

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ANDREW J. HARDIN  
(CRD No. 4534287),

Respondent.

Disciplinary Proceeding  
No. E072004072501

Hearing Officer – AWH

**HEARING PANEL DECISION**

September 8, 2006

**Registered representative exercised discretion in the account of a customer without written authority, parked certificates of deposit in that account, and misrepresented reasons for purchasing the certificates of deposit in that account. Respondent self-reported the violation; there was no firm or customer harm; and the conduct was not motivated by any financial gain. Respondent censured, fined \$10,000, and ordered to pay costs.**

Appearances:

William Brice La Hue, Esq., for the Department of Enforcement

Thomas L. Stephenson, Esq., for Andrew J. Hardin

**DECISION**

**Introduction**

On March 9, 2006, the Department of Enforcement issued a two-cause Complaint against Andrew J. Hardin (“Hardin” or “Respondent”), alleging that on eight occasions over a ten-month period, (1) he exercised discretion without written authority in the account of one customer, and (2) parked certificates of deposit (“CDs”) in that customer’s account prior to reassigning them to another customer to whom he had sold the CDs, and misrepresented that the original purchase was mistakenly put in the first customer’s

account. On March 27, 2006, Respondent filed an Answer admitting that (1) he had certain customers who wanted to purchase CDs; (2) CDs were routinely purchased by other customers as soon as they became available; (3) because he could not always contact his customers immediately, with the verbal permission of another customer, he purchased the CDs in that customer's account; (4) he then contacted his other customers to confirm that they wished to purchase the CDs; and (5) he then transferred the CDs into the interested customers' accounts, giving the reasons alleged in the Complaint. A hearing was held on June 27, 2006, in Atlanta, Georgia, before a Hearing Panel composed of the Hearing Officer and two current members of the District 7 Committee.

### **Findings of Fact<sup>1</sup>**

#### **Stipulated Facts**

Most of the facts in this case are undisputed and have been stipulated in writing.<sup>2</sup> Those stipulations include the following findings:

#### Respondent

Hardin entered the securities business when he was hired by member firm Edward Jones in May 2002. Hardin was 22 years old at the time, and he became registered as a general securities representative in July 2002. Edward Jones placed him in an office in Greenville, South Carolina, with no other licensed personnel, and only a part-time assistant with little or no experience in the securities business. Hardin received at least six weeks of training at Edward Jones, three of which were at its home office in St. Louis, Missouri. Hardin had access to a local mentor, a regional leader, and the IR

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<sup>1</sup> References to the Department of Enforcement's exhibits are designated CX\_; the Respondent's exhibits, as RX\_; and the transcript of the hearing, as Tr.\_.

<sup>2</sup> The Stipulations of Fact are comprised of 29 numbered paragraphs. Counsel for the parties signed the Stipulations on June 16, 2006, and filed them with the Office of Hearing Officers.

Development Department at Edward Jones, although his supervisor and branch manager were located in Edward Jones' home office in St. Louis.

While at Edward Jones, Hardin had no reported customer complaints. Hardin was terminated by Edward Jones in September 2004, and immediately hired by NASD member firm A.G. Edwards & Sons, Inc., where he is currently employed. The NASD CRD system shows no customer complaints regarding Hardin's employment with A.G. Edwards.

### The Violations

Customer CDC maintained a securities account with Edward Jones that was serviced by Hardin. CDC gave Hardin verbal authorization to use his account.<sup>3</sup> Hardin did not obtain written acceptance from Edward Jones of CDC's account as a discretionary account. Moreover, Edward Jones prohibited the use of discretion by its representatives and did not accept accounts as discretionary during the period pertinent to the Complaint.

During the ten-month period from September 2003 through July 2004, Hardin purchased eight CDs for CDC's account. Hardin's total net commissions on the eight purchases amounted to less than \$200.<sup>4</sup>

Hardin purchased the CDs with the intent of transferring them to other customers who had told Hardin that they wanted CDs. Because he could not contact them immediately, Hardin did not buy the CDs directly in the ultimate customers' accounts. The CDs remained in CDC's account until Hardin contacted the ultimate customer who

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<sup>3</sup> The evidence adduced at the hearing expands on these stipulations and is detailed *infra*.

<sup>4</sup> The certificates of deposit ranged in size from \$10,000 to \$30,000, with a mean value of \$18,625. CX-5.

wanted them. Hardin then requested that the original purchases be corrected by reassigning them to the account of the customer who ultimately wanted the CDs.

In requesting that the transactions be reassigned to other customers, Hardin represented on the Edward Jones wire system that the trades were “put in the wrong acct number”; he “entered order in the wrong account”; he “put wrong acct number in”; he was in a hurry and put “wrong acct number”; he “put wrong amount of CD needed in the wrong account”; and “put order in under wrong account number.” Those representations were not technically correct because he intended to purchase the CDs in CDC’s account until the ultimate customers gave him authorization to reassign them.

No customer lost money because of Hardin’s actions alleged in the Complaint, and none of the facts alleged in the Complaint arose because of a customer complaint. Hardin was cooperative with the NASD’s investigation of the facts alleged in the Complaint.

### **Additional Facts Adduced at the Hearing**

#### Use of CDC’s Account

Hardin, 26 years old at the time of the hearing, grew up in an area close to Greenville where his office was located. His customers, who numbered between 100 and 125, were neighbors of one another, went to church together, and referred other customers to Hardin. Hardin had a life-long, close personal relationship with Customer CDC and his wife, a childless couple in their seventies. Hardin sat with them at church and had dinner every Tuesday evening with them. CDC referred a number of customers with large accounts to Hardin at Edward Jones.<sup>5</sup>

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<sup>5</sup> Tr. 53, 55-57, 81, 89.

Approximately 15 of Hardin's customers were retired persons who invested only in CDs. Their investments earned Hardin less than one-half of one percent of his gross commissions. However, most of those customers referred other customers to Hardin. They would tell Hardin when their currently held CDs were coming due, and the dollar amount and interest rate of the CD coming due.<sup>6</sup>

To service these customers, Hardin would check the Edward Jones computerized inventory system to determine the availability of CDs that had been sold back or turned in early to the firm. However, because of the popularity of these CDs, they would be sold within minutes of being added to Edward Jones' inventory. Unlike some other firms, Edward Jones did not have a mechanism for holding a CD until the representative could contact a client who he knew was interested in it.<sup>7</sup> Hardin explained the problem to CDC who told Hardin that he could use his account to hold the CDs if it would help.<sup>8</sup>

In looking for these CDs, Hardin always had a specific customer in mind, as well as a specific dollar amount. Hardin knew that Edward Jones had a specific rule against buying something before a representative had approval from the customer. Therefore, if he could not contact the customer for whom he had a specific CD in mind, he would leave a message for the customer and then purchase the CD for the account of customer CDC. The customer for whom Hardin intended the CD would return Hardin's message by 5:30 or 6:00 p.m. that same day, after which Hardin would rebill the purchase to the account of the intended customer.<sup>9</sup>

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<sup>6</sup> Tr. 54, 55, 58, 79, 81, 82.

<sup>7</sup> CX-10, p. 4; Tr. 55-57, 60, 77

<sup>8</sup> As noted previously, the parties have stipulated that CDC gave Hardin verbal authorization to use his account. In addition, an affidavit from CDC, a letter from CDC's wife, and Hardin's testimony all confirm the fact that Hardin had verbal permission to use the account to hold CDs. RX-1, RX-2.

<sup>9</sup> Tr. 55-58, 67, 70, 82.

## Discovery of Parking

Approximately every six months, Edward Jones would conduct a surprise audit at Hardin's office. During the summer of 2004, as the auditor was leaving his office after completing the audit, Hardin told him about holding CDs in CDC's account. Hardin explained that he was doing so because he believed it was in his customers' best interests. Hardin told the auditor: "This is what I've been doing. Is there a better way to do it?" The auditor told Hardin to stop the practice. Shortly thereafter, Hardin exchanged a series of internal communications with Kelly Coats, an Edward Jones field supervisor, in which Hardin readily admitted what he had done. He wrote to Phillip Wisely, Senior Compliance Officer for Edward Jones: "I now understand this is parking and I have not done it again."<sup>10</sup> On September 14, 2004, Edward Jones filed a Form U-5 stating that Hardin had been terminated because he "acknowledged entering orders in one account with intent to rebill trades to another customer accounts (sic) and gave various reasons for cancel and rebills."<sup>11</sup>

## **Discussion, Conclusions, and Sanctions**

Throughout the course of the investigation, in his Answer to the Complaint, and in his testimony at the hearing, Hardin acknowledged that he (1) exercised discretion in CDC's account without the customer's prior written authorization or the firm's written acceptance of the account as a discretionary one, and (2) parked securities in CDC's account until he could confirm that certain other customers wished to purchase those

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<sup>10</sup> Tr. 59-60; CX-13, CX-15. At the hearing, Hardin testified that, at the time he purchased the CDs in CDC's account, "I didn't think I was parking because . . . I wasn't looking for clients. I knew who wanted them and how much they wanted." Tr. 82. Exhibit C-12, p. 2 is a page of Edward Jones' Compliance Manual that concerns "Parking Securities." However, that policy was in effect as of July 29, 2004, after the events charged in the Complaint. Phillip Wisely was not able to state what the Compliance Manual provided prior to that date. Tr. 51.

<sup>11</sup> CX-1.

securities, and misrepresented to his firm that the original purchases were mistakenly put in CDC's account. By his use of discretion without written authority from the customer and acceptance by the firm of the account as discretionary, Hardin violated NASD Conduct Rules 2510(b) and 2110.<sup>12</sup> By parking securities and misrepresenting that they were mistakenly purchased for CDC's account, Hardin violated NASD Conduct Rule 2110, which provides that a registered person, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

The NASD Sanction Guideline for the use of discretion without written authorization call for a fine ranging from \$2,500 to \$10,000. In egregious cases, the Guideline suggests consideration of a suspension of from 10 to 30 business days.<sup>13</sup> For negligent misrepresentation, the Guideline suggests a fine of \$2,500 to \$50,000, and a suspension of up to 30 business days. For intentional or reckless misconduct, the Guideline suggests a fine of \$10,000 to \$100,000, and a suspension of 10 business days to two years.<sup>14</sup> There is no specific Guideline for parking securities.<sup>15</sup>

The violations all arise out of a common underlying cause – a misguided attempt to secure CDs in short supply for customers who wanted them, but whom Hardin could

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<sup>12</sup> Conduct Rule 2510(b) specifically prohibits the use of discretionary power in a customer's account unless the customer has given prior written authorization, and the account has been accepted in writing by the member firm. A violation of Rule 2510 is a violation of Rule 2110. *Stephen J. Gluckman*, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, at \*22 (July 20, 1999).

<sup>13</sup> NASD SANCTION GUIDELINES, at 90 (2006 ed.).

<sup>14</sup> *Id.* at 93.

<sup>15</sup> The only mention of "parking" in the Guidelines is under the principal considerations for net capital violations. That Guideline suggests consideration of whether a violation was concealed by means of "parking" of inventory or inflating certain calculations. *Id.* at 29. "Parking" in this case has no relationship to the firm's net capital or to any motive other than to benefit Hardin's customers.

not immediately contact to confirm their interest. Accordingly, the Hearing Panel aggregates the misconduct for purposes of imposing sanctions.<sup>16</sup>

Although the Complaint alleges eight purchases of CDs over a period of ten months, the Hearing Panel will batch those instances because the conduct did not result in injury to public investors, and, as noted above, it resulted from a single systematic cause that has since been corrected.<sup>17</sup> Hardin self-reported the violations to an auditor, and there is no evidence that had he not done so, the violations would have been detected in any event. Moreover, when the auditor advised Hardin to stop using CDC's account to hold CDs, Hardin immediately complied with that directive, and, moreover, cooperated in the investigation of his activities, readily admitting what he had done.

At the hearing, Hardin also acknowledged his misconduct, accepted responsibility for it, and expressed contrition. The Hearing Panel found his testimony to be forthright, candid, and credible. His motivation for his actions was solely to benefit a small group of elderly customers, not to enrich himself.<sup>18</sup> Finally, he used CDC's account with CDC's oral grant of discretion, albeit in the absence of any written grant of discretion.

On the other hand, the firm prohibited the exercise of discretion in customer accounts. Moreover, the reasons Hardin gave to the firm for rebilling the purchases were not correct and, at best, lulled the firm into not questioning the transactions.

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<sup>16</sup> See *Dep't of Enforcement v. J. Alexander Securities, Inc., et al.*, No. CAF010021, 2004 NASD Discip. LEXIS 16, at \*69 (NAC Aug. 16, 2004).

<sup>17</sup> NASD SANCTION GUIDELINES, *General Principles Applicable to All Sanction Determinations*, ¶ 4.

<sup>18</sup> One purchase netted him no commission, while the other seven totaled net commissions of only \$173.80. CX-8, CX-11.



Enforcement argues that the violations are egregious and merit a \$10,000 fine and a 60-calendar-day suspension. The Hearing Panel finds the misconduct to be serious and to warrant a fine of \$10,000, which is significant enough to prevent and discourage future misconduct by this respondent, and will deter others from engaging in similar misconduct. However, the Hearing Panel concludes that a suspension would be punitive and not remedial under the particular circumstances of this case.<sup>19</sup> From the outset, he accepted full responsibility for his conduct, and cooperated fully in the investigation of it by the firm and NASD. Moreover, Hardin was terminated by Edward Jones for that conduct prior to regulatory detection.<sup>20</sup> His current employer, who personally appeared on Hardin's behalf, testified that a suspension, at this stage in Hardin's career, would do irreparable harm to that career because the vast majority of his customers come from a tight knit community where any cloud of doubt would be extremely difficult to dissipate over time.<sup>21</sup> Finally, after assessing Hardin's testimony and observing his demeanor during that testimony, the Hearing Panel concludes that Hardin should be able to remain in the securities industry and that he has been chastened by his experience during this proceeding.

Accordingly, for (1) use of discretion without written authorization, in violation of NASD Conduct Rules 2510(b) and 2110, and (2) parking securities and misrepresenting for whom those securities were purchased, in violation of NASD Conduct Rule 2110, Andrew J. Hardin is censured,<sup>22</sup> fined \$10,000, and assessed costs in

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<sup>19</sup> NASD SANCTION GUIDELINES, *General Principles Applicable to All Sanction Determinations*, ¶¶ 1, 2.

<sup>20</sup> *Id.*, *Principal Considerations in Determining Sanctions*, ¶ 14.

<sup>21</sup> Tr. 86-89.

<sup>22</sup> See NASD SANCTION GUIDELINES, p. 9.

the total amount of \$967.25, consisting of a \$750 administrative fee and a \$217.25 transcript fee.

**SO ORDERED.**

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Alan W. Heifetz  
Hearing Officer  
For the Hearing Panel

Copies to:

Via Overnight and First-Class Mail  
Andrew J. Hardin

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