NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. STEPHEN P. DUNBAR (CRD No. 2041644), Respondent.	Disciplinary Proceeding No. C07050050 Hearing Officer – SNB **HEARING PANEL DECISION** August 10, 2006

Respondent (1) engaged in unsuitable trading in customer accounts, in violation of Rules 2310 and 2110; (2) provided customers with false and misleading account summaries, in violation of Rule 2110; and (3) exercised discretion over customer accounts without written authority and exceeded the scope of his oral discretionary authority, in violation of Rules 2110, 2510 and IM-2310. For providing customers with false and misleading account summaries, Respondent is barred. In light of the bar, no further sanctions are imposed for Respondent's other violations.

Appearances

Gene E. Carasick, Esq. and Joel R. Beck, Esq., Atlanta, GA, Rory C. Flynn, Esq., Washington, DC, of Counsel, for Complainant.

Stephen P. Dunbar, pro se.

DECISION

I. Procedural History

On June 27, 2005, the Department of Enforcement filed a three-cause Complaint. The first cause charges that Respondent Stephen P. Dunbar ("Respondent") engaged in a course of unsuitable trading in the accounts of customers GP and HP ("G&HP"), by engaging in excessive trading, investing in unduly concentrated equity positions, incurring unauthorized and excessive margin debits, and exceeding the scope of his

discretionary authority. The second cause charges that Respondent provided false and misleading quarterly account summaries to G&HP. The third cause charges that Respondent exercised discretion without written authority, and engaged in unauthorized trading.

Respondent filed an answer denying the charges and requesting a hearing, which was held in Atlanta, Georgia on January 11, 2006, before a Hearing Panel that included a Hearing Officer and two members of the District 7 Committee.[1] The Department of Enforcement called five witnesses. Respondent testified on his own behalf.

II. Facts

A. Respondent

Respondent has been associated with a number of member firms since entering the securities industry in 1990. He was registered with Register & Akers Investments, Inc. ("Register & Akers"), from April 2000 until April 2002, during which time the violations in the Complaint are alleged to have occurred. From April 2002 through October 2005, he was associated with another NASD Member. At the time of the hearing, Respondent was not associated with an NASD Member. Respondent has no prior disciplinary history. CX-1.

B. G&HP Open Accounts with Respondent

Respondent first met G&HP through a mutual friend in 1991 – just a year after Respondent began in the securities industry. G&HP were, at the time, a young, newly married couple with a modest income. They had recently moved to Florida, and were

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[1] Enforcement offered Complainant's Exhibits "CX" 1-19 and 7A, which were admitted without objection. Exhibit CX-20 was excluded on the basis of undue prejudice to Respondent. Respondent offered Respondent's Exhibits "RX" A-G, which were admitted without objection. Citations to the Hearing transcript are cited as "Tr. p."

interested in opening retirement accounts. Tr. 28, 29. They had no prior investment experience. They opened two $2,000 retirement accounts with Respondent, who was their first broker. Id.

G&HP considered Respondent a friend, and socialized with him on a regular basis. Id. As Respondent changed firms through the years, G&HP transferred their accounts so that Respondent could continue to be their broker. Tr. 28-30, 57.

In May 2000, G&HP opened accounts with Respondent at Register & Akers. Tr. Id. At this point, G&HP's assets and income had dramatically increased. By 2001, GP's annual compensation had reached in excess of $2 million and he had a significant equity interest in his firm. Additionally, G&HP held well over $2 million in assets in their accounts at Register and Akers. CX-11, 12; Tr. 39, 160.

C. G&HP's Investment Objectives

While there is no dispute that G&HP had substantial financial resources, there is a dispute as to their investment objectives. G&HP testified that they wanted to save for the future, and were looking for conservative investments.[2] Tr. 33, 34, 78, 81, 82. GP explained that he and Respondent agreed on an asset allocation of 2/3 bonds, and 1/3 equities.[3] Tr. 34. In support of this, GP noted that, at one point, he interviewed other brokers and financial planners; however, he decided to stay with Respondent, because G&HP's chosen investment strategy was so conservative and simple that any broker

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[2] G&HP's account opening forms reflected a growth/return emphasis. However, G&HP did not sign the forms, and did not recall telling Respondent that this was their objective. CX-11; Tr. 67-69. Nor did Respondent assert that the forms reflected Respondents' objectives. Accordingly, the Panel gave the forms no weight.

[3] GP asserted that Respondent prepared a document that GP maintained in his files, which reflected G&HP's conservative and easy-to-follow investment objectives. Tr. 35, 72. However, this document was not offered as evidence.

could serve them. Tr. 58, 59. Because they knew and trusted Respondent, G&HP decided to keep their accounts with him. Tr. 57-59.

On the other hand, Respondent contended that G&HP were not conservative investors. Tr. 158-161. Although Respondent acknowledged that G&HP wanted to own mutual funds and municipal bonds as their core holdings, Respondent also asserted that G&HP were willing to take on considerable risk for the opportunity of higher returns in their equity investments. Id.

In support of this, Respondent offered summaries indicating that in 1998 and 1999, several years prior to the period at issue in this case, G&HP's accounts engaged in short-term trading in approximately 16 stock positions, ranging in price from approximately $3,000 to $114,000, with an average position in the $20,000 range. Id.; RX-A. Respondent highlighted two such transactions in the 1998-1999 timeframe, which he characterized as short-term trading in small cap securities. In the first transaction, the account invested $114,000 in one security, with a sale of this position two days later for a $5,000 gain. In the second, the account invested $30,000 in another security, with a sale one week later for a $21,000 loss. Id.

Respondent also pointed to GP's decision in 1998, over Respondent's objection, to invest in a high-risk private placement. Specifically, Respondent asserted that GP initially wanted to invest $100,000 in this private placement, but Respondent highlighted the risks, and recommended that GP reduce the investment to $50,000, which GP did.[4] Tr. 31, 159, 160. G&HP lost their entire investment. Tr. 160.

[4] GP testified that he chose to invest in this private placement because the issuer's CEO was a major customer, and others in the industry also chose to invest. Tr. 30, 31.

Based upon the evidence presented, the Panel finds that G&HP's investment objectives at the relevant time included an asset allocation of 2/3 bonds and 1/3 equities. The Panel also finds that G&HP were willing to take moderate risk as to the 1/3 of the account allocated to equity. However, this risk did not include the use of margin.

D. Trading Activity in G&HP's Accounts

Throughout the year 2000, trading in G&HP's accounts was generally consistent with the conservative 2/3 bonds, 1/3 equities allocation that GP testified was their investment strategy. Moreover, as a general matter, trading was not active, and there was no margin trading. However, beginning in March 2001 for GP's account, and June 2001 for HP's account, activity dramatically changed.[5] CX-2, 3, 4, 10, 12, 13; Tr. 87-90. Throughout this period, it is undisputed that Respondent generally exercised discretion over trading in G&HP's accounts.

In particular, Respondent purchased over $11 million in equities in GP's account during the 13 months beginning in March 2001. CX-10. During this period, Respondent accumulated seventeen equities in the account, each in excess of $200,000. In fact, three of these positions exceeded $1 million. CX-6. The average net value of the account for the same period was over $1.6 million. The annualized turnover ratio for this activity is 6.2.[6] The cost-to-equity ratio – the percentage GP would have to earn to break even –

[5] Although G&HP had five accounts with Respondent at Register & Akers, only two accounts – the GP and HP individual accounts – are at issue. Tr. 11.

[6] Turnover ratio is a well-accepted tool in evaluating the activity level of a securities account. "The turnover ratio is calculated by applying the 'Looper formula,' named after In re Looper & Co., 38 S.E.C. 294 (1958), which divides the total cost of purchases made during a given period by the average monthly investment. … The turnover ratio is computed 'by dividing the aggregate amount of the purchases by the average cumulative monthly investment, the latter representing the cumulative total of the net investment in the account at the end of each month, exclusive of loans, divided by the number of months under consideration.' ... A modified Looper formula divides the total cost of purchases by the average monthly equity." DBCC v. Pinchas, 1998 NASD Discip. LEXIS 59 at n.6 (NAC June 12, 1998) (citations omitted), aff'd, Exch. Rel. Act No. 41,816,1999 SEC LEXIS 1754 (Sept. 1, 1999).

was 8.9%.[7] CX-10, 12; Tr. 90-93. However, far from breaking even, the account incurred a loss of approximately $1,383,000 during this period. The loss resulted, in part, from the leverage and costs associated with the heavy margin trading in the account, which began in June 2001. The account's margin balance reached a high of $3,365,781 in January 2002. Between June 2001 and April 2002, GP paid over $100,000 in margin interest. CX-4. This heavy use of margin amplified the risk of the trading activity in the account.

Similarly, during the ten-month period beginning in June 2001, Respondent purchased $2.4 million in equities in HP's account. CX-10. During this period, Respondent accumulated four positions, each in excess of $200,000. CX-6. The average net value of the account for this period was approximately $400,000. The annualized turnover ratio in the account was 7.4, and the cost-to-equity ratio was 9.3%. CX-10. The account incurred a loss of approximately $120,000 for activity during this period. CX-8. This loss was partially attributable to heavy margin trading in the account, which began in August 2001. The account's margin balance reached a high in March 2002 of just under $600,000. Between July 2001 and April 2002, HP's account paid over $19,000 in margin interest. CX-4.

Respondent also disregarded G&HP's specific instructions regarding the use of funds in the accounts. For example, in December 2001, GP deposited a $1.474 million bonus check into his account. HP notified Respondent that the funds would soon be used

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[7] The cost-to-equity ratio "is sometimes expressed as the 'break-even cost factor.' The phrases refer to identical calculations. ... This calculation represents the percentage of return on the customer's average net equity needed to pay broker/dealer commissions and other expenses, such as margin interest. Put another way, because of the transaction costs related to trading, the account would need to appreciate that amount to break even." Pinchas, 1998 NASD Discip. LEXIS 59 at n.7 (citations omitted).

to pay off their mortgage, and she would give Respondent wiring instructions when G&HP returned from vacation. CX-14; Tr. 46, 78, 79. However, rather than placing the funds in a money market, Respondent accelerated his trading activity, purchasing almost $4 million in equities in January 2002. On January 22, 2002, when G&HP requested that funds be wired to pay off their mortgage, Respondent had to sell approximately $750,000 in recently purchased equities to fund the transfer. CX-12, p. 96-103; Tr. 101, 102.

E. Respondent's Discretion to Trade G&HP's Accounts

There is no dispute that Respondent directed trading in G&HP's accounts throughout the timeframe at issue.[8] However, according to GP, Respondent did this without authority until August 2001, when GP gave Respondent discretion to invest up to $200,000, with a $50,000 maximum loss.[9] Tr. 41-44. In contrast, Respondent testified that he had "open-ended" discretion to trade the accounts throughout the period at issue.[10] Tr. 191.

The Panel rejects GP's contention that Respondent had no discretion to trade in the accounts until August 2001. In doing so, the Panel considered that GP apparently gave Respondent discretion to select and purchase bonds, as long as the purchases were consistent with the bond laddering strategy they discussed and GP authorized. Tr. 69-71.

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[8] Enforcement did not distinguish between Respondent's authority over HP's account versus GP's account. Nor did Enforcement address whether GP had discretion to direct trading and set investment objectives for HP's account. Accordingly, the Panel does not address these issues. However, the Panel notes that a registered representative may not take direction from persons other than account holders, including spouses, absent the account holder's written authorization, and subject to the firm's approval pursuant to Rule 2510.

[9] Respondent's recollection of the August 2001 conversation was that he and GP agreed that Respondent would attempt to make $200,000 in the account, and, when he did, this money would be segregated in another account in which Respondent would trade.

[10] These differing accounts underscore quite well the importance of the Rule 2510 requirement that discretion be documented and approved by the member firm, so that it may be supervised.

However, the Panel also rejects Respondent's claim of open-ended discretion. As explained above, G&HP wanted to maintain a 2/3 bonds, 1/3 equities balance, and the Panel concludes that Respondent's discretion was consistent with the 2/3 bonds, 1/3 equity allocation. Moreover, the Panel finds that Respondent had no authority to engage in margin trading in the accounts. Tr. 34, 43, 55, 78, 111, 112, 150, 151.

In any event, based upon the margin and high-risk activity in the accounts, there is ultimately no dispute that Respondent exceeded any undocumented discretion that he may have had. Indeed, Respondent acknowledged that "the accounts were handled way too aggressively. I was desperately trying to make the accounts money in a market downturn of which I had never experienced before." Tr. 175.

F. False Account Summaries

Over the course of his relationship with G&HP, and in response to GP's request some years ago, Respondent had a general practice of preparing quarterly account summaries for G&HP. GP originally requested these summaries because he worked long hours and traveled frequently, and the summaries were a helpful way to quickly review the status of his accounts.[11]

Historically, the summaries accurately reflected activity in the accounts. However, beginning in August 2001, they did not. In particular, while the August 2001 summary correctly reflected GP's long-held equity positions, it also reflected a cash position of $276,000, when in fact the account had a margin balance of $1.7 million.[12]

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[11] At the prior firm, and as required by Rule 2510, Respondent sought and received approval from the Compliance Department before providing the summaries to GP. However, he did not seek or receive such approval for this at Register & Akers. Tr. 34, 35, 166.

[12] Respondent presented this quarterly summary to GP during a meeting with GP in Daytona, Florida. Tr. 41.

Moreover, the summary omitted significant new holdings in the account, including: $1 million in Mercury Interactive; $330,000 in Ciena Corp.; $230,000 in Internet Security; $220,000 in BEA Systems; and $85,000 in Rational Software. CX-15, 16; Tr. 102-105. The August 2001 summary for HP's account was also relatively accurate regarding long-held securities positions, but it inaccurately reflected $66,000 in cash, when, in fact, the cash balance was only $5,000. Moreover, it omitted new holdings, including $9,000 in Rare Medium and $10,800 in UAXS Global. Id. Similar inaccuracies appeared in the December and March summaries.

The December summary showed a $200,000 cash balance in GP's account, rather than a $2.4 million margin balance. The summary also omitted significant stock holdings, including $1.4 million in Mercury Interactive; $430,000 in Nextel Communications; $162,000 in Finisar; and $110,000 in Herley Industries. It also reflected a $50,000 cash balance in HP's account, rather than a $440,000 margin balance. Id.

Similarly, the March summary showed a $620,000 cash balance in GP's account, when in fact there was a $2.3 million margin balance. Moreover, new equity holdings in GP's account, including $1.1 million in WorldCom Inc., were omitted from the summary. HP's account also showed a $50,000 cash balance, rather than a $580,000 margin balance. Id.

Respondent attempted to explain the discrepancies, asserting that he prepared the summaries for a different use beginning in August 2001. He contended that the summaries were intended to reflect what the accounts would have looked like without his new equity investments, and thus, they were designed to provide a benchmark to measure

his trading performance. However, he never explained this to G&HP. Tr. 166, 167. Respondent also claimed that G&HP had internet access to their accounts, and received and reviewed account statements and confirmations reflecting activity in the accounts. Tr. 157.

On the other hand, GP claimed that he never looked at account statements or confirmations and had no idea of the activity in his accounts. Tr. 64, 65. The Panel does not credit this, particularly given that GP was a highly successful business executive who held a significant portion of his hard-earned wealth in the accounts. However, the Panel finds that G&HP were in fact misled by the summaries, and they were honestly shocked to learn the extent of the losses in their accounts.[13] The Panel also finds that Respondent intentionally used the false summaries to mislead G&HP, to avoid confronting the dramatic deterioration in the accounts. In reaching this finding, the Panel considered that Respondent never explained that the nature of the summaries changed, nor did Respondent change the heading on the document so that it was descriptive. Moreover, Respondent failed to provide G&HP with a summary of the actual trading as GP had historically requested.

G. G&HP Discover the Facts About Trading in Their Accounts.

Respondent's mishandling of G&HP's accounts came to a head on April 12, 2002, when Respondent met with GP to discuss the status of the accounts. At that meeting, Respondent for the first time told GP that G&HP's accounts had lost $1.5 million. Tr. 50. GP became extremely upset. Respondent apologized and begged to

[13] GP's outrage when Respondent told him the accounts lost $1.5 million supports this finding. Tr. 50.

keep the accounts. Tr. 80. GP refused, and instituted proceedings against Respondent and Register & Akers, culminating in a settlement of G&HP's claims. Tr. 54, 55.

III. Violations

A. Unsuitable Trading - Rules 2310 and 2110

The Complaint charges that Respondent violated Rules 2310 and 2110 by engaging in a course of unsuitable trading in G&HP's accounts.

Rule 2110 requires registered representatives to "observe high standards of commercial honor and just and equitable principles of trade." Rule 2310(a) requires that, in recommending the purchase or sale of a security, an associated person must have a reasonable basis for believing that the recommendation is suitable for the customer, based on the facts disclosed by the customer as to his or her other security holdings and his financial situation and needs.[14] In other words, recommendations must be consistent with the customer's best interests. Wendell D. Belden, Exch. Act Rel. No. 47,859, 2003 SEC LEXIS 1154, at *11 (May 14, 2003).

These obligations equally apply to discretionary transactions effected by members or associated persons. See, e.g., Department of Enforcement v. Lu, No. C9A020052, 2004 NASD Discip. LEXIS 8 (N.A.C. May 13, 2004); aff'd, Exch. Act Rel. No. 51047, 2005 SEC LEXIS 117 (Jan. 14, 2005), aff'd, No. 05-1153 (D.C. Cir. May 9, 2006). ("When a broker effects transactions in an account over which he has discretionary authority, the transactions are implicitly recommended").

Enforcement claims that Respondent engaged in unsuitable trading in G&HP's accounts by engaging in excessive trading in equities, investing in unduly concentrated

[14] Although Rule 2310 refers to the member's obligations, Rule 0115 provides, "Persons associated with a member shall have the same duties and obligations as the member under these Rules."

equity positions, incurring unauthorized and excessive margin debts, and exceeding the scope of his discretionary authority.

Although suitability usually refers to the quality of the recommended security, "[r]ecommending excessive activity in a customer's account may also be unsuitable." Jack H. Stein, Exch. Act Rel. No. 47,335, 2003 SEC LEXIS 338, at *7 (Feb. 10, 2003). Moreover, IM-2310-2 provides that recommending excessive activity in a customer account violates the requirement of fair dealing.

To establish excessive trading, Enforcement must prove two elements. First, Enforcement must show that Respondent had control over trading in the account. Second, Enforcement must show that the level of activity in the account was inconsistent with his customers' objectives and financial situation. Pinchas, 1999 SEC LEXIS 1754, at **11–12 (Sept. 1, 1999).

Control is established if the account is discretionary. Peter C. Bucchieri, Exch. Act Rel. No. 37,218, 1996 SEC LEXIS 1331 (May 14, 1996). Here, it is undisputed that Respondent exercised discretion over the accounts.

There is no single test to determine excessive trading. Rather, there are a number of factors, such as the turnover ratio, the cost-to-equity ratio, and the number and frequency of trades in an account, which may be considered. See, Department of Enforcement v. Gliksman, No. C02960039, 1999 NASD Discip. LEXIS 12 at *25, (N.A.C. March 31, 1999), aff'd, Exch. Act Rel. No. 42,255, 1999 SEC LEXIS 2685 (Dec. 20, 1999). Generally, excessive trading is indicated by a turnover rate in excess of six. David Wong, Exch. Act Rel. No. 45,426, 2002 SEC LEXIS 339, at *14, n.18 (Feb. 8, 2002); Bucchieri, 1996 SEC LEXIS 1331, at *11, n.11, citing Mihara v. Dean Witter &

Co., Inc., 619 F.2d 814, 821 (9th Cir. 1980). Excessive trading is also generally indicated where there is a cost-to-equity ratio in excess of 20%. Pinchas, 1999 SEC LEXIS 1754, at *18. In addition, in and out trading by itself can provide a basis for finding excessive trading. Id. at *15. Moreover, the use of margin leverages an account's exposure to speculative trading, and increases the costs of such trading. See Department of Enforcement v. Jack H. Stein, No. C07000003, 2001 NASD Discip. LEXIS 38, *15 (N.A.C. Dec. 3, 2001), citing, David A. Gringas, 50 SEC 1286 (1992), and additional authority.

In this case, GP's account had an annualized turnover ratio of 6.2, and a cost-to-equity ratio of 8.9%. HP's account had an annualized turnover ratio of 7.4 and a cost-to-equity ratio of 9.3%. The turnover ratios in the accounts are indicative of excessive trading. This is particularly so given that a significant portion of the portfolio was held in municipal bonds which were not subject to trading, which would tend to reduce the overall turnover ratio for the account.[15]

Respondent also invested in unduly concentrated equity positions, particularly in GP's account, which held seventeen technology stock positions, each in excess of $200,000 during the timeframe at issue. In fact, three of these positions exceeded $1 million.

Moreover, there is no dispute that margin trading was not consistent with G&HP's investment objectives, nor was it authorized. Nonetheless, Respondent traded the accounts on margin and leveraged the accounts' exposure to the unduly concentrated

[15] While the cost-to-equity ratios of 8.9% and 9.3% in the accounts are under the 20% threshold generally indicative of excessive trading, this does not negate the Panel's finding of excessive trading, particularly given that the analysis was applied to all assets in the account, which included substantial holdings in municipal bonds that were not subject to active trading.

positions in technology equities, resulting in losses of approximately $1.5 million, and margin interest of approximately $120,000 in the accounts.

The Panel finds that Respondent exceeded the scope of his undocumented discretionary authority to trade the accounts. However, the Panel rejects the notion that Respondent's discretion was only granted in August 2001 and was limited to $200,000. Therefore, the Panel must also reject Enforcement's suitability theory based upon the unproven August 2001 grant of discretion.

Nonetheless, the Panel finds that the level of activity in the account, including significant margin trading and high turnover, was a gross departure from G&HP's investment objectives. Accordingly, the Hearing Panel finds that Respondent's recommendations and trading activity were unsuitable and that Respondent therefore violated Rules 2310 and 2110.

B. False and Misleading Account Summaries - Rule 2110

The Complaint alleges that Respondent provided G&HP with false and misleading account summaries. There is no dispute that, beginning August 2001, these summaries did not present an accurate picture of the activity in G&HP's accounts. Respondent argues that his customers should not have been misled, because they could have compared these summaries to their statements and figured out the discrepancies.

Registered representatives, however, have an obligation not to transmit false and misleading documents to their customers. Doing so is a plain violation of Rule 2110's command to "observe high standards of commercial honor…"

Accordingly, the Hearing Panel finds that Respondent provided G&HP with false and misleading account summaries, in violation of Rule 2110.

C. Exercise of Discretion without Written Authority/Unauthorized Trades - Rules 2110, 2510 and IM-2310-2

NASD Conduct Rule 2510(b) provides that "No member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual … and the account has been accepted by the member …."

It is undisputed that Respondent traded equities on a discretionary basis in G&HP's accounts, and that he did so without obtaining written discretionary authority. Respondent therefore violated NASD Rules 2510. See, Paul F. Wickswat, 50 S.E.C. 785, 1991 SEC LEXIS 2482 (1991) (finding a violation when there was oral authorization to make discretionary trades without also obtaining written authority). However, because Enforcement's charge of unauthorized trading is tied to the unproven allegation that discretion was only granted in August 2001, the Panel does not find that Respondent engaged in unauthorized trading *as alleged*.

Accordingly, the Panel finds that Respondent exercised discretionary authority without written authorization, but did not engage in an unauthorized trading in G&HP's accounts as alleged in the Complaint.

IV. Sanctions

The Panel was most concerned by Respondent's preparation of false and misleading quarterly account summaries. The Guideline for falsification of records recommends a fine of $5,000 to $100,000, and, where mitigating factors exist, a suspension of up to two years, or, in egregious cases, a bar. NASD Sanction Guidelines ("Guidelines") at 39. In determining the appropriate sanction, the Guidelines suggest consideration of the nature of the document, and whether there was a mistaken, but good

faith belief of implied authority. Id. Here, the account summary was critically important – quite possibly the only document that G&HP consistently relied upon to reflect activity in their accounts. See, Department of Enforcement v. Bendetsen, Complaint No. C01010025, 2004 NASD Discip. LEXIS 13 (N.A.C. Aug. 9, 2004) (citing DBCC v. Mangan, Complaint No. C10960162, 1998 NASD Discip. LEXIS 33, at *16 (NAC July 29, 1998)) (the creation of false statements "is the antithesis of a registered representative's [duty to uphold] high standards of commercial honor."). Moreover, Respondent could have no good faith belief that he had his customers' authority to create false summaries and provide them to G&HP. The Panel finds that Respondent's conduct is egregious and there are no mitigating circumstances. Accordingly, a bar is the appropriate sanction.

Given this bar, the Panel is not required to impose sanctions for Respondent's other violations. That said, the Panel finds that the record supports imposition of a significant suspension and fine for those violations as well. In particular, with respect to Respondent's suitability violation, on one hand, the Panel considers favorably that Respondent accepted responsibility and deep regret for the unsuitable trading in G&HP's accounts. Moreover, the Panel notes that Respondent's actions were not motivated by personal gain, but rather, Respondent escalated the activity and risk to the accounts in a desperate attempt to recoup losses attributable, in part, to the severe market downturn during 2001 and 2002. Nonetheless, the Panel finds that Respondent's conduct was egregious, particularly given his unauthorized use of margin, and his attempt to hide the account activity from his customers through the use of misleading account summaries. Accordingly, an upward departure from the one year suspension guideline would be

justified. Similarly, given Respondent's gross departure from G&HP's discretion to trade their accounts, the Panel finds that the maximum sanctions for exercising discretion without written authorization provided in the Guidelines would be warranted.[16]

V. <u>Conclusion</u>

Respondent (1) engaged in unsuitable trading in customer accounts, in violation of Rules 2310 and 2110; (2) provided customers with false and misleading account summaries, in violation of Rule 2110; and exercised discretion over customer accounts without written authority and exceeded the scope of his oral discretionary authority, in violation of Rules 2110, 2510 and IM-2310. For providing customers with false and misleading account summaries, Respondent is barred. In light of the bar, no further sanctions are imposed for Respondent's other violations. In addition, Respondent is ordered to pay costs in the amount of $2,092.50, which includes an administrative fee of $750 and Hearing transcript costs of $1,342.50.[17]

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD, except that the bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

HEARING PANEL

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By: Sara Nelson Bloom
Hearing Officer

[16] The Guidelines recommend a fine of $2,500 to $10,000, and in egregious cases, a suspension from 10 to 30 days. Guidelines at 90.

[17] The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

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