguments by the parties.