

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

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In the Matter of

DECISION

Department of Enforcement,

Complaint No. C07980011

Complainant,

Dated: October 18, 1999

vs.

Mark S. Balbirer  
Sunrise, FL,

Respondent.

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**Where registered person effected seven unauthorized transactions in the account of a public customer, held that registered person violated NASD Conduct Rule 2110. Hearing Panel sanctions increased to \$15,000 fine and two-year suspension.**

This matter was called for review pursuant to NASD Procedural Rule 9312.<sup>1</sup> Under review is a decision of an NASD Regulation Hearing Panel ("Hearing Panel") dated November 3, 1998. After a review of the entire record in this matter, we affirm the Hearing Panel's findings that Balbirer executed seven unauthorized trades in a customer account, in contravention of Conduct Rule 2110. We fine Balbirer \$15,000, suspend him for two years, and affirm the Hearing Panel's imposition of costs.

Background. Balbirer first entered the securities industry when he was employed by GKN Securities Corp. ("GKN") from September 1992 through November 1994, the period relevant to this case, and was registered as a general securities representative. Between November 1994 and May 1998, Balbirer was associated with eight different member firms. Most recently, from May through August 1998, he was associated with Barron Chase Securities, Inc.

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<sup>1</sup> The Review Subcommittee of the National Adjudicatory Council ("NAC") called this matter for review to determine whether the sanctions that the Hearing Panel imposed are commensurate with Balbirer's misconduct and whether it was appropriate for the Hearing Panel to consider certain factors as mitigative of sanctions.

The complaint alleged that, between August and October 1994, while associated with GKN, Balbirer executed two sales and five purchases of securities in the account of GKN customer JK without authorization. The complaint originated from an entry in GKN's Form U-5 Notice of Termination for Balbirer that indicated that JK had complained to GKN that Balbirer had entered unauthorized transactions in his account.

Facts. JK opened a securities account at GKN in March 1991. JK's original account executive at GKN subsequently left the firm, and Balbirer was assigned to JK's account. JK's account was not discretionary, but JK was approved to trade on margin.

In 1994, JK was 73 years old. He maintained two homes, one in upstate New York and the other in Florida. JK lived principally at his Florida residence, and he typically stayed at his New York home during the Summer months. During all of August 1994, when six of the unauthorized trades were executed, JK resided in his New York residence.<sup>2</sup> JK maintained several other securities accounts at other broker/dealers. He testified that he had never complained about his other stock brokers.

Between August 3 and October 20, 1994, Balbirer effected the following seven transactions in JK's account at GKN:

<u>Trade Date</u>	<u>Transaction</u>
August 3, 1994	Buy 1,000 shares of KBL Healthcare Acquisition ("KBL")
August 17, 1994	Sell 200 shares of Guinness PLC ("Guinness")
August 17, 1994	Sell 400 shares of McDonalds ("McDonalds")
August 17, 1994	Buy 1,500 shares of Paging Partners Corp. ("Paging")
August 17, 1994	Buy 500 shares of Phoenix Advanced Technology, Inc. ("Phoenix")
August 31, 1994	Buy 10,000 shares of Innovo Group, Inc. ("Innovo")
October 20, 1994	Buy 3,000 shares of Enteractive, Inc. ("Enteractive")

GKN sent confirmations for each trade to JK's Florida address. The confirmations thereafter were forwarded to JK's New York address.

Balbirer admitted that he had executed the seven transactions referenced in the complaint. The sole issue before the Hearing Panel therefore was whether Balbirer had received prior authorization from JK to effect the transactions. On this issue, JK and Balbirer's testimony conflicted. JK denied having had prior knowledge of or given prior authorization for the

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<sup>2</sup> The record is not clear as to where JK resided during October 1994, when the last unauthorized trade occurred. The evidence indicates, however, that Balbirer attempted to contact JK at his New York telephone number in October and that Balbirer placed no calls to JK's Florida residence during that time.

transactions. Balbirer, on the other hand, contended that he spoke with JK before every trade and that JK authorized all of the trades.

On appeal, Balbirer continued to assert that he talked with JK and received his authorization for every trade. Staff contended that the record supported the Hearing Panel's findings, that Balbirer's misconduct was egregious, and that, consistent with NAC precedent, Balbirer should be barred.

Discussion. We affirm the Hearing Panel's findings of violation. The Hearing Panel heard the testimony of both JK and Balbirer and found JK's testimony to be more credible and corroborated by other evidence in the record. The Securities and Exchange Commission consistently has held that the credibility determinations of the initial fact-finder are entitled to considerable weight and deference. See In re Jon R. Butzen, Exchange Act Rel. No. 36512 (Nov. 27, 1995); In re Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992). Moreover, there is nothing in the record to call the Hearing Panel's credibility determination into question. Indeed, the record evidence, as discussed below, corroborates the Hearing Panel's determination.

At the outset, we note that GKN had canceled the unauthorized trades and had restored JK's account to its original status before NASD Regulation filed this complaint. Thus, JK would not have been motivated by financial loss to lie when he testified in this disciplinary proceeding.

Additionally, the nature and quality of the securities purchased and sold are consistent with the conclusion that the trades were not authorized. Balbirer sold a number of blue chip stocks out of JK's account and placed him into low-priced, more speculative securities, including three stocks that GKN had underwritten. Furthermore, despite the fact that some of the August unauthorized purchases had increased in value by October and therefore were potentially profitable, JK still complained about them. If JK had complained solely to recoup losses, as Balbirer argued that he had, it is unlikely that he would have included in his complaint stocks that had increased in value.

Balbirer contended that, prior to each transaction, he spoke with JK by telephone. JK disputed this claim. The telephone records showing when calls were made from GKN to JK's New York home support JK's claim and refute Balbirer's contention.

With respect to the August 3 purchase of KBL (which was marked as "solicited"), the record showed no calls by Balbirer on August 2 or 3 and two calls lasting less than one minute on August 1. Balbirer asserted that he left two messages on JK's machine and that JK had

returned his calls.<sup>3</sup> JK, however, was away from his home from July 26 through August 7, and he denied that he received any messages from Balbirer.

As to the four August 17 trades (three purchases marked "solicited" and one sale marked "unsolicited"), the record shows no calls from Balbirer to JK between August 1 and October 14. With respect to the October 20 purchase (which was marked "solicited"), the record shows a one-minute telephone call on October 14, a two and one-half minute call on October 14, and a one-minute call on October 17 from Balbirer to JK. The record does not demonstrate, however, that JK and Balbirer spoke on the day of the solicited trade or during the two days prior, and JK denied authorizing the trade.

Balbirer argued that he often spoke with JK via speaker phone from his GKN office and that another GKN employee, John Suss ("Suss"), had overheard JK authorize some of the trades at issue. Suss testified that, during the Summer of 1994, he sat across from Balbirer, but he denied that he ever heard Balbirer use the speaker phone to talk with a customer.

Balbirer also contended that he maintained detailed customer notes with respect to conversations that he had had with JK. He asserted that Martin Schaffer ("Schaffer"), his branch manager at GKN, took his customer book (within which he kept his customer notes) while he was out of the office. Schaffer testified that he retained Balbirer's customer book after Balbirer left GKN and that he had not seen any notes regarding conversations with customers in the book.

Balbirer argued that JK did not complain immediately upon receipt of the confirmations for the trades and that he complained only after learning that Balbirer had left GKN. The record does not support Balbirer's contention. The confirmations for the trades at issue were delayed in arriving at JK's New York home, since they first went to his Florida residence. JK testified consistently with his affidavit of March 6, 1998 that he contacted Balbirer in August 1994 and demanded that the unauthorized trades be reversed. After Balbirer failed to reverse the trades, JK contacted Schaffer.<sup>4</sup> Thereafter, in late October or early November (about the time that Balbirer

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<sup>3</sup> At the hearing before the Hearing Panel, Balbirer also asserted that JK often contacted him to place orders. JK denied this, particularly with respect to the trades at issue. Balbirer's initial written response to JK's complaint letter to GKN was consistent with JK's version of events; Balbirer's letter implied that Balbirer had called JK to obtain authorization for the trades at issue, not that JK had contacted him. JK was unable to locate his personal telephone records from 1994, but he noted that he generally contacted Balbirer on GKN's "800" number and that his personal telephone records therefore would not have shown his calls to Balbirer. In any event, telephone records would establish only that a telephone conversation occurred; they would not establish that JK actually authorized any trades. District Business Conduct Committee for District No. 9 v. Michael Euripides, Complaint No. C9B950014 (NBCC July 28, 1997).

<sup>4</sup> Schaffer remembered speaking with JK, but recalled that JK complained only about the August 17 McDonalds sale during that call. Balbirer never denied that the McDonalds sale was unauthorized. He contended that it resulted from a misunderstanding between himself

left GKN), JK complained in writing about numerous unauthorized trades undertaken by Balbirer in his account.<sup>5</sup>

Given the delay in the delivery of the confirmations to JK's New York address and JK's verbal complaint to Balbirer, we concur with the Hearing Panel that JK timely complained about the trades. Furthermore, Balbirer's contention that JK failed to complain at the time of the trades -- even if true -- would provide no defense to the allegations. See In re Justine Susan Fischer, Exchange Act Rel. No. 40335 (Aug. 19, 1998) (even if a failure to complain amounts to ratification of a trade, ratification after the fact does not mean that a trade was properly authorized); In re Patrick G. Keel, Exchange Act Rel. No. 31716 (Jan. 11, 1993) (failure of the customer to complain at the time of the trade is not a defense).

In light of the foregoing evidence, we affirm the Hearing Panel's finding that Balbirer executed seven unauthorized trades in JK's account.

With respect to sanctions, however, we do not concur with the Hearing Panel. We find that Balbirer's misconduct justifies increasing the sanctions. In our view, the Hearing Panel's imposition of a censure and \$5,000 fine is contrary to established NAC precedent in unauthorized trading cases. Furthermore, certain of the factors considered by the Hearing Panel as mitigative were in fact neutral or even aggravating. Balbirer's misconduct demonstrates his willingness to ignore his responsibilities to his clients. His execution of unauthorized purchases and sales "belies his claim of fair dealing with his customers," and the sanctions that we impose must recognize the seriousness of the misconduct. In re Jon R. Butzen, Exchange Act Rel. No. 36512 at 6 (Nov. 27, 1995).

We first turn to the principal considerations listed in the NASD Sanction Guidelines ("Guidelines") (1998 ed.). Unlike the Hearing Panel, we find no mitigating factors present in this case. The Hearing Panel considered as mitigative Balbirer's lack of disciplinary history. While we concur that the existence of disciplinary history is an aggravating factor, we do not concur that the lack thereof is mitigating. Registered individuals are required as part of the terms of their admission to the securities industry to comply with the NASD's Rules and observe high standards of conduct. We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person. We therefore do not find that the absence of a disciplinary history should mitigate the seriousness of the misconduct or the severity of the sanctions imposed. See In re Tammy S. Kwikkel-Elliott, Complaint No. C04960004 (NAC Jan. 16, 1998) (respondent's lack of disciplinary history is not mitigating, particularly when respondent has not been registered very long).

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and JK and that he had agreed to reverse the trade at his own expense. Balbirer ultimately paid approximately \$1,300 to repurchase McDonalds in JK's account.

<sup>5</sup> JK's written complaint is not dated, but GKN received it in November 1994.

The Hearing Panel also considered as mitigative GKN's decision to make the injured customer whole and the fact that GKN recovered from Balbierer the commissions that Balbierer had earned on the trades at issue (thereby denying Balbierer any profits that he might have earned on the trades). We do not concur. The Guidelines recommend consideration of whether the individual voluntarily paid restitution to the injured customer prior to detection of the misconduct by the firm or a regulator. Although GKN made JK whole and reversed Balbierer's commissions, neither occurred as a result of Balbierer's voluntary actions and both occurred subsequent to the firm's investigation of JK's complaint.

The Hearing Panel also found to be mitigative the fact that Balbierer's misconduct involved only one customer and seven trades, and that Balbierer withdrew from the securities industry. We do not agree. The Guidelines instruct us to consider whether the respondent engaged in numerous acts of misconduct over an extended period. We find the fact that Balbierer executed seven unauthorized trades over approximately two months to be aggravating. While execution of even one unauthorized trade is inexcusable, the execution of seven trades and the continuation of the misconduct for two months raise the misconduct (and consequently the sanctions) to a more serious level. Similarly, we find nothing mitigating in the fact that Balbierer has left the securities industry. It is Balbierer's conduct while in the industry that is relevant to our review.

Additionally, the Guidelines recommend consideration of aggravating factors, such as the fact that Balbierer profited from the misconduct through receipt of commissions<sup>6</sup> and the fact that Balbierer's misconduct resulted in injury to JK.<sup>7</sup> See In re Aaron Eugene Granath, Complaint No. C02970007 (NAC March 6, 1998) (lack of disciplinary history, cancellation of unauthorized trades, and reversal of commissions should not mitigate severity of sanctions); In re Ernest A. Cipriani, Jr., 51 S.E.C. 1004 (1994) (lack of disciplinary history and payment of restitution afford no justification for the reduction of sanctions).

We next turn to NAC precedent, which makes clear that unauthorized trading is serious misconduct deserving of severe sanctions. In our recent decision in In re Daniel S. Hellen, Complaint No. C3A970031 (NAC June 15, 1999), we clarified our position with respect to

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<sup>6</sup> The record is devoid of evidence of the amount of Balbierer's commissions on the trades at issue. Although this information would have been useful in our determination of sanctions, its absence from the record is not fatal, since Balbierer does not deny that he earned commissions on these trades. Furthermore, the fact that GKN ultimately reversed Balbierer's commissions does not negate the fact that Balbierer expected to benefit monetarily from his misconduct.

<sup>7</sup> Unlike the Hearing Panel, we cannot conclude that GKN's restoration of JK's account negates the fact that Balbierer's underlying misconduct resulted in customer injury.

sanctions in unauthorized trading cases. In Hellen, we began by observing that the Guideline for unauthorized trading recommends, suspending respondent in all capacities for 10 to 30 days and further suggests that in "egregious" cases the adjudicator should "consider a longer suspension (of up to two years) or a bar." Guidelines (1998 ed.) at 86. We noted in Hellen that, although the Guideline does not define what constitutes an "egregious" case, a number of our earlier decisions had identified two categories of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading and (2) unauthorized trading that is egregious because it is accompanied by certain aggravating misconduct.<sup>8</sup>

We further noted in Hellen that in In re Ted D. Wells, Complaint No. C07970045 (NAC July 24, 1998), we concluded that there was a third category of egregious unauthorized trading -- conduct that was "qualitatively egregious" -- and barred a respondent who had effected a single unauthorized transaction that we concluded was qualitatively egregious. The respondent in Wells admitted that he had intentionally effected an unauthorized trade because he "needed to make some money" at the expense of his customer. We concluded that the respondent's action was tantamount to conversion and warranted a bar. Subsequently, in In re Gerald Cash McNeil, Complaint No. C3B960026 (NAC Jan. 21, 1999), we imposed a two-year suspension on a respondent who we found had engaged in another form of qualitatively egregious unauthorized trading -- unauthorized trading accompanied by high-pressure sales tactics designed to intimidate

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<sup>8</sup> Illustrative of cases imposing a bar or lengthy suspension because of the sheer number of unauthorized transactions are In re Adam S. Levy, Complaint No. C07960085 (NAC Mar. 6, 1998) (imposing a bar where respondent engaged in 16 unauthorized transactions) and In re Aaron Eugene Granath, Complaint No. C02970007 (NAC Mar. 6, 1998) (imposing a bar where respondent executed 23 unauthorized transactions). In cases of this type, evidence of numerous unauthorized transactions often constitutes compelling circumstantial evidence that the unauthorized transactions were not the result of miscommunications or mistakes. In addition, the volume of the violations significantly increases the gravity of the respondent's transgression.

In the second category of unauthorized trading cases, misconduct has been viewed as "egregious" -- and thus warranting a lengthy suspension or bar -- because of the presence of "aggravating misconduct." Efforts to conceal unauthorized trades have been held to constitute one category of such aggravating misconduct. In In re Martin J. Cunnane, Exchange Act Rel. No. 39242 (Oct. 15, 1997), the SEC upheld the imposition of a three-year suspension where the respondent effected four unauthorized trades and tried to conceal the misconduct, and in In re Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992), the SEC upheld a two-year suspension where the respondent effected nine unauthorized transactions, resulting in customer losses, and then attempted to evade the NASD's investigative efforts. A history of unauthorized trading has been held to constitute another category of aggravating misconduct. See, e.g., In re Howard Alweil, 51 S.E.C. 14 (1992) (upholding imposition of a one-year suspension for effecting three unauthorized transactions where respondent previously had been sanctioned for engaging in similar misconduct).

and wear down two customers. When McNeil's tactics did not succeed, he simply disregarded those customers' instructions and effected a total of three unauthorized trades in their accounts.

In Hellen, we attempted to elaborate on the principles underlying the Wells and McNeil decisions and to clarify that, for purposes of determining sanctions, the relevant issue is whether the trading was qualitatively egregious. We concluded in Hellen that two factors are relevant to the determination as to whether unauthorized trading was or was not qualitatively egregious. The first concerns the strength of the evidence that the trades at issue were unauthorized. The second concerns the evidence relating to the respondent's motives.

In the instant case, highly persuasive circumstantial evidence supports our finding that the trades in question were unauthorized. As discussed earlier in this decision, the nature and quality of the securities that Balbirer purchased and sold in JK's account; the fact that when JK complained, some of the unauthorized trades were profitable; and the fact that GKN had underwritten some of the stocks<sup>9</sup> support our finding. Furthermore, Balbirer's "defenses" were refuted by other direct evidence. Balbirer claimed to have talked with JK before each trade, yet GKN's phone records do not show that calls were made to JK's residence at or around the time of the trades. Many of the trades were marked as having been solicited by Balbirer, thereby casting doubt on Balbirer's claim that the calls originated from JK, not Balbirer.<sup>10</sup> Balbirer contended that a co-worker (Suss) overheard his conversations with JK, but Suss denied having heard any of Balbirer's conversations with any clients. Finally, Balbirer asserted that he kept notes of his conversations with JK in his customer book, which Schaffer, his branch manager, had taken. When Schaffer was called to testify, however, he indicated that he found no such notes in the customer book. Additionally, since GKN had restored JK's account to its original position and had covered JK's losses from the unauthorized trading, JK had no financial motive to lie during his testimony before the Hearing Panel (which testimony was consistent with his March 6, 1998 affidavit).

With respect to Balbirer's motives,<sup>11</sup> the evidence suggests that Balbirer intentionally or

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<sup>9</sup> Balbirer's execution of trades in stocks that GKN had underwritten raises questions concerning whether Balbirer was motivated to effect these trades more to promote his firm's and his own interests than to further his customer's interests.

<sup>10</sup> Indeed, one of the trades (the August 3 solicited purchase of KBL) occurred while JK was not even at his home.

<sup>11</sup> In Hellen, we noted that in cases involving evidence that a registered representative acted with a good faith belief that a trade, albeit unauthorized, would benefit his or her customer or that an unclear, ambiguous or misunderstood communication from a customer led a registered representative to believe, honestly but mistakenly, that he or she was authorized to trade, imposition of a lengthy suspension or bar is not appropriate. In this case, Balbirer admitted that his August 17 sale of 400 shares of McDonalds was unauthorized and that it resulted from a misunderstanding between himself and JK. After JK complained to Balbirer's

recklessly engaged in unauthorized trading for his own benefit. As a result of Balbirer's actions, JK suffered monetary losses while Balbirer earned commissions. In addition, when JK initially complained about the trades, Balbirer took no action. GKN, not Balbirer, redressed JK's grievances. Furthermore, the number of unauthorized trades that Balbirer effected (seven) and the fact that he effected them during a two-month period supports a finding that he engaged in a pattern of misconduct. Conduct of this nature represents a clear betrayal of his customer's trust and rises to the level of qualitatively egregious action, warranting the imposition of weighty sanctions. We find that a two-year suspension is appropriate and necessary to impress upon Balbirer and others the importance of following customer instructions and to deter Balbirer from engaging in similar misconduct should he seek to reenter the industry in the future.<sup>12</sup>

With regard to monetary sanctions, we note that the Sanction Guideline for unauthorized trading recommends fining the respondent the amount of any commissions, concessions, or profits, plus \$5,000 to \$75,000, and requiring restitution of customer losses. Guidelines (1998 ed.) at 86. We have not ordered restitution in this matter because GKN made JK whole and recovered its costs from Balbirer.

In light of Balbirer's serious misconduct, we have increased the fine imposed by the Hearing Panel from \$5,000 to \$15,000.<sup>13</sup>

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manager, Balbirer voluntarily reversed the trade at his own expense. The fact that Balbirer effected six other unauthorized trades during the same period as this trade casts doubt on Balbirer's assertion that the McDonalds unauthorized trade resulted from an honest misunderstanding. Additionally, even if Balbirer effected the McDonalds sale because he misunderstood JK's instructions, Balbirer's misconduct must still be viewed as egregious given the evidence regarding the remaining six unauthorized trades.

<sup>12</sup> In light of our imposition of a suspension, we eliminate the censure that the Hearing Panel imposed. In Notice to Members 99-59, we announced our new policy regarding censures. Under our new policy, censures will not be imposed in cases in which the respondent is barred or suspended, since bars and suspensions are severe sanctions that already signify the NASD's disapproval of a respondent's misconduct.

<sup>13</sup> In reaching this conclusion, we have considered all of the factors listed in the applicable Guideline and find that, taken as a whole, these factors require imposition of the aforementioned sanctions. The sanctions are consistent with the applicable Guidelines. See Guidelines (1998 ed.) at 86.

Accordingly, Balbirer is fined \$15,000, suspended in all capacities for two years,<sup>14</sup> and assessed Hearing Panel costs of \$823.90.<sup>15</sup>

On Behalf of the National Adjudicatory Council,

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Joan C. Conley, Senior Vice President and Corporate Secretary

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<sup>14</sup> The suspension imposed herein shall commence 30 days after issuance of this decision.

<sup>15</sup> We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, the registration of any 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.