

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RORIC E. GRIFFITH
(CRD No. 2783261),

Respondent.

Disciplinary Proceeding
No. 2010025350001

Hearing Officer – RLP

HEARING PANEL DECISION

June 13, 2014

For exercising discretion without written authorization in violation of NASD Rule 2510 and FINRA Rule 2010, Respondent Roric Griffith is suspended from associating with any FINRA member in any capacity for 20 business days and fined \$5,000. For engaging in unauthorized trading in violation of FINRA Rule 2010, Griffith is suspended from associating with any FINRA member firm in any capacity for two months and fined \$5,000. The suspensions shall run concurrently. In addition, Griffith is ordered to pay costs.

Appearances

Thomas K. Anderson, Esq., Dale Glanzman, Esq., Chicago, Illinois, for the Department of Enforcement.

Ross A. Anderson, Esq., Chicago, Illinois, for Respondent Roric E. Griffith.

DECISION

I. Introduction

After Respondent Roric E. Griffith's customer, JK, complained to FINRA about Griffith's handling of JK's account, FINRA undertook an investigation.¹ Thereafter, FINRA's Department of Enforcement ("Enforcement") instituted this proceeding on June 26, 2013, alleging two causes of action. The first cause charges that when, without written authorization, Griffith exercised

¹ Hearing Transcript ("Tr.") 74, 106, 126-127 (Almazan); Complainant's Exhibit ("CX") 21, at 3-12.

discretion in the purchase of shares in certain dividend-generating funds for JK's account, Griffith violated NASD Rule 2510 and FINRA Rule 2010. The second cause charges that when, without any authorization, Griffith purchased shares in an additional dividend-generating fund for JK's account, Griffith violated FINRA Rule 2010. On July 24, 2013, Griffith filed an answer, admitting many of the complaint's allegations but denying that he had engaged in any violative activity. At the hearing, Griffith largely conceded liability, focusing instead on sanctions and contending that fines would adequately remedy his misconduct.

For the reasons detailed below,² the Hearing Panel finds that Griffith engaged in the misconduct charged in the complaint. First, the Panel finds, as Griffith largely admits, that after JK orally authorized Griffith to exercise limited time and price discretion in making purchases of certain specified fund shares, Griffith proceeded to exercise discretion in the absence of both JK's written authorization and Griffith's employer's acceptance of JK's account as discretionary. Griffith thus violated NASD Rule 2510 and FINRA Rule 2010. Second, the Panel finds, as Griffith has acknowledged, that Griffith purchased shares in one fund without any authorization from JK. Griffith thus violated FINRA Rule 2010. The Panel concludes that a 20-business-day suspension and a \$5,000 fine appropriately remedy Griffith's improper exercise of discretion and that a concurrent suspension of two months and another \$5,000 fine appropriately remedy Griffith's unauthorized trading.

² The hearing was held in Chicago, Illinois, on April 2, 2014. On the day before the hearing, one panelist withdrew, and the Chief Hearing Officer determined that she would not appoint a replacement panelist. *See* FINRA Rule 9234(a). The Hearing Panel therefore consisted of a Hearing Officer and one current member of the District 8 Committee.

II. Findings of Fact

A. After JK and WK Become His Clients, Griffith Recommends that He Implement His Income Generation Strategy in JK's Account.

Griffith entered the securities industry in 1997. From 2005 through the present, Griffith has been registered with FINRA through Princor Financial Services Corporation as an investment company products and variable contracts representative and as a general securities representative.³ Around two years after he joined Princor, Griffith was introduced to Princor customers JK and his wife, WK, who, by that time, had become dissatisfied with their account representative. After meeting with Griffith, the Ks became Griffith's customers.⁴

In 2007, JK was 53 years old and working for a union as an assistant business manager.⁵ His goal was to retire early with an annual income of at least \$90,000. He informed Griffith of that goal and, as time progressed, repeatedly met with Griffith, eventually discussing an "income generation strategy" that, taking into account the Ks' financial situation, would permit JK to retire at 55 and potentially provide the Ks with an annual income of \$90,000 in retirement.⁶

Griffith's income generation strategy—designed for retirees or soon-to-be retirees—involved the purchase of shares in certain mutual funds and closed-end funds that used leverage to generate substantial dividends, thus reducing the need to draw down principal in retirement. Griffith selected the funds included in the model portfolio and determined the portfolio weight of each fund, periodically recommending changing or rebalancing the investment mix as he deemed

³ Complainant's and Respondent's April 3, 2014 Stipulations of Fact ("Stip.") 1; Tr. 138-139 (Griffith). JK and WK maintained separate IRA accounts at Princor; Griffith was their account representative. Tr. 28, 68 (JK).

⁴ Stip. 2; Tr. 27-28 (JK), 144-145, 148-149 (Griffith); CX-21, at 6.

⁵ Stip. 3; Tr. 25, 67 (JK).

⁶ Tr. 28-30, 31-32, 56 (JK), 75 (Almazan), 151, 155-164 (Griffith); *see* Stips. 3, 4, 5; CX-22, at 1-2.

appropriate.⁷ By 2009, Griffith was employing this strategy in the accounts of more than 30 of his customers.⁸

In JK's case, Griffith recommended using funds in JK's IRA (derived primarily from the pension distribution that would follow JK's retirement) to purchase shares in the dividend-generating funds. To avoid the tax penalty that would result from early distributions from the IRA, Griffith recommended that JK complete trustee-to-trustee transfers of the dividends from JK's IRA to his union 401(k) plan account, from which Griffith believed the funds could be withdrawn without penalty.⁹ Although Griffith and the Ks met in early 2009 to discuss the strategy and complete the paperwork for JK's pension distribution to be rolled over into his IRA, the income generation strategy could not be implemented until JK actually retired (in March 2009) and the distribution was completed (in June 2009).¹⁰

B. JK Authorizes Griffith to Implement the Income Generation Strategy in JK's Account.

After JK learned that his pension payout had been rolled into his IRA, he wanted Griffith to implement the income generation strategy as soon as possible. Consequently, he repeatedly called and emailed Griffith, initially to no avail.¹¹ Ultimately, on July 21, 2009, Griffith, the Ks, and another Princor representative met at the Ks' home to discuss the specific dividend-generating funds Griffith proposed to purchase, when the purchases would be made, and how soon the Ks could expect dividend payments. In aid of the discussion, Griffith used a "Hypo Report," dated

⁷ Tr. 162-166 (Griffith).

⁸ Tr. 164 (Griffith).

⁹ Stips. 5, 6; *see* Tr. 33 (JK), 74-75 (Almazan), 171-172 (Griffith); CX-13, at 1, 2; CX-22, at 1-2.

¹⁰ CX-21, at 6; CX-22, at 1, 2; *see* Tr. 29, 32, 33-34 (JK).

¹¹ Tr. 33-35, 61-62 (JK); CX-21, at 6. Only after JK complained to others at Princor did Griffith respond. Tr. 34 (JK).

July 13, 2009.¹² The “Portfolio Snapshot” on page 9 of the report identified the following funds and the corresponding percentage of the portfolio shares in each fund would comprise:¹³

No.	Fund Name (Symbol)	Fund Type	Percentage of Assets
1	Alpine Dynamic Dividend (ADVDX)	Mutual Fund	31.47%
2	BlackRock Enhanced Dividend Achievers (BDJ)	Closed End	14.04%
3	Calamos Global Total Return (CGO)	Closed End	11.27%
4	Morgan Stanley Emerging Markets (MSF)	Closed End	10.74%
5	Alpine Total Dynamic Dividend (AOD)	Closed End	9.68%
6	BlackRock Diversified Income Strategies (DVF)	Closed End	9.50%
7	BlackRock Preferred Income Strategies (PSY)	Closed End	5.51%
8	JHancock Investors (JHI)	Closed End	5.34%
9	Tortoise North American Energy Corp (TYN)	Closed End	2.46%

During the meeting, Griffith and JK agreed on how Griffith’s income generation strategy would be implemented. First, they agreed that Griffith would purchase only shares in the funds identified in the Hypo Report and that the weighting of shares in each fund would match the percentage allocations set out in the Hypo Report.¹⁴ Second, although Griffith and JK discussed making the specified purchases immediately (on July 21 or July 22), JK agreed to give Griffith some flexibility to purchase shares later—when Griffith considered it appropriate to do so,

¹² Stips. 7-8; CX-21, at 6-7; Tr. 35-38, 69 (JK), 79 (Almazan), 169-170 (Griffith); *see* CX-4, at 10. Although JK could not remember seeing the entire report (*e.g.*, Tr. 52-53, 58), we conclude that Griffith brought the report in its entirety. *See* Tr. 79-80 (Almazan), 207 (Griffith). We further conclude that, consistent with JK’s testimony (*e.g.*, Tr. 53), discussion focused on page 9 of the report.

¹³ Stip. 8; CX-4, at 10. The funds and allocations were those that were included in the income-generation strategy’s model portfolio as of July 21. Tr. 173 (Griffith).

¹⁴ Tr. 37, 39-40 (JK), 80-82 (Almazan), 196-197, 200-203 (Griffith); CX-3, at 159:22-160:8, 166:13-15, 169:12-14 (Griffith).

considering premium and discount figures, share prices, and ex-dividend periods.¹⁵ JK did not grant Griffith open-ended discretion, however. Instead, JK directed Griffith to effect purchases as soon as possible and, based upon Griffith's express assurances, he expected that at least some of the purchases would be made in time for the Ks to benefit from July dividend payments.¹⁶

Griffith did not secure written authorization from JK to engage in discretionary trading on JK's behalf, and Prncor never accepted JK's account as a discretionary account. Indeed, Prncor prohibited the exercise of discretion by its registered representatives.¹⁷ According to Griffith, however, because JK had authorized the implementation of the income generation strategy generally, Griffith did not believe that JK had given him discretionary authority or that he exercised discretion in purchasing fund shares for JK's account, as set out below.¹⁸

C. Several Weeks Later, Griffith Partially Implements the Strategy and Makes an Unauthorized Trade.

Griffith did not place orders to purchase shares in the funds identified in the Hypo Report in July. Instead, he waited until August 13, 2009.¹⁹ According to Griffith, he delayed the purchases to avoid paying premiums (or otherwise paying high prices) for shares and to ensure that shares were not trading ex-dividend, so as to avoid the decrease in share prices that would

¹⁵ Tr. 37, 39 (JK), 83 (Almazan); *see* Tr. 175 (Griffith).

¹⁶ Tr. 39, 42, 44-45 (JK); *see* CX-12, at 1-2. According to JK, Griffith assured him that some of the purchases would be made "immediately and some he would get soon thereafter." Tr. 42. JK also testified that Griffith told him that the Ks would receive dividend payouts in July. Tr. 44-45. We credit this testimony, despite Griffith's inconsistent testimony (*see, e.g.*, Tr. 179-180), in light of JK's subsequent actions and his August 5 email.

¹⁷ Stips. 12, 13; CX-27, at 3; Tr. 84-85 (Almazan), 143-144 (Griffith).

¹⁸ Tr. 175-176, 209-212 (Griffith); CX-3, at 181:7-15 (Griffith); CX-23, at 3 (question 17); CX-24, at 2 (answer 17).

¹⁹ Stips. 9, 10; CX-8. Griffith recommended to JK that he implement the income generation strategy in a fee-based brokerage account. JK agreed and signed new account and account opening forms on July 21. CX-6A; CX-7A; Tr. 40-42 (JK), 86-87 (Almazan), 170-171 (Griffith). For reasons Griffith could not explain, submission of the documents to Prncor was delayed, however. Tr. 178-179 (Griffith); *see* Tr. 86-88, 133 (Almazan); CX-9. Griffith has acknowledged that this holdup contributed to the delay in implementing the strategy. *See* Tr. 86-88 (Almazan). In fact, the delay in opening the account necessarily was a significant—if not the exclusive—reason for the postponed implementation of the strategy. *See* CX-9, at 6 (showing that retirement account transfer took place on August 13); Tr. 132 (FINRA investigator testified that account was opened "right when the [August 13] trades were ordered.").

follow dividend payment.²⁰ In fact, shares in at least some of the funds identified in the Hypo Report could have been purchased before August 13 without paying a premium. And well before August 13, shares in all but two of the funds could have been purchased when they were not in ex-dividend status.²¹

In the meantime, JK grew concerned when he did not hear from Griffith within a few days of their July 21 meeting, as he had requested that Griffith inform him when he made purchases. JK thus began calling Griffith on a daily basis, eventually enlisting another Prncor representative to help him reach Griffith. Ultimately, Griffith called JK at the end of July or the beginning of August and, as a result, JK understood that Griffith had, by that time, purchased shares in at least some of the funds listed in the Hypo Report.²² Thereafter, notwithstanding his receipt of an August 5 email from JK seeking confirmation that a portion of JK's pension and 401(k) funds would be used to purchase investments "that would begin to pay dividends starting in July 2009," and asking for a list of the investments "that were purchased," Griffith did not contact JK until August 14, the day after he placed the purchase orders (which were filled over the ensuing days). In that August 14 email, Griffith informed JK that JK's email was "correct" in all pertinent regards and listed the ticker symbols of the funds that Griffith had purchased.²³

²⁰ *E.g.*, Tr. 180 (Griffith); CX-10, at 1; CX-13, at 2; CX-24, at 2 (answer 14); Tr. 86, 89-90, 91-92, 93-94 (Almazan).

²¹ Two of the funds—CGO and MSF—traded at a discount through the entire period. Tr. 100 (Almazan); *see* Tr. 120-121 (Almazan). As for ex-dividend periods, three of the funds (BDJ, MSF, and JHI) were not in ex-dividend status at any time between July 21 and August 13, and four other funds (ADVDX, CGO, AOD, and TYN) all could have been purchased at various times during the period from July 21 through the end of July outside ex-dividend periods. *See* CX-32, at 2 (ADVDX), 4 (BDJ), 7 (CGO), 9 (MSF), 12 (AOD), 18 (JHI), 20 (TYN).

²² Tr. 42-43 (JK). Although Griffith has testified that he did not speak to JK between July 21 and August 13 (*e.g.*, CX-3, at 178:4-7), we conclude, based on JK's credible testimony, that this late July or early August conversation did take place. Although JK also testified that he "believe[d]" but could not "say for sure" that, during the conversation, Griffith stated that some but not all of the funds had been purchased (Tr. 67), JK's contemporaneous and nearly contemporaneous written communications establish that, by early August, JK understood that shares in at least some of the funds had been purchased. CX-12, at 2; CX-21, at 7.

²³ CX-12, at 1-2; Tr. 43-46 (JK); *see* Stip. 11.

As his email indicated, Griffith had purchased shares in only five of the nine funds identified in the Hypo Report.²⁴ Specifically, he purchased: 30,364.372 ADVDX shares for \$150,000; 8,833 BDJ shares for \$74,992.17; 1,925 CGO shares for \$25,025; 2,440 AOD shares for \$19,983.60; and 4,455 JHI shares for \$74,977.65. The total cost of these purchases was \$344,978.42.²⁵

In addition, Griffith purchased shares in a fund he neither identified in the Hypo Report nor brought to JK's attention by any other means—the BlackRock Debt Strategies Fund (“DSU”).²⁶ Around one week after his July 21 meeting with the Ks, Griffith decided to change the investment mix of the income generation strategy model portfolio, to reduce holdings in one BlackRock closed-end fund and add holdings in DSU. While Griffith contacted the customers in whose accounts he already had implemented the strategy to get their approval to change their mix of investments, he neglected to call JK, whose account was then in cash.²⁷ As a consequence, Griffith's purchase of 7,145 DSU shares for \$25,007.50, comprising nearly 7% of the total value of all of the fund shares Griffith purchased on August 13, was unauthorized.²⁸

²⁴ Stip. 10; CX-9, at 2-4, 5; CX-12, at 1; *see* Tr. 207-208 (Griffith).

²⁵ CX-8, at 2; CX-9, at 2-4; Stip.10. Four of the five funds were closed-end funds; Griffith placed buy limit orders for the shares in those funds. CX-8, at 2.

²⁶ Stip. 15; Tr. 101-102 (Almazan), 203 (Griffith); CX-8, at 1; CX-9, at 3; *see* Tr. 39 (JK).

²⁷ Tr. 176-178, 235-236 (Griffith).

²⁸ Stips. 14, 15; CX-8, at 1; Tr. 101-102 (Almazan) 235-236 (Griffith); *see* CX-9, at 3. At the time, the shares were in ex-dividend status. CX-33, at 2. As a result of Griffith's purchases, the asset allocations in JK's portfolio differed markedly from the Hypo Report's allocations, as a comparison between JK's account statement (CX-9, at 2-4) and the Hypo Report's Portfolio Snapshot (CX-4, at 10) demonstrates. ADVDX shares comprised more than 40% of the fund portfolio (compared with just over 31% in the Hypo Report). Shares in BDJ made up more than 20% of the fund portfolio (compared with just over 14% in the Hypo Report). CGO shares comprised just 6.76% of the portfolio (compared with more than 11% in the Hypo Report). AOD shares made up around 5.4% of the portfolio (compared with around 9.6% in the Hypo Report). Shares in JHI comprised more than 20% of the portfolio (compared with just over 5% in the Hypo Report). And, as stated, shares in DSU, a fund not mentioned in the Hypo Report, made up nearly 7% of the fund portfolio. While approximately \$90,000 cash remained in JK's account after the purchases, JK had directed that \$130,000 be used to purchase an annuity. *E.g.*, CX-12, at 1; CX-9, at 1, 2.

D. The Ks' Relationship with Griffith Ceases.

Although Griffith has stated that he intended to purchase shares in the remaining four funds identified in the Hypo Report at a later date, Griffith learned, shortly after August 13, that the planned trustee-to-trustee transfers from JK's IRA to his union 401(k) plan account could not be completed because the plan did not permit additional deposits from retired employees.²⁹ JK subsequently complained to Princor about the tax ramifications of Griffith's recommendations, as well as Griffith's delay in implementing the income generation strategy, among other matters.³⁰ Shortly thereafter, Griffith ceased working with the Ks,³¹ and after reviewing JK's complaint, Princor reprimanded Griffith and required him to agree to a special supervision arrangement lasting two years.³²

III. Conclusions of Law

A. Griffith Exercised Discretion Without Written Authorization in Violation of NASD Rule 2510(b) and FINRA Rule 2010.

NASD Rule 2510(b) prohibits registered representatives from exercising discretion without written authorization:

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 or individuals and the account has been accepted by the member, as evidenced in writing by the member or the partner, officer or manager, duly designated by the member, in accordance with Rule 3010.

²⁹ Stip. 16; Tr. 172 (Griffith); CX-13, at 1, 3.

³⁰ Tr. 48-50 (JK); *see* CX-21, at 7-8.

³¹ Tr. 50 (JK); *see* Stip. 16.

³² CX-29; Tr.186-193 (Griffith). Under the special supervision agreement, Griffith's supervisor: met with him regularly to discuss compliance and other matters; pre-reviewed accounts and trades; and ensured that customer funds were timely invested, customer paperwork was complete, and customer calls were returned within 24 hours. CX-29. As a result of operating under this agreement, Griffith has improved many of his practices. *E.g.*, Tr. 192-193 (Griffith).

As the Securities and Exchange Commission has recognized, “[d]iscretionary trading in a customer’s account is a practice that is inherently susceptible to abuse.”³³ FINRA’s rules require written advance authorization and firm approval “to assure . . . that the trading is being done with the consent of the customer and to alert the firm that extra oversight of the sales representative’s handling of the account may be necessary to protect against improper or unsuitable trading.”³⁴

It is undisputed that Princor never accepted JK’s account as a discretionary account and that JK never gave Griffith written authorization to exercise discretion in JK’s account. Griffith nevertheless exercised discretion over when, and at what price, to purchase securities for JK’s account.³⁵ Based on these undisputed facts, we conclude that Griffith violated NASD Rule 2510(b) and FINRA Rule 2010.³⁶

³³ *William J. Murphy and Carl M. Birkelbach*, Exchange Act Rel. No. 69923, 2013 SEC LEXIS 1933, at *27 (July 2, 2013) (quoting *William J. Murphy*, 54 S.E.C. 303, 307 (1999)), *petition for review denied*, *Birkelbach v. SEC*, ___ F.3d ___, 2014 US App. LEXIS 8338 (7th Cir. 2014).

³⁴ *Murphy*, 54 S.E.C. at 307; *see Dep’t of Enforcement v. Wilson*, No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *30-31 (NAC Dec. 28, 2011) (explaining that compliance with the requirements of NASD Rule 2510(b) is “an additional means of ensuring effective supervision of sales practices at securities firms”).

³⁵ As set forth below, Griffith also exercised discretion over what securities to buy in what quantities. Because the complaint characterizes the violation as exercising time and price discretion without written authority, however, we consider Griffith’s additional exercises of discretion only with respect to sanctions.

³⁶ *See Murphy*, 2013 SEC LEXIS 1933, at *26-31; *Charles D. Tom*, 50 S.E.C. 1142, 1144 (1992); *Dep’t of Enforcement v. Pino*, No. 2010021621201, 2014 FINRA Discip. LEXIS 9, at *13 (NAC May 20, 2014). To the extent that Griffith relies on JK’s oral authorization of the trades as a defense to liability, it is well established that even when a representative has obtained his customers’ prior oral authorizations for discretionary trades, he runs afoul of the rule unless he obtains written authorizations from his customers and his firm before effecting the trades. *See Murphy*, 2013 SEC LEXIS 1933, at *27-28; *Protective Group Sec. Corp.*, 51 S.E.C. 1233, 1240 (1994) (addressing predecessor, Article III, Sec. 15). Furthermore, it is no defense that Griffith did not believe that he was exercising discretion at the time. As the SEC has stated, “[i]gnorance of [FINRA] rules is no excuse for their violation.” *Richard J. Lanigan*, 52 S.E.C. 375, 378 (1995) (citing *David A. Gingras*, 50 S.E.C. 1286, 1291 n.12 (1992)). Instead, as the SEC has repeatedly emphasized, “[p]articipants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements.” *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) (citing *Kirk A. Knapp*, 51 S.E.C. 115, 134 (1992)).

B. Griffith Purchased Shares for JK's Account Without Authorization in Violation of FINRA Rule 2010.

“An associated person is ‘responsible for obtaining his customer’s consent prior to purchasing a security for the customer’s account.’”³⁷ Accordingly when a registered representative purchases securities for a customer’s account without the customer’s authorization, he breaches the duty set forth in FINRA Rule 2010 to observe high standards of commercial honor and just and equitable principals of trade.³⁸

Here, Griffith has admitted that his purchase of DSU shares was unauthorized.³⁹ Indeed, as we have found, Griffith never even mentioned the fund to JK before placing an order to purchase more than 7,000 fund shares on August 13, 2009. Accordingly, the Hearing Panel concludes that Griffith violated FINRA Rule 2010.

IV. Sanctions

A. Exercising Discretion Without Written Authorization

The sanction guideline for exercising discretion without a customer’s written authority recommends a fine of \$2,500 to \$10,000, and in egregious cases, a suspension between 10 and 30 business days.⁴⁰ Guideline-specific principal considerations in determining the appropriate sanction include: (1) whether the customer’s grant of discretion was express or implied; and (2) whether the firm’s policies or procedures prohibited discretionary trading.

Turning to the first guideline-specific consideration, although JK orally granted Griffith time and price discretion on July 21, we conclude that Griffith knowingly exceeded the grant by waiting until August 13 to exercise that discretion. In early July, JK spoke with Griffith and

³⁷ *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (quoting *Carlton Wade Fleming, Jr.*, 52 S.E.C. 409, 412 (1995)).

³⁸ *Murphy*, 2013 SEC LEXIS 1933, at *31-32; *see Sears*, 2008 SEC LEXIS 1521, at *6.

³⁹ *See, e.g.*, Tr. 203 (Griffith) (Griffith answered “That’s correct” when asked whether it was true that the purchase of DSU shares was not an authorized trade); CX-3, at 186:14-16 (Griffith agreed that the purchase was unauthorized).

⁴⁰ FINRA Sanction Guidelines, at 85 (2011), available at <http://www.finra.org/Industry/Enforcement/SanctionGuidelines/index.htm>.

“voiced [his] displeasure” about Griffith’s lack of communication and delay in implementing the income generation strategy following JK’s pension distribution. JK “demanded a meeting”—which took place on July 21—to discuss communication issues and “figure out going forward how quick these funds could be purchased.”⁴¹ Against this backdrop, Griffith must have understood that JK’s oral grant of time and price discretion was limited. Indeed, we have found that Griffith assured JK that Griffith would purchase at least some of the shares by the end of July. But even in the absence of such assurance, JK’s August 5 email to Griffith—confirming JK’s understanding that Griffith was to have purchased investments that “begin to pay dividends starting in July 2009” and requesting that Griffith send him a list of investments “that were purchased”—laid bare the limits of the discretion JK orally granted. Griffith nevertheless waited until August 13 to make any purchases.⁴²

Moreover, Griffith did not merely transgress the limits of the time/price discretion JK orally granted. Instead, he purchased shares in some, but not all, of the funds JK had authorized him to purchase and in quantities that resulted in asset allocations that differed markedly from those JK had approved.⁴³ Indeed, Griffith’s purchases resulted in holdings allocated in a way that bore no discernable proportional relationship to the allocations in the Hypo Report.⁴⁴ Given that, by his own admission, Griffith assured JK that he would purchase only shares in funds identified in the Hypo Report and weight the holdings as set forth in the Hypo Report, Griffith must have

⁴¹ Tr. 34-35 (JK), 169 (Griffith) (acknowledging that JK “had some concerns about communication issues that had arisen that I needed to address with him, and I did.”).

⁴² For the reasons set forth at *infra* n. 50, we reject Griffith’s assertions that the delay resulted from his attempt to benefit JK by purchasing the shares when they were not trading ex-dividend or at a premium.

⁴³ See Tr. 208 (Griffith); see *supra* n. 28.

⁴⁴ See *supra* n. 28.

known he was acting in an unauthorized manner.⁴⁵ This also aggravates the seriousness of Griffith's misconduct.

In sum, Griffith overstepped the limits of JK's oral authorization, a circumstance we consider aggravating. Similarly, the second guideline-specific consideration is aggravating given that it is undisputed that Prncor's policies prohibited discretionary trading.

Griffith testified that he did not understand that he had been granted or was exercising discretionary authority in making the purchases because JK had agreed to have him implement the income generation strategy.⁴⁶ This claim demonstrates a serious misunderstanding of what it means to exercise discretion, which aggravates, rather than (as Griffith urges) mitigates, the severity of Griffith's violative conduct. By 2009, Griffith had been in the industry for more than 12 years, had several hundred client "relationships," and had even served on his firm's equity advisory council, advising the firm's home office about service-related issues representatives were encountering and new products the firm might consider selling.⁴⁷ Given his long experience in the industry, it is significantly aggravating that he did not understand that he was exercising discretion in purchasing fund shares for JK's account.⁴⁸

Griffith urges as mitigating that he acted to benefit JK and not to reap any profit for himself, and that he has acknowledged his wrongdoing and is sorry for it. He also urges that, given the practice improvements he has made as a result of his special supervision arrangement, he will not likely repeat his misconduct. We address each of these factors.

⁴⁵ See *supra* n. 14.

⁴⁶ See *supra* n. 18.

⁴⁷ Tr. 141-143 (Griffith).

⁴⁸ *Harry Friedman*, Exchange Act Rel. No. 64486, 2011 SEC LEXIS 1699, at *29-30 (May 13, 2011) (agreeing with FINRA that industry experience was an aggravating factor).

First, although a motivation to benefit a customer can be mitigating in the appropriate case,⁴⁹ Griffith's violative conduct—discretionary trading without written authorization—was not undertaken to benefit JK.⁵⁰ In exercising discretion in the absence of JK's written authorization, Griffith acted counter to JK's limited oral grant of authority and clearly expressed expectations—precisely the sort of improper conduct that NASD Rule 2510(b) is designed to prevent. And, by exercising discretion despite his firm's prohibition, Griffith effectively ensured that his actions would go unchecked. Second, while it can aggravate the seriousness of misconduct when a respondent profits, lack of profit is not mitigating.⁵¹ Third, even if we were persuaded that Griffith had consistently acknowledged and expressed remorse for his wrongdoing after it was detected—which we are not⁵²—there is no evidence that he reported his misconduct to Prncor before JK complained to the firm and, accordingly, there is no mitigation.⁵³

⁴⁹ *E.g., Dep't of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *10-11 (NAC Aug. 7, 2009) (finding it mitigating that, when respondent entered false disability waivers, respondent was motivated to benefit customers who were in financial difficulty).

⁵⁰ Because Griffith's violative conduct was not merely the exercise of discretion but rather the exercise of discretion *without written authority*, the reasons that Griffith sought and exercised what he now recognizes was time/price discretion are largely beside the point. In any event, we do not credit Griffith's testimony that he timed his purchases to avoid ex-dividend and other pricing concerns, particularly in view of the following contrary evidence: (1) Griffith could have purchased some, if not all, of the securities listed in the Hypo Report by the end of July, while still avoiding ex-dividend and pricing concerns (*see supra* pp. 6-7); (2) Griffith purchased DSU shares during an ex-dividend period (*see supra* n. 28); and (3) the delay in establishing JK's new fee-based account necessarily impeded any purchases until the account was established (*see supra* n. 19).

⁵¹ *See Mark F. Mizenko*, No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NAC Dec. 21, 2004) (overturning panel's finding that respondent's failure to benefit personally from misconduct was a mitigating factor). Here, because the purchases were made in a fee-based account, Griffith did not earn a commission on the transactions. Tr. 123, 125 (Almazan).

⁵² When asked, nearly two years later, whether he had exercised discretion in making the August 2009 purchases, Griffith responded that: “[a]t the time” he did not believe he did; he had “proceeded based on [his] last conversation” with JK; he was attempting to “act in the best interest” of JK; and that, after speaking with compliance personnel, he understood “that given the timing of the purchases,” a “review conversation with the client would have helped alleviate this question.” CX-24, at 2-3 (answer 17); CX-23 at 3 (question 17). This is hardly an acknowledgment of wrongdoing.

⁵³ Under Principal Consideration 2, adjudicators consider whether a respondent accepted responsibility for and acknowledged misconduct to his employer or a regulator prior to the detection and intervention by the firm or a regulator. FINRA Sanction Guidelines, at 6; *see Dep't of Enforcement v. Olson*, No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *20-21 (FINRA Board of Governors May 9, 2014). During the hearing, Griffith also stressed that he fully cooperated with FINRA's investigation. *E.g.*, Tr. 187-188. Cooperation with an investigation is not mitigating, however; it is expected. *See Dep't of Enforcement v. Keyes*, No. C02040016, 2005 NASD Discip. LEXIS 9, at *28 (NAC Dec. 28, 2005), *aff'd in part*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631 (Nov. 8, 2006).

Although there are factors that mitigate the severity of the violation—that the misconduct was isolated and of short duration⁵⁴—aggravating factors far outweigh mitigating factors and the Hearing Panel concludes that Griffith’s misconduct was egregious. We therefore suspend Griffith for 20 business days and fine him \$5,000 for his exercise of discretion without written authority. We consider these sanctions an appropriate remedial response to Griffith’s misconduct in view of the improved practices that have resulted from Griffith’s special supervision arrangement, making it less likely that Griffith will repeat his violative conduct in the future.⁵⁵

B. Unauthorized Transaction

The sanction guideline for unauthorized transactions recommends a fine of \$5,000 to \$75,000 and a suspension of 10 business days to one year. In egregious cases, a longer suspension—up to two years—or a bar should be considered. Principal considerations under the guideline are: (1) whether the respondent misunderstood his or her authority; and (2) whether the unauthorized trading was egregious.⁵⁶

As for the first consideration, as Griffith admitted, he did not misunderstand his authority with respect to the purchase of the DSU shares; he had none.⁵⁷ On the other hand, adjudged in light of the categories of egregious unauthorized trading the NAC has identified, this case is not egregious. Griffith’s one instance of unauthorized trading is not quantitatively egregious.⁵⁸ Similarly, there is no evidence of accompanying aggravating misconduct that could qualify Griffith’s unauthorized trading as egregious. Griffith did not attempt to conceal the trade or evade

⁵⁴ FINRA Sanction Guidelines, at 6 (Principal Considerations 8, 9). Griffith’s orders were entered during a time span of less than 10 minutes on one day. CX-8, at 1, 3.

⁵⁵ To the extent that Griffith asks us to take into consideration his testimony that Princor will terminate his employment if he is suspended, we note that the sanctions we impose are independent of a firm’s decision to terminate or retain an employee. *Cf. Dep’t of Enforcement v. Prout*, C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NAC Dec. 18, 2000).

⁵⁶ FINRA Sanction Guidelines, at 98.

⁵⁷ Tr. 204 (Griffith); *see* Tr. 203 (Griffith).

⁵⁸ *See* FINRA Sanction Guidelines, at 98, n.2; *Dep’t of Enforcement v. Sears*, No. C07050042, 2009 FINRA Discip. LEXIS 4, at *10 (NAC July 23, 2009).

investigative efforts and he does not have a prior history of similar misconduct.⁵⁹ Nor is there evidence of bad faith that could lead to a finding that Griffith's unauthorized trading was qualitatively egregious.⁶⁰ Instead, as we have found, around one week after he met with JK, Griffith decided to recommend to customers in whose accounts he employed the income generation strategy that they change their investment mix and, although Griffith contacted the customers already utilizing the strategy to get their approval, he overlooked JK, whose account was then in cash. His misconduct was not the product of deliberation.

Accordingly, the Panel concludes that this is a serious case of unauthorized trading and that a two-month suspension and a \$5,000 fine appropriately remedy this misconduct.⁶¹ Because Griffith's exercise of discretion without written authority and his unauthorized purchase are similar types of misconduct that raise similar regulatory concerns, this suspension will run concurrently with the suspension for improper discretionary trading.⁶²

V. Conclusion

For exercising discretion without written authority, Roric E. Griffith is suspended from associating with any FINRA member firm in any capacity for a period of 20 business days and ordered to pay a \$5,000 fine. For engaging in unauthorized trading, Roric Griffith is suspended from associating with any FINRA member firm in any capacity for a period of two months and ordered to pay an additional \$5,000 fine. The suspensions shall run concurrently.

⁵⁹ See FINRA Sanction Guidelines, at 98, n.2; *Sears*, 2009 FINRA Discip. LEXIS 4, at *11.

⁶⁰ The record does not support a finding that Griffith effected this trade because he was motivated by financial gain, for example.

⁶¹ The Panel declines to accord mitigative weight to Griffith's untimely acknowledgment of unauthorized trading. On the other hand, for the reasons stated at p. 15 *supra*, the Panel has considered Griffith's improved practices in fashioning the sanction for this violation.

⁶² See *Dep't of Enforcement v. Siegel*, No. C05020055, 2007 NASD Discip. LEXIS 20, at *53-55 (NAC May 11, 2007), *aff'd*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008), *petition granted in part on other grounds*, *Siegel v. SEC*, 592 F.3d 147 (D.C. Cir. 2010).

In addition, Griffith is ordered to pay costs in the amount of \$2,685.77, which includes the hearing transcript costs and an administrative fee of \$750.

The fines and 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. If this decision becomes FINRA's final disciplinary action, Griffith's suspensions shall begin on August 4, 2014, and the two-month suspension shall end at the close of business on October 3, 2014.⁶³

Rada Lynn Potts
Hearing Officer
For the Hearing Panel

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⁶³ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.