FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CHRISTOPHER B. ARIOLA (CRD No. 2957096), Respondent.	Disciplinary Proceeding No. 2012034139101 Hearing Officer–RES December 6, 2016 **DEFAULT DECISION**

For making unsuitable recommendations in high-risk gold and energy stocks and exercising control over a former customer's online brokerage account without providing written notice of the account to his employer member firm or of his registered status to the executing firm, Respondent is barred from associating with any FINRA member firm and ordered to pay restitution in the amount of $137,993.13 plus prejudgment interest.

For the Complainant: Brody W. Weichbrodt, Esq., Christopher Perrin, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: No appearance

DECISION

I. Introduction

Respondent Christopher B. Ariola ("Ariola") was associated with FINRA broker-dealer Bay Mutual Financial, LLC ("Bay Mutual" or the "Firm") as a General Securities Representative. The Complaint alleges that, while associated with Bay Mutual, Ariola: (1) made unsuitable recommendations that three elderly customers and one former customer invest in high-risk gold and energy stocks in violation of NASD Rule 2310 and FINRA Rule 2010; and (2) exercised control over the former customer's online brokerage account at a different firm without providing written notice of the account to Bay Mutual or of his registered status to the executing firm, in violation of NASD Rule 3050(c) and FINRA Rule 2010. Because of Ariola's unsuitable investment recommendations, the three customers lost $137,993.13. The former customer lost $4,824.52 but recouped it in a settlement with Bay Mutual.

Ariola did not answer the Complaint. The Department of Enforcement filed a motion for entry of a default judgment (the "Default Motion"), together with counsel's declaration and

supporting exhibits. Ariola did not respond to the motion. For the reasons stated below, the Hearing Officer finds Ariola in default and grants Enforcement's Default Motion.

II. Findings of Fact and Conclusions of Law

A. Respondent's Background

Ariola was first employed in the securities industry in 1997.[1] He joined Bay Mutual as a General Securities Representative in 2004.[2] Through Bay Mutual, he was registered with FINRA until his resignation from the Firm in August 2012.[3] He was then registered with FINRA through Financial Telesis, Inc. ("Financial Telesis") until September 2014.[4] He has not been associated or registered with a FINRA member since that time.[5]

B. FINRA's Jurisdiction

FINRA has jurisdiction over Ariola pursuant to Article V, Section 4(a) of FINRA's By-Laws. Enforcement filed the Complaint within two years after the termination of his registration with Financial Telesis, and the Complaint charges him with violations that he committed when he was registered with Bay Mutual.

C. Origin of the Investigation

The investigation of Ariola started after FINRA received a Uniform Termination Notice for Securities Industry Registration ("Form U5") filed by Bay Mutual stating he had been permitted to resign when he was under an internal review initiated because "the Firm developed concerns that certain securities recommended for client accounts were not consistent with Firm guidelines."[6]

D. Respondent's Default

On August 25, 2016, Enforcement served the First Notice of Complaint and Complaint by certified mail and sent a copy by first-class mail to Ariola at his residential address recorded in the Central Registration Depository (the "CRD Address") in accordance with FINRA Rule 9134(b)(1).[7] The certified mailing of the First Notice of Complaint was returned—opened—with a notation dated September 6, 2016, stating "Return to Sender, Attempted—Not Known, Unable

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[1] CX-1, at 4. Enforcement's exhibits in support of the Default Motion are cited as "CX."

[2] Declaration of Brody W. Weichbrodt ("Decl.") ¶ 2.

[3] *Id.*

[4] *Id.*

[5] CX-1, at 3.

[6] Decl. ¶ 3.

[7] *Id.* ¶ 5.

to Forward, Return to Sender."[8] The first-class mailing was not returned.[9] Ariola did not file an answer to the First Notice of Complaint.[10]

On September 26, 2016, Enforcement served the Second Notice of Complaint and Complaint by certified mail and sent a copy by first-class mail to Ariola's CRD address.[11] The certified mailing of the Second Notice of Complaint was returned with a notation dated October 10, 2016, stating "Return to Sender, Attempted—Not Known, Unable to Forward, Return to Sender."[12] The first-class mailing was not returned.[13] Ariola did not file an answer to the Second Notice of Complaint, and it is now past the 25-day deadline of FINRA Rule 9215(a).[14] The Hearing Officer finds that Ariola defaulted.

E. Ariola's Default Warrants the Issuance of a Default Decision

FINRA Rule 9269(a) authorizes the Hearing Officer to issue a default decision against a respondent who "fails to answer the complaint within the time afforded under Rule 9215." Similarly, FINRA Rule 9215(f) provides that "[i]f the Respondent fails to file an answer with the Office of Hearing Officers within the time required, the Hearing Officer may issue a default decision against the Respondent pursuant to Rule 9269."

Ariola had two opportunities to file an answer but did not. The Second Notice informed him of the possible consequences of not answering—a default decision under FINRA Rule 9269.[15] Enforcement sent both the First and Second Notices of Complaint to Ariola at his CRD Address which, to the best of Enforcement's knowledge, is his current residential address.[16] The Hearing Officer finds that a default decision against Ariola is warranted.[17]

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[8] *Id.* ¶ 7.

[9] *Id.* ¶ 6.

[10] *Id.* ¶ 8.

[11] *Id.* ¶ 9.

[12] *Id.* ¶ 11.

[13] *Id.* ¶ 10.

[14] *Id.* ¶ 12.

[15] CX-6, at 1.

[16] Decl. ¶ 13.

[17] Respondent is notified that he may move to set aside the default pursuant to FINRA Rule 9269(c) if he can show good cause.

F. Ariola Made Unsuitable Recommendations in High-Risk Gold and Energy Stocks and Controlled an Outside Brokerage Account Without Providing the Required Notice

FINRA Rule 9269(a) provides that "[i]f the defaulting Party is the Respondent, the Hearing Officer may deem the allegations against that Respondent admitted." FINRA Rule 9215(f) contains a similar provision. As provided for in these Rules, the Hearing Officer deems the allegations in the Complaint against Ariola to be admitted.

The Complaint alleges that in early 2012 Ariola began recommending his customers invest heavily in gold and energy stocks, including stocks that were supposed to produce high-yield dividends.[18] These stocks exposed his customers to significant investment risk.[19] Some of the stocks were negatively impacted by corporate events or announcements that occurred shortly before Ariola recommended the stocks.[20] Two of the customers to whom Ariola recommended the stocks were LH and SH, a married couple who had retired from their jobs as bus drivers in 2010.[21] Ariola recommended that LH and SH invest in nine gold and energy stocks. Between the two of them, they lost $93,052.21.[22]

Like LH and SH, Ariola's customer DS was a retired bus driver.[23] Ariola recommended that DS invest in twelve gold and energy stocks. DS lost $44,940.92.[24]

Ariola's former customer WF was another retired bus driver.[25] Ariola exercised effective control and discretion over an online brokerage account in WF's name at TD Ameritrade. Over a 2.5 year period, Ariola executed 863 securities transactions in this account.[26] He did not give his employer member firm, Bay Mutual, written notice of his role with respect to this account—*i.e.*, that he controlled it.[27] Nor did he provide TD Ameritrade with written notice of his registered status with Bay Mutual.[28] WF recouped his losses in a settlement with Bay Mutual.

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[18] Complaint ("Compl.") ¶ 9.

[19] *Id.*

[20] *Id.* ¶ 10.

[21] *Id.* ¶ 11.

[22] *Id.* ¶¶ 18-20; Decl. ¶¶ 14-15.

[23] Compl. ¶ 22.

[24] *Id.* ¶¶ 27-28; Decl. ¶ 16.

[25] Compl. ¶¶ 29-30. None of the customers had significant investment experience. LH completed two years of college education, and SH had a high school diploma. *Id.* ¶ 14. DS's and WF's highest level of education was high school. *Id.* ¶¶ 22, 30. The customers' prior investment experience was limited to their retirement plan accounts. *Id.* ¶¶ 14, 23, 31.

[26] *Id.* ¶ 39.

[27] *Id.* ¶ 44.

[28] *Id.* ¶ 45.

Because of Ariola's unsuitable recommendations, the customers incurred combined losses of $137,993.13.

G. Ariola Violated NASD Rules 2310 and 3050(c) and FINRA Rule 2010

NASD Rule 2310(a) required that a FINRA member have reasonable grounds for believing that an investment recommendation was suitable for a customer:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have 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.[29]

To make the suitability determination, NASD Rule 2310(b) required that a FINRA member make reasonable efforts to obtain information about the customer's financial status, tax status, and investment objectives.[30]

Ariola made unsuitable recommendations to four retirees with limited financial resources and who were in need of income from those resources. He recommended that these unsophisticated investors concentrate their retirement assets in a handful of risky gold and energy stocks. This was inconsistent with their financial situation, needs, and investment objectives. It also concentrated their limited retirement assets into high-risk investments.[31] This misconduct violated NASD Rule 2310 and FINRA Rule 2010.[32]

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[29] "Persons associated with a member shall have the same duties and obligations as a member under the Rules." FINRA Rule 0140(a).

[30] The NASD Rules are applied in this Decision because they were the Rules in effect at the time of Ariola's misconduct.

[31] Ariola concentrated approximately 80 percent of LH's and SH's IRA accounts into the recommended gold and energy stocks. Compl. ¶¶ 18-19. He concentrated 44 percent of DS's account into the gold and energy stocks. *Id.* ¶ 27.

[32] *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *57 (NAC July 18, 2016) ("[t]he recommended transaction was not suitable for [the customer] in light of her net worth, investment objectives, [and] financial sophistication"), *appeal filed*, *Bernard G. McGee*, Exchange Act Release No. 78901, 2016 SEC LEXIS 3587 (Sept. 21, 2016); *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *37 (May 27, 2011) (finding a violation of NASD Rule 2310 because the customer "was retired, needed to preserve principle [sic], requested low-risk investments, and needed immediate income for monthly withdrawals to cover living expenses"), *aff'd*, 693 F.3d 251 (1st Cir. 2012); *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *64 (Feb. 1, 2010) (finding a violation of the suitability rule where the customers "lived on modest retirement incomes, their investments ... were relatively modest, and their Wachovia accounts appeared to represent a significant portion of their net worth"). "A violation of Rule 2310 constitutes a violation of Rule [2010], which requires registered representatives to 'observe high standards of commercial honor and just and equitable principles of trade.'" *Richard G. Cody*, 2011 SEC LEXIS 1862, at *26 (quoting NASD Rule 2110 and FINRA Rule 2010).

Ariola's control and discretion over the TD Ameritrade account in the name of WF gave rise to another violation of NASD Rules. NASD Rule 3050(c) required that an associated person give notice to both his employer firm and the executing firm when he opened a brokerage account with the executing firm:

> A person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member.

NASD Rule 3050(e) provided that this notice requirement also applied to accounts in which an associated person had discretionary authority.

Ariola exercised control over the TD Ameritrade account, executing 863 securities transactions and receiving account statements and confirmations through electronic delivery to his personal email address. He did not disclose the account to Bay Mutual or his registered status to TD Ameritrade. He violated NASD Rule 3050(c) and FINRA Rule 2010.[33]

III. Sanctions

Because of the egregious nature of Ariola's suitability violations, he shall be barred from associating with any FINRA member firm in any capacity.[34] He shall be ordered to pay $137,993.13 in restitution plus prejudgment interest. The reasons for these sanctions are as follows.

The FINRA Sanction Guidelines for unsuitable recommendations call for a fine ranging from $2,500 to $110,000 and a suspension of ten business days to two years.[35] Where aggravating factors predominate, the Guidelines advise the adjudicator strongly to consider a bar.[36]

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[33] *Dep't of Enforcement v. McGuire*, No. 20110273503, 2015 FINRA Discip. LEXIS 53, at *44 (NAC Dec. 17, 2015) ("McGuire failed to provide the necessary notifications before [he] opened his outside brokerage accounts, in violation of NASD Rule 3050(c)"); *Dep't of Enforcement v. Ng*, No. 2009019369302, 2013 FINRA Discip. LEXIS 6, at *18 (NAC Apr. 24, 2013) ("NASD Rule 3050(c) required that Ng provide written notice of his outside brokerage accounts to AllianceBernstein"); *Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117, at *13 (Jan. 14, 2005) (finding a violation of NASD Rule 3050 because the registered person "exercised discretionary authority to buy and sell securities in Dr. Hu's Schwab account"). "A registered representative's failure to notify his employing firm and the executing member firm prior to opening a brokerage account also violates FINRA Rule 2010." *McGuire*, 2015 FINRA Discip. LEXIS 53, at *41.

[34] Because a bar is imposed for Ariola's suitability violations, the Hearing Officer does not order additional sanctions for Ariola's violation of NASD Rule 3050(c).

[35] FINRA Sanction Guidelines ("Guidelines") at 93 (2016), http://www.finra.org/sites/default/files/sanction-guidelines.pdf.

[36] *Id.*

Several aggravating factors from the Principal Considerations apply here. First, Ariola engaged in a pattern of misconduct involving several customers and numerous unsuitable recommendations.[37] Second, the investing public was injured in that three customers lost $137,993.13 as a result of Ariola's recommendations.[38] Third, for the injured customers, the transactions were significant because they represented a large percentage of the customers' limited retirement assets.[39] Fourth, the injured customers were not sophisticated investors.[40]

There are no mitigating factors. Simply put, Ariola's recommendations for gold and energy stocks exposed his customers to unwarranted investment risk. The appropriate sanction is a bar in all capacities.

The adjudicator should order restitution when an identifiable person has incurred a quantifiable loss proximately caused by a respondent's misconduct.[41] Here, the customers identified in the Complaint incurred quantifiable losses directly caused by Ariola's unsuitable recommendations. Three of them lost $137,993.13 combined. Schedule A to Enforcement's Default Motion shows the amount of the realized losses, prejudgment interest (as of November 16, 2016), and total restitution for each customer. The Hearing Officer adopts Schedule A as having a reasonable basis in fact and support in the law. In particular, Enforcement calculated prejudgment interest at the rate in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a).

Ariola shall pay restitution and prejudgment interest in the following amounts: (1) to LH, repayment of realized losses in the amount of $39,935.23, plus prejudgment interest in the amount of $5,599.65,[42] for total restitution in the amount of $45,534.88; (2) to SH, repayment of realized losses in the amount of $53,116.98, plus prejudgment interest in the amount of $7,447.97, for total restitution in the amount of $60,564.95; and (3) to DS, repayment of realized

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[37] *Id.* at 6 (Principal Consideration No. 8: Whether the respondent engaged in numerous acts and/or a pattern of misconduct).

[38] *Id.* (Principal Consideration No. 11: Whether the respondent's misconduct resulted directly or indirectly in injury to the investing public). Because the fourth customer recouped his loss in a settlement with Bay Mutual, the $4,824.52 amount of his loss is not included in the $137,993.13 amount above.

[39] *Id.* at 7 (Principal Consideration No. 18: The number, size and character of the transactions at issue).

[40] *Id.* (Principal Consideration No. 19: The level of sophistication of the injured or affected customer).

[41] *Id.* at 4 (General Principle No. 5: "Where appropriate to remediate misconduct, Adjudicators should order restitution … Adjudicators may order restitution when an identifiable person … has suffered a quantifiable loss proximately caused by a respondent's misconduct"); *see also* FINRA Rule 8310(a)(7) (FINRA may impose "any other fitting sanction"); *Dep't of Enforcement v. McGee*, 2016 FINRA Discip. LEXIS 33, at *79 (ordering restitution where the customer's losses "were the foreseeable, direct, and proximate result of McGee's misconduct"); *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *37 (June 2, 2016) ("Ordering Butler to pay [the customer] for the amount he converted plus prejudgment interest is neither excessive nor oppressive, is remedial and not punitive, and is necessary for the protection of investors"); *Alfred P. Reeves, III*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568, at *20 (Nov. 5, 2015) ("Ordering Reeves to pay restitution to [his former firm] for the [converted] amount that he has not yet repaid, together with prejudgment interest on that amount, is neither excessive nor oppressive.").

[42] All prejudgment interest amounts are as of November 15, 2016, the date Enforcement filed the Default Motion.

losses in the amount of $44,940.92, plus prejudgment interest in the amount of $5,609.81, for total restitution in the amount of $50,550.73. Ariola is ordered to pay the restitution within sixty days of the effective date of this Decision.

IV. Order

Christopher Ariola is barred from associating with any FINRA member firm in any capacity because of his unsuitable investment recommendations, in violation of NASD Rule 2310 and FINRA Rule 2010. Ariola shall pay restitution to LH, SH, and DS in the following amounts: (1) to LH, repayment of realized losses in the amount of $39,935.23, plus prejudgment interest in the amount of $5,599.65, for total restitution in the amount of $45,534.88; (2) to SH, repayment of realized losses in the amount of $53,116.98, plus prejudgment interest in the amount of $7,447.97, for total restitution in the amount of $60,564.95; and (3) to DS, repayment of realized losses in the amount of $44,940.92, plus prejudgment interest in the amount of $5,609.81, for total restitution in the amount of $50,550.73. Ariola is ordered to pay the restitution within sixty days of the effective date of this Decision and to provide Enforcement with proof of payment of restitution with prejudgment interest to each customer listed on Schedule A. If Ariola does not pay the restitution and prejudgment interest within sixty days, the prejudgment interest shall continue to accrue at the rate in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from the date of each customer's last sale of the unsuitable investments recommended by Ariola until the date restitution is paid. If Ariola is unable to locate a customer, he shall document his attempts to do so, provide such documentation to the Department of Enforcement, and pay the restitution amount owed to the customer as a fine to FINRA. The bar shall be effective immediately if this Default Decision becomes the final disciplinary action of FINRA.

Richard E. Simpson
Hearing Officer

Copies to:

Christopher B. Ariola (via overnight courier and first-class mail)
Brody W. Weichbrodt, Esq. (via email)
Christopher Perrin, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)