

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Michael Pino  
Middleville, MI,

Respondent.

DECISION

Complaint No. 2010021621201

Dated: May 20, 2014

**Respondent exercised discretion in a customer's accounts without written authority. Held, findings and sanctions affirmed.**

**Appearances**

For the Complainant: Richard A. March, Esq., and Heather Freiburger, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

**Decision**

Pursuant to FINRA Rule 9311, Michael Pino ("Pino") appeals a March 15, 2013 decision. In that decision, a FINRA Hearing Panel found that Pino violated NASD Rules 2510(b) and 2110, and FINRA Rule 2010, by exercising discretion in a customer's accounts without written authority.<sup>1</sup> For these violations, the Hearing Panel fined Pino \$5,000 and suspended him in all capacities for 30 business days. After an independent review of the record, we affirm the Hearing Panel's findings and the sanctions it imposed.

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<sup>1</sup> The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

## I. Background

Pino entered the securities industry in 1988. From May 2002 to December 2008, Pino was registered with Centennial Securities Company, LLC (“Centennial Securities”), as a general securities representative. From January 2009 to August 2010, Pino was registered as a general securities representative with Money Concepts Capital Corporation (“Money Concepts”). Pino is not currently associated with another FINRA member.

## II. Procedural History

On May 16, 2012, FINRA’s Department of Enforcement (“Enforcement”) filed a one-cause complaint alleging that Pino exercised discretion without written authorization in violation of NASD Rules 2510(b) and 2110, and FINRA Rule 2010. Pino denied the alleged violations.

A disciplinary hearing was held on November 8, 2012. In a decision issued on March 15, 2013, the Hearing Panel found Pino liable for the misconduct alleged in the complaint. The Hearing Panel fined Pino \$5,000 and suspended him for 30 business days in all capacities for his violations. On March 27, 2013, Pino appealed the Hearing Panel’s decision.

## III. Facts

### A. Pino’s “Earnings Strategy”

While he was associated with Centennial Securities, Pino developed an “earnings strategy” that he began using for some customers in about 2006. The purpose of the strategy was to garner 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.

Under the earnings strategy, Pino looked for companies that he expected would jump in price following the release of their earnings reports.<sup>2</sup> If a sector leader beat analysts’ forecasts, and the leader’s share price rose by approximately 5 to 15 percent 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. Pino testified that once he 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 two when the stock price rapidly increased or “exploded.” If the stock did not react as he expected, Pino sometimes waited longer than a day or two to see if its price improved. In other cases, Pino quickly sold the stock to free up capital and make other purchases employing the same earnings strategy. Between 2007 and 2009, Pino employed his earnings strategy for customer JD.

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<sup>2</sup> To identify such companies, Pino would wait for a sector leader to release its quarterly earnings report. The record does not indicate which sector leader’s earning reports Pino relied on in executing his earnings strategy.

B. 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 investments in securities apart from a small IRA account at Fidelity Investments that was part of GM's benefits package. The value of his account was approximately \$48,800 when he retired. JD had never worked with a broker or financial adviser before he met Pino. JD learned of Pino from DT, a GM co-worker who had moved his IRA from Fidelity Investments to Pino at Centennial Securities. 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.<sup>3</sup> During their conversation, Pino did not discuss his earnings strategy or any specific investment recommendations. JD and Pino generally discussed placing half of the account in bonds and the other half in stocks. JD told Pino that he did not want to purchase any automotive securities because GM and Chrysler were facing bankruptcy. JD testified that, at this time, he was interested in "environmental stocks" because he had read an article in the local paper indicating that windmills might be put into Lake Erie to help generate electricity for the community. At the end of the meeting, JD signed the required documentation to open an IRA account at Centennial Securities.<sup>4</sup> JD did not grant Pino written authority to exercise discretion in this account.

C. Pino's Trading in JD's Accounts

Pino began purchasing securities in JD's Centennial Securities account shortly after he opened it. Pino made five purchases around the end of January 2007. Two of the purchases included \$21,370 worth of automotive securities (bonds) issued by General Motors Acceptance Corporation and Ford Motor Company. According to JD, Pino purchased these bonds even though JD had instructed Pino that he did not want to purchase any automotive securities, and Pino did not contact JD before making these purchases. JD testified that he was upset when he learned that Pino bought the automotive securities, and he called Pino to complain. Pino, however, convinced JD to keep the securities.<sup>5</sup>

Over the course of the next two years, Pino made roughly 120 purchases and sales in JD's account. Many of these purchases and sales spanned one to three days while others

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<sup>3</sup> Pino and his wife drove from their home near Grand Rapids, Michigan, to meet with JD at his home in Cleveland, Ohio. The meeting lasted two to three hours.

<sup>4</sup> JD transferred the entire value (approximately \$48,800) of his Fidelity Investments account to his Centennial Securities account in January 2007.

<sup>5</sup> There is a dispute in the record as to how Pino convinced JD to keep the bonds. JD claims that Pino told him that the bonds were guaranteed even if the automotive companies went into bankruptcy. Pino claims that JD's testimony on this issue is false. Pino also claims that it is incomprehensible that he could have purchased the bonds against JD's express instructions without JD complaining about it to Pino's firm.

spanned much longer periods. For example, Pino purchased 200 shares of Humana, Inc., on March 12, 2008, which he sold on March 13, 2008. In contrast, Pino purchased 255 shares of Energy Resources on February 7, 2007, which he sold on March 19, 2007 (40 days). A pattern of such purchases and sales persisted throughout the time Pino was at Centennial Securities.<sup>6</sup>

According to JD, Pino did not obtain JD's authorization before each purchase and sale. JD testified that he only talked with Pino about once a month over the two years in which Pino was his broker, and during those conversations, Pino did not discuss the specifics about any trades. JD admitted that he could not recall details about individual conversations. JD testified, however, that he and Pino "never discussed . . . how much to buy or how much to sell, how much [Pino] was buying or how much [Pino] was going to sell of it."<sup>7</sup> Pino testified that he spoke with JD "much more frequently" than once a month and that he spoke with JD prior to every trade. It is undisputed, however, that JD never granted Pino written authority to exercise discretion in JD's Centennial Securities account.

JD's account at Centennial Securities lost approximately half of its value between the beginning of 2007 and the end of 2008. When Pino transferred JD's account to Money Concepts in January 2009, it was only worth \$23,254.74. This total included the value of the automotive bonds which were worth \$6,771.40. Pino attributed all or most of the loss to a general market decline.

Once JD opened an account at Money Concepts, Pino resumed trading the account in the same manner as he had at Centennial Securities. According to JD, after he opened his Money Concepts account, Pino stepped up the frequency of his telephone calls. JD testified that for the first six months, Pino called him approximately once every week or two. Thereafter, JD claims that Pino started calling JD as many as two or three times per week. Pino claims that he discussed every trade in JD's Money Concepts account with JD prior to every execution. JD claims that he did not recall these discussions. It is undisputed, however, that JD never granted Pino written authority to exercise discretion in JD's Money Concepts account.

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<sup>6</sup> Pino testified that he purchased and sold stock in JD's account using the earnings strategy beginning in March 2007. The record, however, does not precisely identify which of these purchases and sales Pino made according to his earnings strategy. Similarly, there is no documentary evidence in the record of any earnings reports that Pino relied on when deciding when to purchase and sell any given stock as part of the earnings strategy.

<sup>7</sup> JD's hearing testimony regarding Pino's failure to obtain JD's authorization before each transaction was consistent with the statements he provided to a FINRA examiner. The examiner first interviewed JD in January 2011, at which time JD told the examiner that, over the two-year period at issue, Pino called him about once a month while Pino serviced JD's accounts and that these calls were general in nature. JD further testified that, on these calls, Pino and he would discuss sports and market conditions, but that they did not discuss the specifics of any of the stock trades Pino made in the account. At the hearing, JD also testified that, with one or two exceptions, he did not talk to Pino about purchases that Pino was going to make on JD's behalf. At the hearing, Pino also acknowledged that he and JD often talked about sports teams.

D. Pino Exercised Discretion in JD's Accounts

Pino testified that all of the trades he executed in JD's accounts were "pre-authorized" by JD. Pino believed that JD orally pre-authorized Pino to make purchases and sales pursuant to the 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 price and time that were in accord with the earnings strategy.

Pino explained that he generally applied the earnings strategy for trades in JD's accounts, and the trades involved a purchase one day followed by a sale the next day or a couple of days later. Pino testified that he would typically speak to JD shortly before Pino executed each trade. Pino admitted, however, that he sometimes exercised a form of "discretion" when he sold JD's securities using the earnings strategy.<sup>8</sup> According to Pino, he sometimes exercised this form of discretion because JD would not be available to speak to him on the morning of a sale.<sup>9</sup> Pino claimed that JD's unavailability on the morning of a sale did not matter because JD had already given Pino authorization (the previous afternoon) to sell the stocks at a certain price range.

Pino also testified that he did not discuss an exact price with JD when Pino obtained this prior authorization because Pino did not know beforehand how much the price of a stock would move on the news of its earnings report. Instead, Pino claimed that he gave JD a "target" price range within which Pino would sell the stock, and Pino would sell the stock if it came within that range. In some cases, when using this discretion, Pino claimed that he sought JD's approval to sell a stock on a particular day, but did not make the sale on the day that he purportedly obtained JD's approval. According to Pino, he held the stock he was purportedly authorized to sell when the stock did not meet Pino's price expectations immediately following the company's release of its earnings. In other words, Pino held the stock if it did not "explode" as he had projected following the release of the stock's earnings report. Pino acknowledged that, on these occasions, he waited longer than one to three days to see if the stock would rise in price before selling it.

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<sup>8</sup> Pino provided this testimony regarding his trading in JD's account at a March 21, 2011 on-the-record interview. At the hearing, however, Pino denied that he ever exercised "discretion" in JD's account. Instead, Pino described his trading in JD's account as trading with JD's prior (oral) approval under the earnings strategy. Neither of Pino's firms allowed Pino to engage in discretionary trading for the type of account that JD had with the firms without written authorization.

<sup>9</sup> Consistent with Pino's testimony, JD acknowledged that he told Pino not to call in the morning because he often slept late. Pino testified that, on the days when JD slept late, he would typically discuss with JD in the afternoon what to do with a stock that Pino had already purchased for JD and whose earnings would be released the next day. Pino further testified that under these circumstances JD would authorize Pino to sell the stock if the stock's price "exploded" the next day as a result of the earnings report.

IV. Discussion

A. Pino Exercised Discretion in a Customer's Account Without Written Authority in Violation of NASD Rule 2510(b)

NASD 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.<sup>10</sup> First, it is undisputed that Pino did not, as required by NASD Rule 2510(b), have written authorization from JD or written acceptance from Pino's firms to exercise discretion in JD's accounts. It is also undisputed that, over the course of two years, Pino made numerous purchases and sales of specific stocks in JD's accounts. When asked whether JD authorized these trades, JD testified that Pino (with one or two exceptions) did not ever discuss these purchases and sales with him before executing the trades. The Hearing Panel cited the consistency of JD's testimony—as well as corroborating testimony by Pino—as support for JD's credibility on this issue. The Hearing Panel therefore found that Pino did not seek or obtain JD's authorization before each purchase and sale and therefore exercised discretion in JD's accounts.<sup>11</sup> We find nothing in the record that would cause us to disturb the Hearing Panel's finding.<sup>12</sup> Consequently, unless Pino's conduct falls within an exception, Pino's conduct violated NASD Rule 2510(b), as well as NASD Rule 2110 and FINRA Rule 2010.<sup>13</sup>

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<sup>10</sup> NASD Rule 2510(b) states that “[n]o member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization . . . and the account has been accepted by the member, as evidenced in writing by the member.” *See also William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at \*26 (July 2, 2013) (stating that an account “must be approved for discretionary trading in writing by [a] member firm” under Rule 2510(b)).

<sup>11</sup> We note that the fact that there is no evidence that JD complained that Pino made the trades without JD's permission does not transform the transactions into authorized the trades. *See Murphy*, 2013 SEC LEXIS 1933, at \*37 (stating that “we have held repeatedly that after-the-fact ‘acceptance’ of an unauthorized trade does not transform that transaction into an authorized trade”) (citation omitted).

<sup>12</sup> *See id.* at \*55 n.69 (refusing to disturb finding below after stating that “[w]e have frequently held that the credibility determination of the initial decisionmaker is entitled to considerable weight and deference, since it is based on hearing the witnesses' testimony and observing their demeanor and that without substantial evidence in the record to the contrary, we cannot depart from the fact finder's determination of credibility”) (internal quotations omitted).

<sup>13</sup> Moreover, even if JD's oral acceptance of the earnings strategy gave Pino permission to exercise discretion, Pino still violated NASD Rule 2510. *See Murphy*, 2013 SEC LEXIS 1933, at \*27 (stating that “oral permission is insufficient to exercise discretionary power in a customer's account under Rule 2510”).

B. Pino Is Not Excepted from NASD Rule 2510(b)'s Requirements

NASD Rule 2510(d)(1) excepts brokers from NASD Rule 2510(b)'s requirement of the need for written authorization to engage in discretionary trading if the broker has been granted "price" or "time" discretion.<sup>14</sup> Pino asserts that his conduct fell within NASD Rule 2510(d)(1)'s exception to the requirements of NASD Rule 2510(b) because JD gave Pino "price" and "time" discretion by orally agreeing to adopt Pino's earnings strategy for trading. This assertion is not supported by the record.

Here, the preponderance of the evidence shows that Pino did not discuss with JD the specific purchases and sales Pino made in JD's account. Pino decided not only the time and price at which the stocks would be bought and sold—but also the specific stocks to purchase and the amount of stocks to purchase. Under these facts, Pino's exercise of discretion in JD's accounts does not qualify for NASD Rule 2510(d)(1)'s exception. *See Murphy*, 2013 SEC LEXIS 1933, at \*29 (rejecting broker's claim that his trading was excused under the "price" and "time" exception where the broker exercised discretion not "only over the timing and prices related to the . . . transactions . . . but also over the type and quantity of [the transactions]"); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at \*34 (Nov. 8, 2006) (finding a Rule 2510 violation where broker claiming "price" and "time" exemption did not come to an agreement with his customer as to the specific amount of stocks to purchase pursuant to such discretion), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008). Thus, even if JD had given Pino "price" and "time" discretion—which the evidence shows he did not—Pino's exercise of this discretion was inconsistent with NASD Rule 2510.<sup>15</sup>

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A violation of NASD Rule 2510 is also a violation of NASD Rule 2110. *See id.* at \*26 n.29 (stating that "a violation of another Commission or NASD rule or regulation . . . constitutes a violation of [NASD] Rule 2110"). Similarly, a violation of NASD Rule 2510 is a violation of FINRA Rule 2010. *See CapWest Sec., Inc.*, Exchange Act Release No. 71340, 2014 SEC LEXIS 205, at \*3 (Jan. 17, 2014) (stating that "[i]n September 2008, the Commission approved . . . FINRA Rule 2010 which replaced NASD Rule 2110 . . . [and that] [t]he new rule, which became effective December 15, 2008, does not alter, in any material respect, the prior rule").

<sup>14</sup> NASD Rule 2510(d)(1) provides that this requirement does 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."

<sup>15</sup> We note that JD's approval of the earnings strategy does not alter this conclusion because Pino exercised discretion over both the type and quantity of the securities he purchased in JD's accounts. *See Murphy*, 2013 SEC LEXIS 1933, at \*29-30 (finding that "the fact that [a customer] approved [a] covered call strategy does not mean that [a broker's] trading—which

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In addition, NASD Rule 2510(d)(1)'s "price" or "time" exception states that a broker may be granted written authorization to exercise "price" or "time" discretion until the end of the business day when such discretion is granted. Here, it is undisputed that, in executing his earnings strategy, Pino sometimes exercised "price" or "time" discretion *beyond the business day* on which JD allegedly granted him such discretion.<sup>16</sup> Accordingly, we find that Pino violated NASD Rule 2510(b). *See Murphy*, 2013 SEC LEXIS 1933, at \*29-30 (finding that applicant violated Rule 2510(b) after applicant "concede[d] that [his] trading could not fall within the . . . time and price discretion exception, which limits the exercise of such discretion to one business day").

## V. Sanctions

The Hearing Panel fined Pino \$5,000 and suspended him for 30 business days. We find that these are appropriately remedial sanctions. We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanctions for Pino's violations.<sup>17</sup> The Guidelines for exercising discretion without written authority in violation of NASD Rule 2510 recommend a fine ranging from \$2,500 to \$10,000.<sup>18</sup> In an egregious case, the Guidelines recommend a suspension in any or all capacities for 10 to 30 business days.<sup>19</sup>

The Guidelines also recommend that adjudicators consider: (1) whether the customer's grant of discretion was express or implied; and (2) whether the firm's policies and/or procedures prohibited discretionary trading and/or whether the firm prohibited the respondent from exercising discretion in customer accounts.<sup>20</sup> In addition, we have considered the Principal Considerations in Determining Sanctions.<sup>21</sup> Upon consideration of all the relevant factors in the record, we find that Pino's conduct was egregious and that a \$5,000 fine and a 30-business-day suspension in all capacities are appropriate sanctions.

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involved exercising discretion over the type and quantity of [securities] traded—would come within the time and price discretion exception").

<sup>16</sup> At oral argument, Pino conceded this point. In doing so, Pino stated that he was "guilty of the charge . . . [and that] there's no need going further with this."

<sup>17</sup> *FINRA Sanction Guidelines* (2013), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter "*Guidelines*"].

<sup>18</sup> *Id.* at 85.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 6-7.



We find it aggravating that Pino did not have express authority from JD to exercise discretion.<sup>22</sup> We also find that Pino did not have implied price or time discretion to implement the earnings strategy.<sup>23</sup> Even if JD did grant Pino price or time discretion orally, Pino exceeded this authority when he exercised price or time discretion beyond the day on which such discretion would have expired and selected the type and quantity of stock to purchase. Moreover, such authority could only be granted in writing.<sup>24</sup> We further find it aggravating that Pino exercised discretion in JD's accounts even though his firms' policies prohibited such discretion.<sup>25</sup> This means Pino's firms were not supervising the account as a discretionary account and JD did not have the benefit of this added supervision. Finally, we find it aggravating that Pino's misconduct was intentional and occurred for approximately two years.<sup>26</sup>

In determining sanctions, we have also examined the record for potentially mitigating factors, and we find that there are no mitigating factors supported by the record.<sup>27</sup> Overall, we

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<sup>22</sup> See *id.* at 85.

<sup>23</sup> See *id.*; see also *supra* Part IV.B.

<sup>24</sup> See NASD Rule 2510(b).

<sup>25</sup> *Guidelines*, at 85.

<sup>26</sup> See *id.* at 7 (Principal Considerations in Determining Sanctions, No. 13); *id.* at 6 (Principal Considerations in Determining Sanctions, No. 8).

The possibility that Pino's misconduct involved roughly 120 transactions is a potentially aggravating factor. See *id.* (Principal Considerations in Determining Sanctions, No. 8). The record, however, does not contain documentary evidence that precisely identifies which of these 120 transactions were earnings strategy trades. Consequently, we decline to consider the number of transactions related to this misconduct to be an aggravating factor.

We also decline to conclude that it is an aggravating factor that JD lost roughly \$25,000 during the time that Pino exercised discretion in JD's accounts. See *id.* at 6 (Principal Considerations in Determining Sanctions, No. 11). The record is unclear as to the extent to which Pino's unauthorized trades under the earnings strategy contributed to JD's losses.

<sup>27</sup> For example, we have considered, and do not find it mitigating, that Pino mistakenly thought that JD orally authorized Pino to exercise "price" and "time" discretion in JD's accounts under the earnings strategy. The record shows that JD credibly testified that he did not grant Pino "price" and "time" discretion. Cf. *Murphy*, 2013 SEC LEXIS 1933, at \*101 n.138 (finding that although a broker believed his customer gave him oral permission to pursue a strategy authorizing the broker to exercise discretion, it was not mitigating when a broker exceeded the permission granted to him by his customer and the customer "provided credible testimony that he did not give [the broker] permission to trade").

find Pino's misconduct was egregious. Accordingly, we determine that a \$5,000 fine and a 30-business-day suspension are appropriate sanctions for his violations.

VI. Conclusion

We find that Pino violated NASD Rules 2510(b) and 2110, and FINRA Rule 2010, by exercising discretion in a customer's accounts without written authority. For these violations, we fine Pino \$5,000 and suspend him for 30 business days in all capacities. Finally, we affirm the Hearing Panel's order that Pino pay hearing costs of \$2,269.15, and we impose appeal costs of \$1,929.30 (consisting of a \$1,000 administrative fee and \$929.30 in transcript costs).<sup>28</sup>

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith,  
Senior Vice President and Corporate Secretary

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<sup>28</sup> We have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.