NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JAMES M. COYNE, SR. (CRD No. 601719) 1961 Kimberwick Road Media, PA 19063 Respondent.	Disciplinary Proceeding No. C9A030041 Hearing Officer – DRP **AMENDED PANEL DECISION** January 3, 2005

Respondent violated NASD Conduct Rules 2310 and 2110 and IM-2310-2 by recommending unsuitable trading in an account. For these violations, Respondent is suspended for four months[1] from association with any member firm in any capacity and fined $10,000. Charges that Respondent churned the account and failed to execute instructions to liquidate the account are dismissed.

Appearances

For the Department of Enforcement: David F. Newman, Regional Counsel, Philadelphia, PA (Rory C. Flynn, Of Counsel).

For the Respondent: Paula D. Shaffner, Esq., Saul Ewing LLP, Philadelphia, PA.

DECISION

I. Procedural History

The Department of Enforcement filed a three-count Complaint on December 26, 2003, charging that from in or about October 1999 through in or about September 2000, James M. Coyne, Sr. (Coyne or Respondent) churned the joint account of customers TD

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[1] The effective dates of the suspension are modified in this Amended Panel Decision.

and SD, recommended quantitatively unsuitable trading in that account, and failed to execute TD's instruction to liquidate the account in February 2000.

Respondent filed an Answer on March 26, 2004, asserting that the volume of trading in the account was suitable for TD and SD and not excessive in light of their experience, objectives, financial resources and circumstances. Respondent also denied that TD had instructed him to liquidate all positions in the account in February 2000 and requested a hearing.

On September 13-14, 2004, a two-day hearing was held in Philadelphia before a hearing panel composed of the Hearing Officer and two members of NASD's District 9 Committee.[2] Enforcement called three witnesses: customer TD, his former assistant, MT, and Respondent's branch manager, Christopher Munafo. Enforcement also introduced sixteen exhibits in evidence.[3] Respondent offered three exhibits and testified on his own behalf.[4] The parties stipulated to the annualized turnover rate, commission-equity ratio and cost-equity ratio in TD and SD's joint account, and to the amount of an arbitration award against Respondent and his firm.[5]

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[2] One panelist is an executive at PNC Investments. Immediately prior to the commencement of the hearing, counsel for Respondent disclosed to Enforcement and the Hearing Officer that her law firm had been recently retained by PNC Investments in a matter involving a registered representative of the firm. Enforcement had no objection to the panelist's participation in this proceeding.

[3] CX-1 – CX-9, CX-11 – CX-14, and CX-16 – CX-18 are in evidence.

[4] RX-1, RX-2 and RX-4 are in evidence.

[5] References to the hearing transcript are noted as Tr. Enforcement's exhibits are cited as CX, while Respondent's exhibits are cited as RX.

II. Findings of Fact and Conclusions of Law

A. Coyne

Coyne is registered with NASD member Janney Montgomery Scott Inc. (Janney) as a general securities representative.[6] Prior to joining Janney in 1995 or 1996, Coyne was associated with several other member firms, including Legg Mason, Advest, Butcher & Singer, and Hornblower & Weeks. Coyne, who received a degree in economics from the University of Pennsylvania and served as an officer in the Navy, has been in the securities industry for more than 40 years. He is seventy years old. (Tr. 443-447, 463.)

B. Trading in the Joint Account of TD and SD

TD and Respondent met when TD joined the Rolling Green Golf Club in the early 1990s. Respondent, who was on the Board of Governors at the club, also chaired a committee on which TD served, and they worked together to appraise the profitability of the food and beverage operation at the club. In January 1997, TD and his wife, SD, opened a joint brokerage account at Janney with a cash deposit of $235,000 from a personal injury award TD received in the fall of 1996.[7] TD, who is a real estate appraiser, had no experience in the stock market other than one joint purchase of common stock with his father approximately twenty years ago. TD attended Temple University but did not receive a degree. He is sixty years old. (Tr. 23-28, 85, 88, 192-193, 358, 449-450, 452-453; CX-2, CX-3.)

Prior to opening the joint account, TD discussed with Respondent his trading goals and objectives. TD told Respondent that he was looking for dividends and growth

[6] Coyne is subject to NASD jurisdiction, because he was registered with a member firm at the time of the alleged violations and when Enforcement filed the Complaint.

[7] TD also opened a separate IRA account, which is not the subject of this Complaint.

but was most interested in protecting the principal. At the time, he and his wife, who is a schoolteacher, had a combined annual income of approximately $125,000 to $135,000 and a net worth over $250,000 excluding their house and cars. The new account form, which TD signed on behalf of his wife, reflected their investment objectives of income and growth.[8] Respondent did not ask TD about his prior investment experience, nor did he ascertain whether TD and his wife had assets in addition to their brokerage account. (Tr. 26, 28-32, 87, 92, 94, 357-361; CX-1, CX-2, CX-4.)

According to TD, he initially discussed potential trades with Respondent, reviewed customer confirmations and account statements, and "charted" his stock purchases. After a month or two, he stopped keeping up with the account, though he once or twice asked Respondent to "check out" a stock for him. According to TD, Respondent called him six or seven times per year to recommend a particular stock. Otherwise, Respondent made all of the trading decisions, which was "fine" with TD, who testified that Respondent had informal discretion to handle the account. TD testified he phoned Respondent once a month to ask "how are we doing" and thought Respondent was "doing a great job," because the account was growing and Respondent made profitable trades in order to recoup money TD had withdrawn.[9] TD trusted Respondent and had no reason to doubt that he was acting in his best interest. (Tr. 38-41, 101-104, 108-109, 156-159, 194-197, 202-203, 468.)

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[8] TD testified that he had his wife's permission to sign the new account form. (Tr. 113.)

[9] After opening the joint account, TD and SD did not deposit additional funds but made several withdrawals from the account, totaling almost $50,000 between January 1997 and January 1999. Respondent sold securities in the account in order to make funds available for them. Respondent testified that when he saw TD withdrawing principal from the account, he spoke to him about opening a margin account, which he believed was suitable for these customers. (Tr. 365-368, 373, 470; RX-4.)

Respondent testified that he and TD "laid out" a trading program, and Respondent talked to him "almost constantly" about what they were doing in the account. Respondent testified that he made proposals, which he and TD discussed and implemented. He conceded, though, that TD was more interested in results than in trades and simply followed Respondent's recommendations. According to Respondent, he exercised time and price discretion in the account. (Tr. 379-385, 458-459, 468.)

In 1999, Respondent's branch manager, Christopher Munafo, told Respondent that the investment objective for TD and SD's joint account should include speculation in light of the level of trading activity Munafo saw on the daily trade blotter and monthly active account reports. Consequently, Respondent asked TD to update the account forms so he "could better serve" him. TD complied, because he had "no problems with whatever [Respondent] wanted to do then…."[10] Respondent testified that TD approved moving to a more aggressive trading posture at that time, and Respondent believed the customer understood the risk involved. With the market "heating up" in 1999, Respondent believed he could develop a program that would provide growth. (Tr. 42-46, 258, 280-282, 309-310, 377, 436-437, 458-459.)

According to TD, he and his wife decided to get out of the market in January or February 2000, after reviewing the year-end or monthly account statement for December 1999, and noting the use of margin in their account. Rather than question Respondent about this issue and create "conflict" or "bad feeling," TD testified that before he went to

[10] TD identified a margin account agreement, dated October 19, 1998, as the document he signed to update his account so Respondent "could better serve" him, but did not recall the letter dated April 13, 1999, authorizing Janney to change his investment objective to include speculation. After his recollection was refreshed with prior testimony, TD testified that Respondent suggested he add speculation as an objective "to better serve him with certain opportunities, and [TD] said fine." Though the April 13th letter refers to TD's IRA account, the parties agreed that it was intended to refer to the joint account. (Tr. 44, 46-48, 113-117, 127-129, 137-138; CX-5, CX-6.)

Arizona in March 2000, he told Respondent to "take [the account] to cash" until after the presidential election in November 2000.[11] According to TD, Respondent concurred but recommended maintaining a small position in one stock, which TD agreed to do.[12] TD further testified that in early March 2000, he spoke to Respondent's assistant, who valued the account at $190,000.[13] (Tr. 48-51, 54-55, 79-82, 160-162.)

MT, who worked for TD at that time, testified that he heard TD instruct Respondent to liquidate the account by telephone and also heard TD confirm his instructions in a subsequent call. MT believed these conversations occurred in February or March 2000, before TD's trip to Arizona. Respondent, however, denies that TD told him to liquidate the account and "go to cash" in any "way, shape or form." (Tr. 238-239, 241-242, 252, 403-404.)

On March 3, 2000, Janney sent an "active account" letter to TD and his wife. After receiving another letter from Janney in April, TD signed the original letter, indicating that he and his wife were aware of the level of activity in their joint account and that all transactions were made with their full approval. He testified that he did so after phoning Respondent, who told him it was a standard letter from the accounting office. According to TD, he thought he was out of the market at this time but did not question Respondent regarding the activity in his account that prompted the letter from Janney. (Tr. 54-55, 70-72, 182-186, 266-268; CX-7, CX-8.)

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[11] On cross-examination, TD appeared to change his testimony regarding the timing of his request to liquidate the account and conceded that he might have given the instruction *after* his Arizona trip, perhaps as late as May 16, 2000, when he withdrew $15,000 from the account. (Tr. 176-178.)

[12] TD's testimony is not supported by account statements for December 1999, when only one security had been purchased on margin. The Panel notes that as of December *1998*, there was significant margin in the joint account, and in January *1999*, all positions were liquidated. All proceeds were deposited in a money market account as of January 30, 1999, but were subsequently reinvested. (CX-13, pp. 80-88, 117-120.)

[13] The Panel notes that as of February 25, 2000, the account value was $176,953.61. *See* CX-13, p. 124.

TD testified that he saw Respondent at the club on April 26, 2000 and said, "Did I call this one right or what? We should have a minimum of $150,000 plus the stock you wanted us to retain." According to TD, Respondent told him the account balance was approximately $110,000. TD was "floored," but said nothing. He turned and walked away.[14] (Tr. 174-175; CX-9.)

Two days later, TD suffered a stroke. Respondent phoned TD while he was hospitalized and during his recovery at home. According to Respondent, he spoke to TD about every trade in the joint account, so he "assumes" he spoke with TD about trading in the account during May 2000, while TD was recuperating. Respondent's contemporaneous notes from this period appear to reflect conversations with TD about the account. (Tr. 56, 385-387, 427-434; CX-16, pp. 123, 126-128.)

During a meeting at TD's home on June 8, 2000, TD held Respondent responsible for losses in the account; Respondent asked for 60 days to recoup some of the losses. TD, who was experiencing memory lapses as a result of his stroke, prepared a letter to memorialize this conversation, which MT delivered to the Janney branch office where Respondent worked. According to Respondent and his branch manager, the firm never received the letter.[15] (Tr. 60-63, 167, 213-220, 252, 271-272, 286-288, 405, 422; CX-9.)

On August 29, 2000, TD and Respondent again met at TD's home. TD stated that he wanted the account value "up to $190,000" and to see growth in the account in the

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[14] TD gave a different version of what was said at this meeting during his direct examination, but on cross-examination, he conceded that the most accurate account was reflected in his letter of June 8, 2000. (Tr. 54-55, 171-174; CX-9.)

[15] Respondent's notes dated June 9, 2000 reflect a conversation with TD regarding a stock purchase. Respondent also wrote "asked about <u>letter</u>?" and "still want to trade to build value – ok." Respondent believes TD asked him about a letter but Respondent did not request a copy of the letter or ask what it concerned. (Tr. 416-418, 421; CX-16, p. 137.)

next 60 days. In late October 2000, TD retained an attorney, who contacted Respondent regarding TD's claim for $83,000 plus interest. In April 2001, TD and SD filed an arbitration claim against Respondent and Janney, which resulted in a joint and several award of $98,676.43.[16] Respondent paid half of the amount. (Tr. 66-69, 438, 459-460; CX-11; RX-2; Stipulation.)

Between October 29, 1999 and September 30, 2000, TD and SD lost approximately $61,000 in their joint account.[17] During this period, the turnover rate was 8.9, the commission-equity ratio was 29%, and the cost-equity ratio was 32%. (CX-13; Stipulation.)

C. Discussion

The charges considered by the Hearing Panel were whether Respondent: (1) churned TD and SD's joint account, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and NASD Rules 2210 and 2110; (2) recommended unsuitable trading in the account, in violation of NASD Rules 2310 and 2110 and IM-2310-2; and (3) failed to execute TD's instructions to liquidate the account, in violation of NASD Rule 2110.

1. Churning

Churning violates the antifraud provisions of the Exchange Act[18] and NASD Rules 2120 and 2110.[19] "Churning occurs when a securities broker buys and sells

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[16] As a result of this complaint, Janney placed Respondent on special supervision. (Tr. 283-285, 288-291.)

[17] The Complaint alleges that Respondent engaged in misconduct from in or about October 1999 through in or about September 2000. The Hearing Panel reviewed monthly account statements in evidence and noted the approximate amount lost during this period. (CX-13.)

[18] *Donald A. Roche*, Exchange Act Rel. No. 38742, 1997 SEC LEXIS 1283 (June 17, 1997).

[19] Conduct Rule 2120, NASD's anti-fraud rule, parallels SEC Rule 10b-5. *Dep't of Enforcement v. U.S. Rica Financial, Inc.*, No. C0100003, 2003 NASD Discip. LEXIS 24, *14, n.5 (NAC Sept. 9, 2003).

securities for a customer's account, without regard to the customer's investment interests, for the purpose of generating commissions." *Sandra K. Simpson*, Exchange Act Rel. No. 45923, 2002 SEC LEXIS 1278, at *52 (May 14, 2002), quoting *Olson v. E.F. Hutton & Co*., 957 F.2d 622, 628 (8th Cir. 1992) (other citations omitted).

Churning has been found where the broker exercised control over an account, trading was excessive in light of the investment objectives, and the broker acted with intent to defraud or with reckless disregard for the interests of the customer. *See Dep't of Enforcement v. Castle Securities*, No. C3A010036, 2004 NASD Discip. LEXIS 1, at *14 (NAC Feb. 19, 2004); *Donald A. Roche*, Exchange Act Rel. No. 38742, 1997 SEC LEXIS 1283, at *12-13. Here, Enforcement failed to prove one of the three elements.

a. Control

Control is established if the account is discretionary (*Peter C. Bucchieri*, Exchange Act Rel. No. 37218, 1996 SEC LEXIS 1331 (May 14, 1996)), or if the broker exercises *de facto* control of the account. *De facto* control of an account may be shown when the client does not understand the trading activity in his or her account or routinely follows the broker's advice. *Dist. Bus. Conduct Comm. v. Gliksman*, No. C02960039, 1999 NASD Discip. LEXIS 12, at *24 (NAC Mar. 31, 1999).

There was conflicting testimony on this issue. TD testified that he did not review monthly account statements or confirmations and essentially trusted Respondent to handle the account. According to TD, he phoned Respondent once a month to check on the account and believed Respondent was doing a great job. Furthermore, he simply complied when Respondent requested that TD change the investment objective to include speculation. Though TD did not give Respondent written authority to exercise discretion

in trading the account, TD essentially claims to have turned over decision-making to Respondent.

Respondent testified that he discussed every trade with TD, and his contemporaneous notes appear to corroborate that they had frequent contact. Nevertheless, Respondent acknowledged that TD was more interested in his balance than the trading in this account, and conceded that TD routinely followed the broker's advice. Thus, even if Respondent's testimony is credited, TD was not directing trading in the account. He simply agreed with and followed Respondent's advice. Accordingly, the Hearing Panel finds that Respondent controlled TD and SD's joint account.

b. Excessive trading

Several factors, including the turnover rate, the cost-equity ratio, "in and out" trading, and the number and frequency of trades in an account may provide a basis for a finding of excessive trading. *Gliksman*, 1999 NASD Discip. LEXIS 12, at *25 (other citations omitted). It is generally recognized that an annual turnover rate of six reflects excessive trading (*Bucchieri*, 1996 SEC LEXIS 1331, at *11, n.11, citing *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814, 821 (9th Cir. 1980)), though lower rates may provide "strong support" for a finding of liability. *See, e.g., Roche*, 1997 SEC LEXIS 1283 (turnover rates of 3.3, 4.6 and 7.2); *Michael H. Hume*, Exchange Act Rel. No. 35608, 1995 SEC LEXIS 983 (Apr. 17, 1995), citing *Samuel B. Franklin & Co.*, Exchange Act Rel. No. 7407, 1964 SEC LEXIS 562 (Sept. 3, 1964) (turnover rates of 3.5 and 4.4).[20]

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[20] The turnover rate is calculated using the "Looper Formula," named for *Looper & Co.*, 38 SEC 294 (1958), which divides the total cost of purchases made during a given period by the average monthly investment. In accounts that primarily hold securities rather than cash, a modified Looper formula is used, which divides the total cost of purchases by the average monthly equity. *See Dep't of Enforcement v. Stein*, No. C07000003, 2001 NASD Discip. LEXIS 38, at *16, n.15 (NAC Dec. 3, 2001), citing *Allen George Dartt*, 48 SEC 693 (1987).

The parties stipulated that for the relevant period, October 1999 through September 2000, the turnover rate in this account was 8.9, the commission-equity ratio was 29%, and the cost-equity ratio was 32%. The high turnover rate alone reflects excessive trading. This finding is further supported by high commission-equity and cost-equity ratios, which measure the amount an account must appreciate on an annual basis to cover commission and other costs. *See Frederick C. Heller*, Exchange Act Rel. No. 31696, 1993 SEC LEXIS 14, at *4 (Jan. 7, 1993) (excessive trading is established by a high cost-equity ratio, i.e., costs associated with operating the account, commissions plus margin interest). Respondent himself admitted that the number of trades (208), turnover rate (8.95) and commission-equity ratio (29%) seemed high.[21]

Turning to the investment objectives, the new account form lists income and growth as the primary investment goal. Based on Respondent's recommendation, TD added speculation as an investment objective in April 1999. Though Respondent testified that TD approved moving to a more aggressive trading posture at that time, Respondent's more aggressive approach was not suitable for TD and SD in light of their financial situation and needs, as discussed more fully below.[22]

The Hearing Panel finds that the level of trading activity in this account was excessive and at odds with the customer's financial needs and objectives. The high turnover rate, commission-equity and cost-equity ratios support this conclusion, and the Panel finds there was excessive trading in TD and SD's joint account.

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[21] Tr. 497-499; CX-17, p. 23.

[22] *See* p. 14 *infra.*

c. Scienter

For excessive trading to constitute churning, there must be scienter. The essential issue is whether the volume of transactions, in light of the nature and objectives of the account, was so excessive it indicates the broker's intention to profit at his customer's expense. *Castle Securities*, 2004 NASD Discip. LEXIS 1, at *14-15, citing *Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1368 (7th Cir. 1983). As discussed, the volume of trading in the account was excessive.

Based on the credible evidence presented at the hearing, however, the Panel cannot conclude that Respondent acted with intent to defraud or with reckless disregard[23] of his customers' best interest. Though the volume of transactions was excessive, there is no evidence that Respondent's intent was to profit at his customers' expense. Rather, the Panel finds that Respondent was pursuing an aggressive trading strategy to increase the value of his customers' account. This approach worked well during the period of "exuberance" in 1999 and early 2000, but was much less successful when the market started to decline thereafter.[24] Furthermore, the Panel believes that Respondent continued to engage in this risky strategy in a misguided effort to increase the value of the account after TD expressed displeasure with Respondent's performance, not to earn hefty commissions.

[23] Recklessness has been held sufficient to satisfy the scienter requirement of Section 10(b), Rule 10b-5 and NASD Conduct Rule 2120. *See, e.g., Dep't of Enforcement v. Fiero*, No. CAF980002, 2002 NASD Discip. LEXIS 16, at *62 (NAC Oct. 28, 2002).

[24] As discussed below, the Panel finds there is insufficient evidence to support the charge that TD instructed Respondent to liquidate the account in February 2000.

Enforcement bears the burden of proof and has failed to demonstrate by a preponderance of the evidence that Respondent acted with the requisite scienter.[25] Accordingly, the Panel dismisses the charge that Respondent churned TD and SD's joint account in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as NASD Conduct Rules 2120 and 2110, as alleged in the first cause of the Complaint.

2. Unsuitability

A registered representative must have a reasonable basis for believing that a recommended transaction is suitable based on the customer's investment objectives and financial situation. *See* NASD Conduct Rule 2310. Suitability usually refers to the quality of the recommended security, but the quantity of trading in an account may also render transactions unsuitable. *Paul C. Kettler*, Exchange Act Rel. No. 31354, 1992 SEC LEXIS 2750 (Oct. 26, 1992). "Excessive trading represents an unsuitable frequency of trading and violates NASD suitability standards." *Id.* at *5.

In considering the churning charge, the Hearing Panel found that Respondent controlled TD and SD's joint account, because TD deferred all trading decisions to him. Based on the turnover rate, commission-equity and cost-equity ratios, the Panel also found that Respondent engaged in excessive trading in those accounts, which conflicted with his customer's financial needs and investment objectives.[26]

Even if the Panel were to credit Respondent's testimony that TD desired and approved of the aggressive approach Respondent recommended, it was his obligation to

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[25] Enforcement argues that Respondent's conduct was reckless, but the Panel concludes that Respondent's conduct was not "an extreme departure from the standards of ordinary care," and thus did not rise to the level of scienter required to establish churning. *Cf. Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *44-45 (NAC Jun. 25, 2001).

[26] *See* pp. 10-11 *infra.*

determine the type and amount of trading suitable for his customers. Without question, it is a broker's "duty to refrain from making recommendations that are incompatible with the customer's financial situation and needs," regardless of the customer's desire to engage in speculative or aggressive trading. *Dep't of Enforcement v. Chase*, No. C8A990081, 2001 NASD Discip. LEXIS 30, at *17 (NAC Aug. 15, 2001) (other citations omitted).

Here, Respondent never ascertained his customers' financial situation or needs or their investment experience. He essentially assumed that TD and SD were people of means, because he knew where they lived, what cars they drove, and that they belonged to his golf club. He never determined whether they had any assets other than their account at Janney, even though TD and SD deposited no additional funds after opening the account, and Respondent was forced to sell securities to make cash available for the numerous withdrawals TD made from the account. Respondent conceded that he did not perform an in-depth analysis of TD and SD's financial situation.[27]

Similarly, after working with TD to appraise the profitability of the food and beverage operation at the golf club, Respondent simply decided that TD was a sophisticated businessperson. He never had any discussions with TD regarding his prior investment experience or lack thereof.[28]

Nevertheless, he advised these customers to open a margin account and subsequently recommended that they pursue an aggressive trading strategy that included the use of margin and frequent trading. By recommending and pursuing an aggressive strategy in a volatile market, for customers who did not have the financial resources to

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[27] Tr. 355, 357, 362-364.

[28] Tr. 358-360.

withstand significant losses, Respondent breached his duty to recommend and pursue a course of trading that offered a degree of risk commensurate with his customers' financial situation and needs. Thus, the Hearing Panel finds that Respondent engaged in trading in TD and SD's joint account that was quantitatively unsuitable, in violation of NASD Conduct Rules 2310 and 2110 and IM-2310-2, as charged in the second cause of the Complaint.[29]

3. Failure to execute

The third cause of the Complaint alleges that Respondent failed to execute TD's instruction in February 2000 to liquidate the joint account. The Panel was not persuaded that TD so instructed Respondent.

First and foremost, the monthly account statements do not support TD's explanation for liquidating the account. TD testified that the decision to "take the account to cash" was prompted after he and his wife reviewed their year-end or monthly account statement for December 1999 and observed that many securities had been purchased on margin. A review of the December 1999 monthly statement, however, shows that of fifteen securities in the account, fourteen were cash positions.[30]

A review of the account statement for December 1998, however, shows that every security was held in the margin account. Respondent then liquidated the entire account in January 1999.[31] But for the year, this scenario is entirely consistent with TD's testimony

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[29] A violation of an SEC or NASD rule also constitutes a violation of Conduct Rule 2110's ethical obligation to observe high standards of commercial honor and just and equitable principles of trade. *See Steven J. Gluckman*, Exchange Act Rel. No. 41628, 1999 SEC LEXIS 1395, *22 (July 20, 1999) (citations omitted).

[30] *See* CX-13, pp. 117-119. There is no year-end statement.

[31] CX-13, pp. 80-87. Shortly after taking the account to cash in January 1999, the account statements show that TD and SD began to reinvest in the market.

regarding the instruction he gave to Respondent and the reason for it. The Panel believes that TD gave the directive to liquidate the account in December 1998, not in December 1999, and notes that Respondent carried out TD's wishes at that time.

TD also appeared confused about the timing of the instruction he claims to have given in 2000. At first, he testified that he told Respondent to take the account to cash before leaving for Arizona in March 2000. He eventually conceded, however, that he may not have told Respondent to liquidate the joint account until mid-May 2000, two months after his trip.[32]

The Panel notes that TD changed his testimony several times on cross-examination, or gave explanations that were inconsistent with other evidence. By his own admission, TD experienced memory problems as a result of his stroke in April 2000. In light of the problems with his testimony, the Panel finds that Enforcement has not shown by a preponderance of the evidence that in or about February 2000, Respondent failed to carry out TD's instruction to liquidate all securities in his joint account. Thus, the Panel dismisses the charge that Respondent violated NASD Conduct Rule 2110 for failing to execute a customer's order, as alleged in the third cause of the Complaint.

III. Sanctions

Enforcement seeks a fine and suspension for Respondent's misconduct and requests restitution to the customers.[33]

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[32] Though the Panel found MT credible in general, it is difficult to believe he can specifically recall when two phone conversations occurred -- discussions that took place more than four years ago and had little, if any, importance to MT. Accordingly, the Panel does not credit his testimony that TD's calls about liquidating the account occurred in February or March 2000.

[33] Enforcement requested a fine of $10,000 and suspension of one year (a $5,000 fine and nine month suspension for the churning/unsuitable trading violations alleged in the first two causes of the Complaint, and a $5,000 fine and three month suspension for the failure to execute alleged in the third cause of the Complaint). Respondent suggested that a modest fine and suspension were more appropriate.

NASD Sanction Guidelines (Guidelines) for unsuitable trading recommend a fine of $2,500 to $75,000, plus the amount of financial gain. In addition, they recommend a suspension in any or all capacities for ten business days to one year. In egregious cases, a longer suspension or a bar is recommended. Guidelines at 97 (2004 ed.).

The Guidelines list no specific factors for adjudicators to consider when imposing sanctions for unsuitable recommendations, but the Hearing Panel finds Respondent's misconduct was serious. The turnover rate, commission-equity and cost-equity ratios were quite high. Though the Panel does not believe Respondent acted with intent to defraud his customers or with reckless disregard of their best interests, his actions demonstrated a cavalier approach to his customers' financial needs that resulted in injury to TD and SD.

Though Respondent testified that he has been in the securities industry for more than forty years and never had a complaint, the lack of a disciplinary history is not a mitigating factor when determining sanctions. *Dep't of Enforcement v. Roethlisberger*, No. C8A020014, 2003 NASD Discip. LEXIS 48, *18 (NAC Dec. 15, 2003). In light of his vast experience in the industry, it is troubling that he merely assumed that TD and SD had significant financial resources beyond the joint account he controlled. In that regard, he violated the fundamental tenet that a registered representative must "know the customer."

For these reasons, the Hearing Panel believes that Respondent's wrongdoing warrants a significant sanction, but is mindful that only one customer account was involved. Accordingly, Respondent is suspended for four months from association with any member firm in any capacity and fined $10,000. Because the evidence does not

adequately quantify the customers' losses, the Hearing Panel is unable to order restitution and notes that TD and SD have pursued other avenues to obtain such relief.

IV. Conclusion

Respondent James M. Coyne, Sr. violated NASD Conduct Rules 2310 and 2110 and IM-2310-2 by recommending unsuitable trading in TD and SD's joint account. For these violations, Respondent is suspended for four months from association with any member firm in any capacity and fined $10,000. In addition, Respondent shall pay costs in the amount of $4,070.80, which includes an administrative fee of $750 and hearing transcript costs of $3,320.80. All other charges are hereby dismissed.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of NASD, except that if this Decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on Tuesday, February 22, 2005 and with the close of business on Tuesday, June 21, 2005.

SO ORDERED.

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Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: January 3, 2005
Washington, DC

Copies to: Paula D. Shaffner, Esq. (*via facsimile and first class mail*)
James M. Coyne, Sr. (*via overnight and first class mail*)
David F. Newman, Esq. (*via electronic and first class mail*)
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