

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

BRIAN JOSEPH PANFIL
(CRD No. 4326407),

Respondent.

Disciplinary Proceeding
No. 2015045549301

Hearing Officer–RES

DEFAULT DECISION

April 6, 2018

Respondent is barred from associating with any FINRA member in any capacity. He effected unsuitable mutual fund switches in four customer accounts, forged or caused to be forged customer signatures on mutual fund switch forms, and exercised unauthorized discretion to execute mutual fund switches.

For the Complainant: Kathryn S. Gostinger, Esq., Christopher M. Burky, Esq., Mark A. Koerner, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: No appearance.

DECISION

I. Introduction

Respondent Brian Panfil was registered through FINRA member firms Caldwell International Securities and then Ridgeway & Conger as a General Securities Representative. While registered through these firms, Panfil effected unsuitable mutual fund switches in four customer accounts. In all, he made 24 switches. He exercised discretion to execute some of the switches without obtaining advance, written customer approval. He forged, or caused to be forged, the customers' signatures on mutual fund switch forms. The switches resulted in the customers paying \$27,924 in excess sales charges and other fees, most of which went to Panfil.

Department of Enforcement served Panfil with the Complaint in accordance with FINRA Rules. Panfil did not answer the Complaint. Enforcement filed a motion for entry of default decision ("Default Motion"), together with counsel's declaration and supporting exhibits. Panfil did not file an opposition. For the reasons stated below, the Hearing Officer finds Panfil in default, grants the Default Motion, and issues this Default Decision.

II. Findings of Fact and Conclusions of Law

A. Panfil's Background

Panfil was registered through consecutive associations with several FINRA member firms beginning in October 2000.¹ On November 24, 2015, his then-current firm filed a Uniform Termination Notice for Securities Industry Registration terminating his registration through the firm.²

B. Origin of the Investigation

FINRA's Chicago District Office commenced the investigation in July 2015 after an attorney for one of Panfil's customers contacted FINRA to make a complaint about Panfil.³ According to the attorney, Panfil mishandled the customer's account by engaging in unsuitable transactions and unauthorized trading.⁴ At the time of this alleged misconduct, the customer was transitioning into an assisted living facility.⁵

C. Panfil's Default

Enforcement served the Complaint on the address in Chicago, Illinois reflected in Panfil's entry in the Central Registration Depository, in accordance with FINRA Rules. In what it describes as an abundance of caution, Enforcement sent the Complaint, by first-class mail, certified mail-return receipt requested, and FedEx, to a Panfil address in Arvada, Colorado.⁶ FedEx delivered the Complaint to Panfil's Arvada address on November 21, 2017, at 8:48 a.m. "P. Pat" signed for these documents.⁷

Panfil did not file an answer or otherwise respond to the Complaint. Accordingly, the Hearing Officer finds that Panfil defaulted.

¹ Declaration of Kathryn Gostinger in Support of Enforcement's Motion for Entry of Default Decision and Imposition of Sanctions ("Decl.") ¶ 6.

² Two conditions to FINRA's jurisdiction in this disciplinary proceeding are met: (1) Enforcement filed the Complaint on November 20, 2017—within two years after the termination of Panfil's registration with a FINRA member; and (2) the Complaint charges him with a violation he committed while he was registered. Decl. ¶ 7.

³ Decl. ¶ 5.

⁴ Decl. ¶ 5.

⁵ Decl. ¶ 5.

⁶ Decl. ¶ 9.

⁷ Decl. ¶ 10.

D. Panfil's Default Warrants the Issuance of a Default Decision

FINRA Rule 9269 authorizes the Hearing Officer to issue a default decision against a respondent who does not answer the complaint within the time afforded under Rule 9215.⁸ Panfil had the opportunity to file an answer but did not. He was informed of the possible consequences of not answering—a default decision.⁹ The Hearing Officer finds a default decision against Panfil to be warranted consistent with the applicable FINRA Rules.¹⁰

E. Panfil Engages in Unsuitable Mutual Fund Switches and Related Misconduct, in Violation of NASD and FINRA Rules

The Complaint alleges three causes of action against Panfil: unsuitable mutual fund switching; falsifying customer signatures on mutual fund switch forms; and exercising discretion without prior written authorization and approval.

1. Unsuitable Mutual Fund Switching

a. The Governing Rules

A recommendation to switch from one mutual fund to another is subject to FINRA Rules on suitability. FINRA Rule 2111 requires that an associated person have a reasonable basis to believe a recommended securities transaction is suitable for the customer:

A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.¹¹

The predecessor to FINRA Rule 2111, NASD Rule 2310, was in force until mid-July 2012.¹² It applied to the mutual fund switches Panfil effected from April 2012 to mid-July 2012. It required a FINRA member to have reasonable grounds for believing an investment recommendation was suitable based on the customer's financial situation and needs:

⁸ FINRA Rule 9269(a).

⁹ Second Notice of Complaint.

¹⁰ Panfil is hereby notified that he may move to set aside this Default Decision under FINRA Rule 9269(c) if he can show good cause.

¹¹ FINRA Rule 2111(a). A customer's investment profile includes the customer's age, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the associated person. *Dep't of Enforcement v. Werner*, No. 2015048048801, 2017 FINRA Discip. LEXIS 45, at *34 (OHO Nov. 6, 2017).

¹² See *Dep't of Enforcement v. Escarcega*, No. 2012034936005, 2017 FINRA Discip. LEXIS 32, at *51 n.28 (NAC July 20, 2017); Regulatory Notice 11-25, 2011 FINRA LEXIS 45, at *2-4 (May 2011).

[I]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of facts, if any, disclosed by such customer as to his other security holdings, and as to his financial situation and needs.¹³

According to the Interpretative Material for NASD Rule 2310, short-term trading in mutual fund shares is a practice that violates a broker's responsibility for fair dealing.¹⁴ Although the texts of FINRA Rule 2111 and NASD Rule 2310 differ, the substance is the same: an associated person must have a reasonable basis to believe a recommended transaction is suitable for the customer.¹⁵ Substantial sales charges and related fees may make a recommended transaction unsuitable.¹⁶

b. Application to this Case

As the Complaint alleges, from April 2012 through March 2015, Panfil effected 24 mutual fund switch transactions in four customer accounts with no reasonable basis to believe the transactions were suitable.¹⁷ On these occasions, he sold mutual funds after the customers had held them for only two or three months.¹⁸

Panfil's mutual fund switches caused the customers to incur \$27,924 in excess sales charges and fees, most of which profited Panfil.¹⁹ These sales charges and fees outweighed any marginal benefit from the new mutual funds.²⁰ The switches were unsuitable because, among other things, they were inconsistent with the long-term nature of the mutual funds the customers already held in their accounts.²¹ There were no reasonable grounds to believe the switches were in the customers' best interests, and the investment objectives of the new funds were similar to those of the previous funds.²²

¹³ NASD Rule 2310(a).

¹⁴ IM 2310-2(a)(1), (b)(3).

¹⁵ *Dep't of Enforcement v. Wall Street Strategies, Inc.*, No. 2012033508702, 2015 FINRA Discip. LEXIS 64, at *26 (OHO Sept. 15, 2015) ("Although differing in language, both rules require that a broker's recommendation of an investment in securities must be suitable to the customer based on the customer's financial needs and circumstances.").

¹⁶ *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *58 (NAC July 18, 2016) (respondent "implemented this investment strategy, knowing that CF's sale of the variable annuities would result in surrender fees of more than \$36,000").

¹⁷ Compl. ¶ 13.

¹⁸ Compl. ¶ 13.

¹⁹ Compl. ¶¶ 3, 13.

²⁰ Compl. ¶ 17.

²¹ Compl. ¶ 14.

²² Compl. ¶¶ 17, 26.

For these reasons, Panfil violated NASD Rule 2310, IM 2310-2, and FINRA Rules 2111 and 2010.²³

2. Falsifying Customer Signatures

FINRA Rule 2010 requires that “[a] member in the conduct of its business shall observe high standards of commercial honor and just and equitable principles of trade.” Forgery is a violation of Rule 2010 when the misconduct defrauds a customer or otherwise benefits the forger.²⁴

Ridgeway & Conger required its representatives and their customers to fill out and sign mutual fund switch forms before switching from one mutual fund to another.²⁵ Three of Panfil’s customers did not receive, fill out, or sign the forms for the switches in their accounts.²⁶ The signatures on the forms were not theirs.²⁷ Panfil forged the signatures, or caused them to be forged.²⁸

3. Exercising Discretion without Prior Written Authorization

NASD Rule 2510 provides:

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.²⁹

Panfil violated NASD Rule 2510 by exercising unauthorized discretion in three customers’ accounts. He decided to execute short-term mutual fund switches and chose which funds to purchase and which to sell.³⁰ He determined the time and price for the purchases and sales.³¹ He

²³ Compl. ¶ 40.

²⁴ *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *16 (Aug. 22, 2008).

²⁵ Compl. ¶ 42.

²⁶ Compl. ¶ 47.

²⁷ Compl. ¶ 47.

²⁸ Compl. ¶ 42.

²⁹ NASD Rule 2510(b); *accord Dep’t of Enforcement v. Griffith*, No. 2010025350001, 2015 FINRA Discip. LEXIS 55, at *12 (NAC Dec. 22, 2015) (“NASD Rule 2510(b) prohibits registered representatives from exercising discretion over a customer account unless the customer has given written authorization and the firm accepts the customer’s account in writing.”).

³⁰ Compl. ¶¶ 51, 53.

³¹ Compl. ¶ 53.

acted without prior written authorization from the customers and without the firm's approval to maintain discretionary accounts.³²

4. Summary

In sum, Panfil effected unsuitable mutual fund switches, forged or caused to be forged customers' signatures, and executed unauthorized discretionary trades, in violation of NASD and FINRA Rules.

III. Sanctions

The purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent.³³ In determining sanctions, the adjudicator must consider the Sanction Guidelines' Principal Considerations in Determining Sanctions, which are applicable to all sanction formulations. The Principal Considerations include aggravating factors that apply to this case. Panfil did not accept responsibility for or acknowledge the misconduct prior to detection and intervention.³⁴ He harmed the customers.³⁵ His misconduct was the result of intentional acts.³⁶ It resulted in his monetary gain.³⁷ There are no mitigating factors.

With these aggravating factors in mind, the sanction for each of Panfil's violations is addressed separately below.

A. Unsuitable Mutual Fund Switching

According to the Sanction Guideline for Unsuitable Recommendations (first cause of action), the adjudicator should strongly consider barring the respondent where aggravating factors predominate.³⁸ The Guideline recommends a fine of \$2,500 to \$110,000.³⁹ Based on the

³² Compl. ¶ 54.

³³ FINRA Sanction Guidelines ("Guidelines") at 2 (2017), <http://www.finra.org/industry/sanction-guidelines> (General Principle No. 1: Disciplinary sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct).

³⁴ Guidelines at 7 (Principal Consideration No. 2: Whether the respondent accepted responsibility for and acknowledged the misconduct to his or her employer prior to detection and intervention by the firm).

³⁵ Guidelines at 7 (Principal Consideration No. 11: Whether the respondent's misconduct resulted directly or indirectly in injury to the investing public, the member firm with which the respondent was associated, and/or other market participants).

³⁶ Guidelines at 8 (Principal Consideration No. 13: Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence).

³⁷ Guidelines at 8 (Principal Consideration No. 16: Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

³⁸ Guidelines at 95.

³⁹ Guidelines at 95.

aggravating factors present here, Panfil shall be barred from associating with any FINRA member firm in any capacity for his unsuitable mutual fund switches in violation of NASD Rule 2310, IM 2310-2, and FINRA Rules 2111 and 2010.⁴⁰

B. Falsifying Customer Signatures

According to the applicable Sanction Guideline for Forgery, Unauthorized Use of Signatures or Falsification of Records (second cause of action), a bar is standard in a case where: (1) the respondent affixes a signature to or falsifies a document without authorization; (2) the respondent affixes the signature in furtherance of another violation; or (3) the forgery results in customer harm or is accompanied by significant aggravating factors.⁴¹ Panfil forged the customers' signatures, or caused them to be forged, without authorization. He did so in furtherance of other violations, resulting in customer harm accompanied by significant aggravating factors.

There are five considerations specific to this Sanction Guideline: (1) the nature of the documents signed or falsified; (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority; (3) whether the customer possessed or saw the document before the customer's signature was affixed to it, and the customer affirmed the signature; (4) if the document pertained to a transaction, whether the transaction was agreed to by an authorized person; and (5) whether the customer re-signed the document or ratified the signature.⁴²

The purpose of the mutual fund switch forms was to protect customers by ensuring they knew of, understood, and agreed to mutual fund switches. The forgeries of the customers' signatures on the forms defeated this purpose. Panfil did not have a belief of express or implied authority to sign the forms or cause them to be signed. Instead, he employed the forgeries without the customers' knowledge to create the false impression that he had authority. The customers did not possess or see the forms before their signatures were forged, and they did not affirm the signatures afterward. The customers did not agree to the mutual fund switches to which the forms pertained. The customers did not re-sign the forms or ratify their signatures. Based on these aggravating factors and the Principal Considerations, the appropriate sanction is to bar Panfil from associating with any FINRA member in any capacity for forging or causing the forgery of his customers' signatures in violation of FINRA Rule 2010. But in light of the bar ordered for the first cause of action, the Hearing Officer does not impose a bar for the forgery.

C. Exercising Discretion without Prior Written Authorization

According to the Sanction Guideline for the Exercise of Discretion without Customer's Written Authority, when aggravating factors predominate, the adjudicator should consider

⁴⁰ Because a bar is imposed, the Hearing Officer does not order a fine. *See* Guidelines at 10.

⁴¹ Guidelines at 37.

⁴² Guidelines at 37.

suspending a respondent in any capacity for at least ten to thirty business days.⁴³ The Guideline also recommends a fine of \$2,500 to \$15,000.⁴⁴ There are four considerations specific to this Sanction Guideline: (1) whether the customer's grant of discretion was express or implied; (2) whether the employer firm's policies or procedures prohibited discretionary trading; (3) whether the firm prohibited the respondent from exercising discretion in customer accounts; and (4) whether the respondent's exercise of discretion went beyond time and price discretion.⁴⁵

The customers affected by Panfil's discretionary trading did not grant express or implied discretion. He did not have approval from his firms to maintain discretionary accounts. His exercise of discretion went well beyond time and price. Because aggravating factors predominate, the Hearing Officer would suspend Panfil from associating with any FINRA member firm in any capacity for a period of thirty business days and fine him \$15,000. But in light of the bar ordered for the first cause of action, the Hearing Officer does not impose a suspension or fine.

IV. Order

Respondent Brian Panfil made unsuitable recommendations for mutual fund switches in violation of NASD Rule 2310, IM-2310-2, and FINRA Rules 2111 and 2010; forged or caused to be forged customers' signatures on mutual fund switch forms in violation of FINRA Rule 2010; and exercised discretion without customers' prior written authorization in violation of FINRA Rules 2510 and 2010. For the first cause of action, he is barred from associating with any

FINRA member in any capacity. The bar shall be effective immediately if this Default Decision becomes FINRA's final disciplinary action.


Richard E. Simpson
Hearing Officer

Copies to:

Brian J. Panfil (via email and first-class mail)
Kathryn S. Gostinger, Esq. (via first-class mail and electronic mail)
Christopher M. Burky, Esq. (via electronic mail)
Mark A. Koerner, Esq. (via electronic mail)
Jeffrey D. Pariser, Esq. (via electronic mail)

⁴³ Guidelines at 86.

⁴⁴ Guidelines at 86.

⁴⁵ Guidelines at 86.