

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL PINO
(CRD No. 1400156),

Respondent.

Disciplinary Proceeding
No. 2010021621201

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

March 15, 2013

Respondent exercised discretion in a customer's accounts without written authority, in violation of NASD Rules 2510(b) and 2110, and FINRA Rule 2010. Respondent is suspended in all capacities for 30 business days, fined \$5,000, and ordered to pay costs.

Appearances

For the DEPARTMENT OF ENFORCEMENT, Complainant, Richard A. March, Esq., and Kevin G. Kulling, Esq., Chicago, Illinois.

Michael Pino appeared pro se.

DECISION

I. INTRODUCTION

Respondent Michael Pino is a former FINRA-registered broker. Most recently, he was associated with Money Concepts Capital Corp. Before he joined Money Concepts, he was associated with Centennial Securities Company, LLC.

One of Pino's customers at Centennial Securities filed a complaint against Pino, which the firm reported to FINRA by filing an amended Uniform Termination Notice for Securities Industry Registration (Form U5). As a result of this filing, FINRA staff opened an investigation. During the ensuing investigation, FINRA staff learned that another

customer, JD, had filed a complaint against Pino with Money Concepts. JD demanded that Money Concepts freeze his account because he had suffered significant loss and Pino had traded the account excessively. JD later supplemented his complaint with a second letter, alleging that he had not authorized the trades Pino made in the account.

FINRA staff investigated JD's complaints and determined that Pino had violated NASD Rules 2510(b) and 2110, and FINRA Rule 2010 by exercising unauthorized discretion in JD's accounts at Centennial Securities and Money Concepts. Accordingly, FINRA's Department of Enforcement initiated this disciplinary proceeding against Pino.¹

Pino contended that he was not guilty of exercising unauthorized discretion in JD's accounts because JD had approved the "earnings strategy" Pino employed in the accounts. Pino contended that JD granted him prior approval to make trades consistent with that strategy, and therefore he did not exercise discretion when he made purchases and sales in JD's accounts that were consistent with the approved strategy.

For the reasons discussed below, the Hearing Panel rejected Pino's defense and concluded that he had exercised discretion in JD's accounts although JD had not granted him written discretionary authority over the accounts and Centennial Securities and Money Concepts had not accepted them as discretionary accounts. Pino thereby violated NASD Rules 2510(b) and 2110, and FINRA Rule 2010. The Hearing Panel determined that the appropriate sanctions are a suspension of 30 business days and a \$5,000 fine.

¹ The FINRA Rules, which include NASD Procedural and Conduct Rules, are available at www.finra.org/Rules. Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, the FINRA procedural rules apply. The conduct rules that apply are those that existed at the time of the conduct at issue.

II. PROCEDURAL HISTORY AND JURISDICTION

Enforcement initiated this disciplinary proceeding on May 16, 2012, by filing the Complaint with the Office of Hearing Officers. Respondent filed an answer on June 13, 2012, and requested a hearing. The hearing was held on November 8, 2012.²

FINRA has jurisdiction of this proceeding pursuant to Article V, Section 4 of FINRA's By-Laws.³ The Complaint alleges that Pino violated NASD and FINRA rules while he was registered with Centennial Securities and Money Concepts, and Enforcement filed the Complaint initiating this disciplinary proceeding within two years after the effective termination date of Pino's last FINRA registration.⁴

III. FINDINGS OF FACT

A. Pino's Background In The Securities Industry

Pino started his career in the securities industry in 1988. In May 2002, he joined Centennial Securities where he was employed as a General Securities Representative until the end of 2008. Pino joined Money Concepts in January 2009, where he was employed as a General Securities Representative until August 31, 2010. Pino is not currently employed in the securities industry.⁵

² The Hearing Panel is composed of a Hearing Officer and two members of FINRA's District 8 Committee. References to the hearing transcript are cited as "Tr." followed by the page number. Enforcement's exhibits are cited as "CX" followed by the exhibit number, and references to Pino's exhibits are cited as "RX" followed by the exhibit number.

³ See Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

⁴ Pino was registered as a General Securities Representative at Money Concepts from January 2, 2009, until September 7, 2010. CX-22, at 2 (extract from Pino's Central Registration Depository record).

⁵ Tr. 90-91; CX-22.

B. Pino's "Earnings Strategy"

Pino developed an "earnings strategy" that he began using for some customers in about 2006 while he was associated with Centennial Securities.⁶ The purpose of the strategy was to garner higher profits by capitalizing on the bounce in a stock's market price immediately following the release of a positive earnings report. Pino viewed the strategy as a reasonable alternative to a buy-and-hold strategy for investors who wanted a higher growth rate.

Pino looked for companies that he expected would jump in price by 5 to 20% following the release of their earnings reports.⁷ To identify such companies, Pino would wait for a sector leader, such as Intel in the technology sector, to release its quarterly earnings report. If the company beat analysts' forecasts, and the company's share price rose by 5 to 15% as a result of the positive news generated by the earnings report, Pino would look for other companies in the same sector that were about to report their quarterly earnings. Once Pino identified a target company, his strategy was to purchase stock in that company the day before it released its earnings report and then sell the next day, or as soon as the stock price "exploded."⁸ If the stock did not react as he expected, Pino sometimes waited to see if its price improved. In other cases, he quickly sold the stock to free up capital and make other purchases employing the same earnings strategy.

Between 2006 and 2008, Pino employed his earnings strategy for ten or fewer customers, including customer JD.⁹

⁶ Tr. 167.

⁷ Tr. 165-66, 177.

⁸ Tr. 165-67, 174.

⁹ Tr. 168.

C. Customer JD

JD retired in 2006 after 38 years at General Motors. At the time he retired, he was 57 years old. JD had a high school education and no investment experience apart from a small IRA account at Fidelity Investments that was part of GM's benefit program. The value of his account was approximately \$48,800 at the time he retired.¹⁰ JD had never worked with a broker or financial adviser before he met Pino.¹¹

JD learned of Pino from DT, a GM co-worker who had moved his IRA from Fidelity to Pino at Centennial Securities.¹² DT told JD how much he was making on his account, which impressed JD. In approximately December 2006, JD called Pino, and they met soon thereafter at JD's home to discuss JD opening an account with Pino at Centennial Securities.¹³ During their conversation, Pino did not discuss his earnings strategy or any specific investment recommendations.¹⁴ They generally discussed placing half of the account in bonds and the other half in stocks.¹⁵ JD told Pino that he did not want to purchase any automotive securities because GM and Chrysler were facing bankruptcy and that he was interested in environmental stocks, which he considered the

¹⁰ Tr. 18-21.

¹¹ Tr. 19-20.

¹² Tr. 19; CX-24, at 1 (Rule 8210 response letter from Pino to FINRA).

¹³ Pino and his wife drove from their home near Grand Rapids, Michigan, on a Sunday to meet with JD at his home in Cleveland, Ohio. The meeting lasted two to three hours. Tr. 22, 52.

¹⁴ Tr. 19, 22, 24.

¹⁵ Tr. 24.

“coming thing.”¹⁶ At the end of the meeting, JD signed the required documentation to open an IRA account at Centennial Securities.¹⁷

D. Pino’s Trading In JD’s Accounts At Centennial Securities And Money Concepts

Pino began purchasing securities in JD’s account shortly after he opened it. Pino made five purchases between January 23, 2007, and the end of the month. Two of the purchases included automotive bonds. He purchased 10,000 bonds issued by General Motors Acceptance Corporation and 15,000 bonds issued by Ford Motor Company¹⁸ although JD had instructed Pino that he did not want to purchase any automotive securities. Pino did not contact JD before he made these purchases. JD was upset when he learned that Pino had bought the GM and Ford bonds, and he called Pino to complain. However, Pino convinced JD to keep the bonds because, unlike stock, they were “guaranteed” even if the companies went into bankruptcy.¹⁹

Over the following 20 out of 23 months, Pino made approximately another 120 purchases and sales in JD’s account applying his earnings strategy.²⁰ Many purchases and sales spanned one to three days, while others spanned much longer periods. For example, Pino purchased 255 shares of Energy Resources on February 7, 2007, which he sold on

¹⁶ Tr. 22-23.

¹⁷ Tr. 25. The new account form JD signed on January 14, 2007, inaccurately describes JD’s investment experience. The form states that he had 19 years’ investment experience in both bonds and stocks. CX-8, at 2; Tr. 25. JD testified that he put 19 years on the form because that is when he began his payroll deduction at GM to have money invested with Fidelity. Tr. 76. JD did not fully understand the questions and their purpose.

¹⁸ CX-9, at 1. The value of the bonds was approximately \$21,370, close to half the value of the transferred assets.

¹⁹ Tr. 26.

²⁰ CX-9.

March 19, 2007.²¹ A similar pattern persisted throughout the time Pino was at Centennial Securities. Although Pino claimed he did not start the earnings strategy immediately, Centennial Securities' records show otherwise. Pino bought 200 shares of Mindray Medical International on January 29, 2007, which he then sold seven days later.²²

Pino did not obtain JD's authorization before each purchase and sale. JD testified that he talked with Pino about once a month over the two years JD had his account at Centennial Securities, and during those conversations Pino did not discuss the specifics about any trades.²³ JD candidly admitted that he could not recall details about individual conversations, but he confidently stated that as a whole he knew they "never discussed the stock or how much to buy or how much to sell, how much he was buying or how much he was going to sell of it. It just happened."²⁴

JD's hearing testimony was consistent with the statements he provided to the FINRA examiner. The examiner first interviewed JD in January 2011, at which time he told the examiner that Pino called him about once a month while he had the account at Centennial Securities.²⁵ JD further stated that the calls were general in nature. Pino and he would discuss sports²⁶ and market conditions, but they did not discuss the specifics of any of the stock trades Pino made in the account.²⁷ The explanations JD gave the examiner on different occasions were consistent—Pino did not seek or obtain JD's authorization

²¹ *Id.* at 1.

²² *Id.*

²³ Tr. 27-29, 82-83.

²⁴ Tr. 83.

²⁵ Tr. 140-41.

²⁶ Tr. 28, 146. At the hearing, Pino acknowledged that they often spoke about sports. Tr. 51, 64.

²⁷ Tr. 141.

before each purchase and sale.²⁸ The consistency of JD's testimony and statements, which were corroborated in large measure by Pino's testimony, supported JD's credibility.

JD's account at Centennial Securities lost approximately half its value between the beginning of 2007 and the end of 2008. When Pino transferred JD's account to Money Concepts it was worth \$23,254.74, which included the value of the GM and Ford bonds.²⁹ Pino attributed all or most of the loss to the general market decline.³⁰

Pino left Centennial Securities because he wanted to go to a firm that had a more liberal trading policy. As Pino wrote in an email to JD at the time, "I made this business decision [to move to Money Concepts] to be able to manage assets independent of Wall Street's buy and hold strategies that have been so wrong over the last 10 years."³¹ In the same email, Pino pledged to "restore and grow [JD's] IRA."³² However, Pino explained at the hearing that he left Centennial Securities because he was desperate. His business was "vaporizing," his "wife was getting on [him]," and he thought it might be better at an "independent firm that has a higher payout."³³

Once the account was opened at Money Concepts, Pino resumed trading the account in the same manner as he had at Centennial Securities. The only meaningful difference is that Pino stepped up the frequency of his telephone calls with JD. For the

²⁸ Tr. 143.

²⁹ CX-12, at 2. JD's account was transferred in kind from Centennial Securities on January 23, 2009. *Id.* at 1.

³⁰ Tr. 63, 160.

³¹ CX-28.

³² *Id.* The value of JD's account at Money Concepts rose to \$29,167.05 by May 31, 2010. CX-12, at 2.

³³ Tr. 176.

first six months, Pino called JD about once every week or two.³⁴ Thereafter, Pino started calling JD as many as two or three times per week.³⁵

Although Pino spoke more frequently with JD, Pino did not believe he needed to obtain specific approval for each purchase and sale. Pino explained that all of the trading was pre-authorized in accordance with his earnings strategy. Pino reasoned that under the earnings strategy the approval to purchase a particular stock necessarily included the authorization to sell the stock at a time and price that were in accord with the earnings strategy.³⁶

JD's testimony regarding the activity in his account at Money Concepts was consistent in large part with Pino's. JD testified that he never approved any sales. Pino would telephone and speak about a stock and then purchase it. But Pino never called to obtain authorization to sell the stock.³⁷

Pino admitted that he exercised a form of limited discretion when he sold JD's securities. Pino explained at his on-the-record interview on March 21, 2011, and at the hearing how he employed the earnings strategy in JD's accounts. Pino stated that he would call JD and explain "buy parameters" to JD and obtain permission to sell the stock if JD was not available the next morning.³⁸ However, Pino did not discuss a specific sales price because he did not know beforehand how much the price of a stock would move on the news of its earnings report. Instead, Pino said he gave JD a target price range within

³⁴ Tr. 37-38.

³⁵ Tr. 38.

³⁶ Tr. 162-64.

³⁷ Tr. 40.

³⁸ Tr. 162-64; CX-21, at 5-7. JD instructed Pino not to call in the morning because he often slept late after watching televised sports into the early morning hours. Tr. 71, 86, 162-64.

which Pino would sell the stock.³⁹ However, even accepting Pino's testimony, he nonetheless exercised discretion in selecting the specific price at which to sell within the target range. In those situations where Pino held the stock "for another day or two," Pino stated that JD "authorized [him] to sell at [his] discretion." Pino estimated that 30 to 70% of the sales involved this form of discretion.⁴⁰

The Hearing Panel finds that Pino exercised discretion in JD's accounts although JD had not granted him written discretionary authority⁴¹ and both firms prohibited discretionary accounts.⁴²

IV. CONCLUSIONS OF LAW

NASD Conduct Rule 2510(b) prohibits a registered representative from exercising any discretionary power in a customer's account without prior written authorization from the customer and written acceptance from the member firm. Conduct Rule 2510(d)(1) provides that these requirements do not apply to "discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed, except that the authority to exercise time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer."

³⁹ Tr. 181.

⁴⁰ CX-21, at 6.

⁴¹ Tr. 182.

⁴² CX-3 (Centennial Securities); CX-17 (Money Concepts). Centennial Securities permitted limited and temporary discretion in circumstances not applicable to this case. Money Concepts only permitted discretionary trading in investment advisory accounts.

Pino exercised discretion in JD's account when he sold stock without first speaking to JD. It is undisputed that JD did not know of the sales at the time they were made,⁴³ and JD did not provide Pino with written authorization to make the sales. Pino also admitted that he did not always speak to JD on the day he made purchases. In fact, he testified that "by and large" he called JD *the day before* he made a purchase.⁴⁴

Pino argues that he did not violate the rule prohibiting discretionary trading without written authorization because he had time and price discretion under the earnings strategy he employed for JD's accounts. However, Pino's testimony shows that he made the purchases and sales pursuant to a general plan to buy companies that he expected would jump in price by 5 to 20% following the release of their earnings report. In many cases he carried out this plan without speaking to JD at all about the specific stocks he purchased. Pino and JD did not agree on specific amounts for each of these purchases. For example, while Pino was associated with Centennial Securities, the evidence shows that he only called JD about once a month although he made many transactions each month. In addition, Pino did not discuss specific sales on the day they were made. Pino testified that he made the sales based on the pre-approval he obtained when he made the purchases. Under the strategy, Pino saw no need to call JD before he made a sale. Pino testified that it was not discretion "to sell something based on a strategy that's been well in place, that to me is not discretion."⁴⁵ Pino also did not always follow the strategy as he claimed to have explained it to JD. In many instances if the stock did not meet his

⁴³ There were two exceptions. JD testified that Pino spoke to him about the sales of Jet Blue and Noah Education because in each case Pino had held the shares for six months or more. On the other hand, JD testified that Pino had not consulted him before Pino purchased shares of Noah Education. Tr. 39.

⁴⁴ Tr. 98.

⁴⁵ Tr. 100.

expectations immediately following the company's earnings release, Pino held the stock and waited to see if it would rise in price further. In those cases, the specifics of the sale were neither pre-approved nor approved by JD on the same day as the eventual sale.

For the foregoing reasons, we find that Pino violated NASD Conduct Rules 2510(b) and 2110, and FINRA Rule 2010 by exercising discretionary authority over JD's accounts without prior written authorization.⁴⁶

V. SANCTIONS

"The overall purposes of FINRA's disciplinary process and FINRA's responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public."⁴⁷ "Adjudicators therefore should impose sanctions tailored to address the misconduct involved in each particular case."⁴⁸

The FINRA Sanction Guidelines ("Guidelines") for exercising discretion without written authority in violation of NASD Rule 2510 and FINRA Rule 2010 recommend a fine of \$2,500 to \$10,000.⁴⁹ In an egregious case, the Guidelines recommend a suspension in any or all capacities for 10 to 30 business days. The Guidelines list two factors to consider in determining the proper remedial sanction: whether the customer's grant of discretion was express or implied; and whether the firm's policies prohibited

⁴⁶ *Cf. Raghavan Sathianathan*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572, at *35-36 (Nov. 8, 2006) (holding that a basic plan to sell shares when the price of the stock was high and then to buy it back when it was lower by trying to time market rallies constituted a violation of NASD Rules 2510(b) and 2110).

⁴⁷ FINRA SANCTION GUIDELINES at 2 (2011) (General Principles, No. 1), <http://www.finra.org/sanctionguidelines>. *See also McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005) (stating that the purpose of a sanction is to remediate misconduct and protect investors).

⁴⁸ GUIDELINES at 3 (General Principles, No. 3).

⁴⁹ GUIDELINES 85.

discretionary trading. We find both factors applicable and aggravating. JD did not give Pino written authority to exercise discretion in his accounts at Centennial Securities and Money Concepts, and Pino knew that both firms had policies prohibiting discretionary accounts. In addition, the preponderance of the evidence shows that Pino lacked implied discretionary authority. Indeed, Pino's main argument was that he was not exercising discretion within the meaning of Rule 2510(b) because he had obtained approval to manage the accounts using his earnings strategy. However, even to the extent JD indirectly granted Pino discretion to execute transactions in a manner consistent with the earnings strategy, Pino far exceeded any such implied discretion by selling stock when he saw fit and without consulting JD. The extent to which he deviated from the parameters of the earnings strategy is aggravating.

We also considered other aggravating factors. Pino engaged in misconduct over an extended period, during which he made approximately 95 discretionary transactions in JD's accounts. Pino's conduct may also have contributed to JD's losses. Had Pino properly sought written discretionary authority, JD may well have rejected the request or insisted on clearer trading parameters.⁵⁰ As it was, JD had no experience working with a broker, and he did not understand the risk inherent in Pino's strategy. In addition, if the firms had approved the accounts for discretionary trading, they would have been in a better position to monitor Pino's activities and guard against unsuitable trading.⁵¹

Considering these facts and circumstances, we conclude that the appropriate sanctions are a suspension for 30 business days and a \$5,000 fine.

⁵⁰ *Dep't of Enforcement v. Dunbar*, No. C07050050, 2008 FINRA Discip. LEXIS 18, at *41-42 (NAC May 20, 2008).

⁵¹ *Id.* at *42.

VI. ORDER

Michael Pino is suspended in all capacities for 30 business days and fined \$5,000. In addition, he is ordered to pay the costs of this proceeding in the amount of \$2,269.15, which costs include the hearing transcript fee and an administrative fee of \$750.

If this decision becomes FINRA's final disciplinary action, Pino's suspension shall commence at the opening of business on May 6, 2013, and end at the close of business on June 17, 2013. The fine and assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel