BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. John Audifferen Brooklyn, New York, Respondent.	DECISION Complaint No. C10030095 Dated: October 18, 2007

Registered representative: willfully caused firm to extend credit impermissibly to a customer; personally extended credit to the same customer; willfully obtained beneficial use of firm extension of credit to customer; impermissibly shared in customer profits; caused firm to free ride in a customer's cash account; willfully caused firm to extend credit impermissibly to his own cash and margin accounts; and failed to disclose a customer complaint on a Form U4. Held, findings and bars affirmed; monetary sanction modified.

Appearances

For the Complainant: Vaishali S. Shetty, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Norman B. Arnoff, Esq.

Decision

Pursuant to NASD Rule 9311, John Audifferen ("Audifferen") appeals a Hearing Panel's March 14, 2005 decision finding that Audifferen willfully caused member firm May Davis Group, Inc. ("May Davis") to extend credit impermissibly to a customer's account and his own accounts, personally extended credit to a customer's account, obtained the beneficial use of the firm's improper extension of credit to a customer, impermissibly shared in a customer account, caused May Davis to free ride in a cash account, and failed to disclose a customer complaint on a Uniform Application for Securities Industry Registration or Transfer ("Form U4"). The Hearing

Panel barred Audifferen and fined him $17,500. In light of the bar imposed for Audifferen's credit-related violations, the Hearing Panel imposed no additional sanction for his failure to disclose a customer complaint on the Form U4. After a thorough review of the record, we affirm the Hearing Panel's findings and the bar imposed, and we modify the monetary sanction.[1]

I. Background

From July 1999 to July 2000, the period related to Audifferen's credit violations, Audifferen was associated as a general securities representative with May Davis. After leaving May Davis, he associated with three other member firms, and then associated as a general securities representative with J.P. Turner & Company, LLC ("JPT") from September through November 2001. The Form U4 violation alleged in the complaint relates to Audifferen's association with JPT. Audifferen is not currently registered with a member firm.

II. Procedural History

FINRA's Department of Enforcement ("Enforcement") filed the complaint in this matter in November 2003. Causes one and two of the complaint contained allegations related to the account of a May Davis customer ("MD Customer"). Causes one and two alleged, and the Hearing Panel found, that, between July 1999 and July 2000, Audifferen willfully caused his firm to extend credit to MD Customer's account, obtained beneficial use of the credit extension, personally extended credit to MD Customer's account, shared in MD Customer's profits, and caused May Davis to free ride in MD Customer's account, in violation of Section 220.8 of Regulation T of the Federal Reserve Board ("Reg. T"), Sections 7(c) and (d) of the Securities Exchange Act of 1934 ("Exchange Act"), and NASD Rules 2110, 2330(f), and 2520(f). Cause three alleged, and the Hearing Panel found, that Audifferen willfully caused May Davis improperly to extend credit to his cash and margin accounts at May Davis, in violation of Sections 220.4, 220.8, and 220.12 of Reg. T, Section 3(b) of Regulation X of the Federal Reserve Board ("Reg. X"), Section 7(f) of the Exchange Act, and NASD Rule 2110. Cause four alleged, and the Hearing Panel found, that Audifferen failed to disclose on the Form U4 that he submitted to JPT for filing with FINRA a complaint that a former customer had levied against him while he was associated with Investec Ernst & Company ("Investec").

The Hearing Panel barred Audifferen for misconduct related to MD Customer's account (causes one and two) and fined him $17,500. The Hearing Panel imposed an additional bar for misconduct related to Audifferen's personal accounts (cause three) and imposed no additional sanction for Audifferen's Form U4 violations (cause four).

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[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

III. Facts

This case involves three distinct areas of misconduct by Audifferen. The first relates to the May Davis account of MD Customer. The second relates to Audifferen's own accounts at May Davis. The third relates to Audifferen's Form U4 for his association with JPT.

A. The MD Customer Account at May Davis

1. Audifferen Convinces MD Customer to Open an Account

MD Customer opened a brokerage account through Audifferen at May Davis in December 1999. Audifferen was the representative on the account. At the time, MD Customer had had a two-year personal relationship with Audifferen. He suggested that she open the account. MD Customer had very limited investment experience and little money to invest, but she trusted Audifferen, so she opened the account as he had suggested. MD Customer's new account form indicated erroneously that MD Customer was in the real estate business, had had five years of investment experience, and owned her own home. It listed her annual income as $100,000 and total assets as $1,000,000. MD Customer testified that she had not seen the new account form and that her annual income was closer to $48,000. MD Customer's December 1999 bank statement indicates that she had approximately $6,500 in her checking account and approximately $10,000 in savings. She stated that she also had an account at Charles Schwab that held one security valued at approximately $20,000. MD Customer indicated that a friend had given her the securities and had opened the account for her six months prior. She sold small amounts of stock from the account when she needed money. Other than the Schwab account, MD Customer had no investment experience when she opened the May Davis account.

In December 1999, MD Customer provided Audifferen with a $5,000 check to open her account (check number 116) and fund a purchase of Delta and Pine Land Company stock ("DLP"). MD Customer's check number 116 for $5,000 was returned for insufficient funds, and MD Customer wrote a second $5,000 check (check number 117), which subsequently cleared. MD Customer received a confirmation for the December 1, 1999 purchase in her account of 400 shares of DLP for $10,191.78. MD Customer contacted Audifferen to ask how he was able to purchase stock valued at $10,000 with the $5,000 that she had deposited. He advised her that he had deposited his own money into her account to fund the difference. In early January 2000, MD Customer received a confirmation for the sale of some of her DLP holdings. She had not authorized the sale and questioned Audifferen about it. He rebuffed her questions.[2]

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[2] MD Customer received her December 1999 May Davis account statement sometime in mid-January 2000. The statement indicated that she had a negative closing balance. She questioned Audifferen, and he blamed a "Y2K" computer glitch for what he indicated was an erroneous statement. At that time, Audifferen asked MD Customer to give him two checks totaling $500. She gave him check number 128, dated January 14, 2000, which was payable to S.G. Cowen Securities Corporation ("Cowen"), May Davis' clearing firm, for $200 and check number 129 for $300. Audifferen advised MD Customer that he would deposit funds into her checking account to cover the two checks. On January 18, he deposited check number 128 into

[Footnote continued on next page]

In January 2000, Audifferen asked MD Customer to give him two signed, blank checks. Audifferen convinced MD Customer that he needed the checks because her check number 116 for $5,000 had bounced. MD Customer did not suspect that Audifferen would try to steal money from her bank account because she had so little money to steal. She signed checks number 132 and number 133, left the remainder of the checks blank, and gave them to Audifferen. Also in January 2000, Audifferen asked MD Customer to write a check for $7,000 to Cowen, May Davis' clearing firm. MD Customer believed that Audifferen needed the check for his own use, because Audifferen's new checks for a personal bank account had not yet arrived, and he needed to pay Cowen for a personal transaction. MD Customer told Audifferen that she did not have $7,000 in her account to cover the check, and he assured her that he would deposit his own money into her account to cover the check. MD Customer wrote check number 131 dated January 20, 2000, to Cowen for $7,000 and gave it to Audifferen.

2. Audifferen Executes Trades for Which MD Customer Cannot Pay

On January 21, 2000, Audifferen bought 1,000 shares of eUniverse Inc. stock ("EUNI") in MD Customer's May Davis account for a purchase price of $6,917.50. MD Customer was unaware of the purchase in advance, and she did not remit payment by the due date, January 28. Cowen obtained an extension of the payment due date (a Reg. T extension) on MD Customer's behalf to February 4, 2000, but she did not pay by that date either. The purchase price was paid on February 8, when MD Customer's check number 131 (which Audifferen, not MD Customer, possessed) was deposited into her May Davis account. This check cleared even though MD Customer's own funds were insufficient to cover it. On Monday, February 7, 2000, Audifferen wrote check number 432 for $7,000 drawn on his personal bank account at Citibank. He wrote the check to "cash" and negotiated the check that day. Also on February 7, 2000, $7,000 was deposited into MD Customer's bank account, and MD Customer contends that Audifferen made the deposit.

On Wednesday, January 25, 2000, without MD Customer's knowledge, Audifferen bought 3,000 shares of Max Internet Communications stock ("MXIP") in MD Customer's account for a total purchase price of $63,105. At the time, MD Customer had insufficient funds in her bank account to cover the purchase. MD Customer neither paid for the MXIP purchase by the original due date, February 1, 2000, nor by the date of the Reg. T extension, February 8, 2000. In fact, MD Customer never paid for the purchase, and on February 10, 2000, Audifferen sold the MXIP stock from MD Customer's account for $76,392.45, generating a $13,287.45 profit. The proceeds of the sale effectively covered the purchase price, which still had not been paid.

[cont'd]
MD Customer's May Davis account, and MD Customer contended that on January 19, Audifferen deposited $200 into her bank account to cover check number 128.

On the day that Audifferen sold the MXIP stock from MD Customer's account, MD Customer's check number 133 (one of two signed, blank checks that MD Customer had given Audifferen one month earlier in January 2000) for $61,105 was deposited into MD Customer's May Davis account. MD Customer was unaware of the deposit or of the fact that the check was returned for insufficient funds until she received her February bank statement. MD Customer testified that the only handwriting on the check that belongs to her is the signature and that she recognized the remaining handwriting to be Audifferen's.[3]

Without MD Customer's knowledge, Audifferen sold the EUNI stock in MD Customer's account on March 3, 2000, for $9,644.67, generating a profit of $2,673.37.[4] On or about March 8, MD Customer received her February account statement from May Davis. She contacted Audifferen to question the activity in her May Davis account, and he told her that the computers were down and that the statement was erroneous. At that time, MD Customer instructed Audifferen to close her account.

3. Audifferen Withdraws Profits from MD Customer's Account

Also on or about March 8, 2000, Audifferen effected a wire transfer of $18,000 from MD Customer's May Davis account to her bank account. Soon after her March 8 telephone conversation with Audifferen, MD Customer received a call from her bank to confirm instructions that they had received to wire $17,500 from her bank account to an account at Citibank, which she later learned belonged to Audifferen. She refused the transfer and contacted Audifferen. MD Customer testified that Audifferen was angry and berated her for refusing to approve the transfer of what he referred to as "his funds." On March 9, 2000, Audifferen deposited MD Customer's check number 132 (the second of two signed, blank checks that MD Customer had given Audifferen two months earlier in January 2000) for the amount of $17,500 into his own bank account. On March 13, check number 132 was returned for insufficient funds.

During subsequent days, Audifferen contacted MD Customer many times and demanded that she pay him $17,500. On March 17, 2000, she relented and wired $17,500 to Audifferen's personal checking account at Citibank. MD Customer testified that she never believed that the profits that Audifferen generated in her May Davis account, through trades that she knew nothing about, truly belonged to her. MD Customer continued to demand that Audifferen close her account. On May 23, 2000, she received notice that the account had been closed and a check for

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[3] The Hearing Panel also made an independent assessment of the handwriting on the check and compared it to an acknowledged sample of Audifferen's handwriting. The Hearing Panel agreed with MD Customer that the handwriting on the check other than the signature appeared to be that of Audifferen.

[4] Total profits generated in MD Customer's account from the sales of EUNI and MXIP stock were $15,960.82.

$1,134.01.[5] MD Customer contacted Audifferen because she believed that the amount returned to her should have been greater. He agreed to get back to her, but never did.

B. Audifferen's May Davis Account

During the second half of April 2000, Audifferen deposited three personal checks, numbers 445, 446, and 449, into his own May Davis accounts. All three were returned for insufficient funds. Check number 445 was dated April 18, 2000, and was payable to Cowen for $13,000 to cover part of Audifferen's purchase in a margin account of 4,000 shares of Metacreations Corp. stock ("MCRE"), totaling $55,305. Check number 449 was dated April 28, 2000, and was payable to Cowen for $30,000 to cover two April 20 purchases totaling $29,671 of 38,900 shares of Celerity Systems, Inc. stock ("CLRT") in Audifferen's cash account. Check number 446 was dated May 1, 2000, and was payable to Cowen for $7,000, in part, to cover an April 24 purchase of 10,100 shares of CLRT and an April 25 purchase of 1,000 shares of CLRT totaling $11,967 in Audifferen's cash account.

Audifferen did not cover the three bad checks, so his stock purchases went unpaid, and May Davis ultimately cancelled the trades or sold off the stock. Audifferen attempted to collect on the profits generated from the firm's sales of CLRT, but the firm withheld the profits from Audifferen.[6]

C. Audifferen's Inaccurate Form U4

Audifferen left May Davis in July 2000 and was associated with Investec from August 2000 through March 2001 and two other member firms from April through August 2001. In September 2001, he joined JPT. During the JPT registration process, JPT's management gave Audifferen a Form U4 that he previously had completed for a prior employer. JPT downloaded the Form U4 from the Central Registration Depository ("CRD"®) and directed Audifferen to review and update the Form U4 for filing. Question number 23I on the Form U4 asked whether, within the prior 24 months, the applicant had been the subject of an investment-related, consumer-initiated, written complaint that alleged a sales practice abuse and claimed damages of $5,000 or greater. The question specifically stated that, if no damage amount was alleged, the complaint must be reported unless the firm has made a good faith determination that the damages

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5 Before closing MD Customer's account, however, Audifferen bought 3,500 shares of WTAA International stock ("WTAA").

6 During the approximately six months preceding these transactions, Audifferen wrote 13 checks totaling $55,000 that were returned for insufficient funds in his and his mother's May Davis accounts. May Davis' records indicate that Audifferen's pre-tax net income was $538.71 in September 1999, $10,990.83 in October 1999, $7,060.70 in November 1999, $4,881.41 in December 1999, $9,857.78 in February 2000, and $2,791.03 in March 2000 (January 2000 income figures are not part of the record). In February 2000, Audifferen requested a pay advance from May Davis in the amount of $21,400 and stated that his reason was financial hardship.

from the alleged misconduct would be less than $5,000. Audifferen answered "no" to this question.

Audifferen was the subject of a complaint from a customer of his while he was a registered representative at Investec. The Investec customer ("Inv. Customer") sent a letter dated April 17, 2000 to Investec in which she complained of Audifferen's unauthorized trading in her account, fraudulent completion of an options agreement and a new account form, and misrepresentation of facts. Inv. Customer copied Audifferen on the letter and demanded the reimbursement of her losses without specifying an amount.[7] Investec ultimately amended Audifferen's Uniform Termination Notice for Securities Industry Registration ("Form U5") to state that Inv. Customer alleged compensatory damages of $10,119.46. Audifferen admitted that he was aware of Inv. Customer's complaint when he submitted the Form U4 to JPT.

IV. Discussion

After a thorough review of the record, we affirm the Hearing Panel's findings of violation and find that Audifferen caused May Davis to violate Sections 220.4, 220.8 and 220.12 of Reg. T, Sections 7(c), 7(d), and 7(f) of the Exchange Act, Section 3(b) of Reg. X, NASD Rules 2110, 2330(f), and 2520(f), and NASD IM-1000-1.

A. Improper Credit Extensions in MD Customer's May Davis Account (Causes One and Two)

We find, as alleged in causes one and two, that Audifferen willfully caused May Davis to extend credit impermissibly to MD Customer's cash account, willfully benefited from May Davis' extension of credit to MD Customer, personally extended credit to MD Customer, impermissibly shared in the profits generated in MD Customer's May Davis account, and caused May Davis to free ride in MD Customer's cash account, in violation of Section 220.8 of Reg. T, Sections 7(c), (d) and (f) of the Exchange Act, and NASD Rules 2110, 2330(f) and 2520(f).

Reg. T applies to cash and margin accounts at brokerage firms. Section 220.8 of Reg. T states that, in a cash account, a broker-dealer may buy or sell to any customer any security if there are sufficient funds in the account or if the broker-dealer accepts in good faith that the customer will promptly make full cash payment for the security before selling it and does not anticipate selling it prior to making payment. "Accordingly, a customer purchasing a security for a cash account must pay for it immediately or within the period usually required to complete an ordinary securities transaction." *SEC v. Packer, Wilbur & Co., Inc*, 362 F. Supp. 510, 513 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 978 (2d Cir. 1974). The payment period at the time of the purchases in

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[7] In a follow-up letter to the Securities and Exchange Commission in May 2001, Inv. Customer expanded on her original complaint. She stated that she had been dating Audifferen when he encouraged her to open an account with him to invest in the securities market. She contended that Audifferen, after persuading her to sign an options trading agreement, completed the agreement inaccurately and overstated her financial assets.

MD Customer's account was five business days unless lawfully extended.[8] NASD Rule 2520(f)(9) precludes member firms from permitting a customer to make a practice of effecting purchases in a cash account in which the cost of the purchase is met with a sale of the same security.[9] Section 7(c) of the Exchange Act makes it unlawful for a broker-dealer to extend credit to a customer except in accordance with the regulations prescribed by the Federal Reserve Board under Reg. T. *Coburn and Middlebrook, Inc.*, 37 S.E.C. 583, 584 (1957). Section 7(d) of the Exchange Act extends the proscriptions contained in Section 7(c) to associated persons. Violations of any of these rules constitute violations of Rule 2110.[10] *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

On January 21, 2000, Audifferen purchased 1,000 shares of EUNI in MD Customer's account. The $6,917.50 purchase price was due, with a Reg. T extension, on February 4, 2000. Payment arrived at May Davis, via Audifferen, on February 8. On January 25, 2000, Audifferen purchased 3,000 shares of MXIP in MD Customer's account. The $63,105 purchase price was due, with a Reg. T extension, on February 8, 2000, but never arrived. Audifferen sold both blocks of stock. Proceeds from Audifferen's February 10, 2000 sale of the MXIP block covered the purchase price and generated a profit. Audifferen's March 3, 2000 sale of EUNI also generated a profit.

Both the EUNI and MXIP purchases in MD Customer's account arose from Audifferen's recommendations, and the Hearing Panel credited MD Customer's contention that she was unaware of the purchases until after they occurred. Audifferen executed both purchases, and the evidence links him to the payment for the EUNI purchase and attempted payment for the MXIP purchase. In January 2000, Audifferen asked MD Customer for a check for $7,000, purportedly to cover a personal debt. She gave him check number 131 made payable to Cowen. MD Customer told Audifferen then that she did not have the funds in her account to cover the check, and he assured her that he would deposit his funds into her account to cover the check. On February 7, 2000, Audifferen withdrew $7,000 from his checking account. On that same day, a

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[8] Section 220.8(d) of Reg. T allows the creditor/broker-dealer to grant an extension of the payment period. Reg. T also establishes the parameters within which a broker-dealer may extend credit to a customer in a margin account. For example, Section 220.4 of Reg. T limits the amount of money that a broker-dealer can lend to a person in connection with a securities transaction to 50 percent of the initial purchase price. *See Investment Street Co.*, Exchange Act Rel. No. 42447, 2000 SEC LEXIS 278, at *6 (Feb. 22, 2000).

[9] This practice is known as "free riding." *See Prime Investors, Inc.*, 53 S.E.C. 1, 4 (1997) ("The 'free riding' purchaser buys a security, expecting to pay for it through the sale of the security before payment is due."). The customer essentially borrows the funds to purchase the securities, which is prohibited in a cash account, and the firm extends credit to the customer impermissibly. *See John Thomas Gabriel*, 51 S.E.C. 1285, 1288 (1994), *aff'd*, 60 F.3d 812 (2d Cir. 1995).

[10] Pursuant to NASD Rule 0115, persons associated with members have the same duties and obligations as members.

deposit of $7,000 was made into MD Customer's bank account. MD Customer testified that she had not made the deposit and that Audifferen had. The next day, check number 131, which MD Customer testified she gave to Audifferen in January, was deposited into her May Davis account without her knowledge.

MD Customer testified that, in January 2000, she gave Audifferen two signed, blank checks (numbers 132 and 133). On February 10, 2000, MD Customer's check number 133 for $61,105 was deposited into MD Customer's May Davis account without MD Customer's knowledge ($63,105 was due on February 8 for the MXIP purchase). (There is no evidence in the record to account for the difference between $61,105 (the amount of the check) and $63,105 (the amount due).) The check was returned for insufficient funds. After comparing the handwriting on the check (other than MD Customer's signature) to samples of Audifferen's handwriting included in the record, the Hearing Panel concluded that Audifferen wrote the payee, date, and amount of the check. MD Customer also testified that she was familiar with Audifferen's handwriting and identified the handwriting on check number 133 as his.[11]

Audifferen knew, based on his past experience with MD Customer and her own admissions to him, that she did not have sufficient funds in her bank account to cover the EUNI and MXIP purchases. He nonetheless executed the transactions without informing MD Customer and knowing that she could not pay for them. By doing so, he willfully caused May Davis to extend credit to MD Customer in violation of Reg. T and Section 7(c) of the Exchange Act. Audifferen also deposited $7,000 of his own money into MD Customer's bank account to cover her check that he submitted to May Davis as payment for the EUNI purchase, thereby personally extending credit to MD Customer in violation of Reg. T and Section 7(d) of the Exchange Act. We further find that Audifferen's MXIP purchase in MD Customer's account caused May Davis to violate NASD Rule 2520(f)(9) by enabling MD Customer to free ride in a cash account.

We also find that Audifferen enjoyed the beneficial use of May Davis' credit extensions to MD Customer, in violation of Section 7(f) of the Exchange Act. Section 7(f) prohibits registered persons from obtaining, receiving or enjoying the beneficial use of an extension of credit for the purpose of purchasing securities unless the credit extension complies with Reg. T. *See Dep't of Enforcement v. Roethlisberger*, Complaint No. C8A020014, 2003 NASD Discip. LEXIS 48, at *8 (NASD NAC Dec. 15, 2003). In February and March 2000, Audifferen sold MD Customer's MXIP and EUNI holdings, securities that he purchased in MD Customer's account based on violative extensions of credit, and generated a profit of $15,987. At Audifferen's request and without MD Customer's knowledge, May Davis transferred $18,000

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[11] Audifferen argues that Enforcement was required to offer the testimony of a handwriting expert in order to prove that the handwriting on check number 133 belonged to him. We disagree. It was proper for the Hearing Panel to compare examples of Audifferen's handwriting to the handwriting on check number 133 and conclude that they were similar and to accept MD Customer's testimony in this regard. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1165 (2002) ("Even under the Federal Rules of Evidence, which do not apply in NASD disciplinary actions, expert testimony would not have been required on this issue.").

from MD Customer's May Davis account to MD Customer's personal bank account. Audifferen thereafter attempted unsuccessfully to transfer funds from MD Customer's bank account to his own Citibank account and then pressured MD Customer until she executed the transfer of $17,500 from her account to Audifferen's Citibank account. Audifferen's sales of MD Customer's EUNI and MXIP positions accounted for approximately 90 percent of the profits that flowed into MD Customer's May Davis account. MD Customer's purchases of those securities would not have been possible without May Davis' extensions of credit to MD Customer's account, and Audifferen's ultimate receipt of profits from MD Customer's account constitutes Audifferen's beneficial use of the credit extension. *See SEC v. Militano*, Fed. Sec. L. Rep. (CCH) p. 98330, 1994 U.S. Dist. LEXIS 8420, at *19 (S.D.N.Y. 1994) (finding a violation of Section 7(f) when registered person purchased securities in a margin account without adequately funding the account and later withdrew funds from the under-margined account), *aff'd*, 101 F.3d 685 (2d Cir. 1996).

We also find that Audifferen impermissibly shared in the profits generated in MD Customer's account. NASD Rule 2330(f), as it read at the time of the misconduct at issue, restricted registered representatives from sharing directly or indirectly in the profits or losses in a customer's account unless the representative receives prior written authorization from the member carrying the account and shares in the profits or losses only in direct proportion to the financial contributions that the representative has made to the account.[12] Audifferen does not contend that he had written permission from May Davis or Cowen, its clearing firm, to share in the profits in MD Customer's account. Additionally, he deposited $7,000 into her account, but withdrew $17,500. By transferring trading profits from MD Customer's May Davis account to her bank account and then pressuring her to give the money to him, Audifferen shared in the profits in MD Customer's account.[13] *See Dist. Bus. Conduct Comm. v. Jenson*, Complaint No. CHI-1050, 1989 NASD Discip. LEXIS 13, at *4 (NASD Bd. of Governors Feb. 23, 1989) (finding rule violation and impermissible sharing when broker received $8,000 of $11,197.60 in profits generated in customer account).

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[12] FINRA amended NASD Rule 2330(f) effective May 2003. *See NASD Notice to Members 03-21* (May 12, 2003).

[13] Audifferen referred to MD Customer's $17,500 payment to him alternately as the repayment of a loan or the return of a gift. The Hearing Panel credited MD Customer's testimony that the funds did not represent the repayment of a loan or return of a gift. MD Customer testified that Audifferen demanded the money from her and regularly referred to the funds in her account as "his money." Furthermore, even if the $17,500 payment represented reimbursement for a prior loan or the return of a gift, it does not alter the fact that Audifferen did not comply with Rule 2330 and shared in the profits in MD Customer's account without written permission from May Davis and Cowen. *Cf. Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17, at *57 (NASD NAC June 25, 2001) (finding that a broker who contributes his own assets, whether received as compensation or a loan, into a customer account to offset trading losses is sharing in those losses).

Audifferen contends that Enforcement failed to meet its burden of proof and based its case entirely on inadequate circumstantial evidence. We disagree. The standard of proof in FINRA disciplinary proceedings is preponderance of the evidence. *See Howard Brett Berger*, Exchange Act Rel. No. 55706, 2007 SEC LEXIS 895, at *18 (May 4, 2007). As discussed above, the evidence in this case supports our findings of violation by a preponderance of the evidence and compels us to affirm the Hearing Panel's decision.[14]

We also find that Audifferen's violations of Sections 7(c) and 7(d) of the Exchange Act were willful. "In order to commit a willful violation, a respondent need only have intentionally committed the act that constitutes the violation." *Dep't of Mkt. Regulation v. Ko Sec., Inc.*, Complaint No. CMS000142, 2004 NASD Discip. LEXIS 21, at **8-9 (NASD NAC Dec. 20, 2004). An individual need not know that his conduct will violate an FINRA rule or securities regulation in order to support a finding of willfulness. *Cf. Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000) (holding that a finding of willfulness is possible even without the intent to violate the law and a reckless disregard of a regulatory requirement).

Audifferen was an experienced securities broker who had been employed in the securities industry since 1990. He admitted that he was familiar with the requirements of Reg. T and the restrictions that it imposed on the timing of payments for securities transactions. He knowingly executed both the EUNI and MXIP purchases in MD Customer's account without MD Customer's prior knowledge and notwithstanding the fact that she had bounced other checks to May Davis. He knew that she had limited financial resources, yet executed the EUNI and MXIP purchases, which together cost nearly $70,000. Audifferen was well aware that MD Customer could not pay the $7,000 needed for the EUNI purchase alone because she had advised him that she had insufficient funds to cover check number 131 for $7,000. He nonetheless executed the EUNI purchase by supplementing MD Customer's funds and then executed the MXIP purchase just days later notwithstanding its $63,000 price tag. We thus conclude that Audifferen executed both trades knowing that MD Customer could not pay for them within the period required under Reg. T and that May Davis and Cowen would have to extend credit to her in order for her to complete the transactions. His demand for $17,500 from MD Customer came after he knowingly sold her MXIP and EUNI blocks without her knowledge and transferred funds without her

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[14] Audifferen objects for the first time on appeal to testimony accepted into the record from witness HS, a registered representative at May Davis. Audifferen, not FINRA's Department of Enforcement, called HS as a witness. On direct examination by Audifferen, HS testified about MD Customer's personal life. On appeal, Audifferen objects to cross examination of HS by the Enforcement attorney regarding Audifferen's personal relationships with MD Customer and other customers. He argues that the prejudicial nature of this testimony far outweighed its probative value and that the Hearing Officer should not have accepted the testimony into evidence. Audifferen's argument is misplaced. Audifferen, not Enforcement, offered HS's testimony and elicited information on MD Customer's personal life. Furthermore, counsel for Enforcement confined his questions of HS to Audifferen's conduct at May Davis and other member firms. We do not find that the Hearing Officer erred in allowing Enforcement to cross-examine HS.

knowledge from her May Davis account to her personal bank account. We find that Audifferen sold the MXIP and EUNI blocks and transferred MD Customer's funds with the intent of obtaining the beneficial use of those trading profits for himself. We conclude that Audifferen's violations under causes one and two were willful.

B. Improper Credit Extensions in Audifferen's Account (Cause Three)

We find, as alleged in cause three, that Audifferen willfully caused May Davis to extend credit impermissibly in his May Davis cash and margin accounts by paying for his purchases of securities or for a margin deposit in those accounts with checks that were returned for insufficient funds, in violation of Sections 220.4, 220.8, and 220.12 of Reg. T, Section 3(b) of Reg. X, Section 7(f) of the Exchange Act, and NASD Rule 2110.

Section 220.8 of Reg. T applies to cash accounts; Sections 220.4 and 220.12 of Reg. T apply to margin accounts. Under Sections 220.4 and 220.12 of Reg. T, a margin deposit of 50 percent of the market value of the security at issue is required to effect a purchase on margin.[15] *Investment Street Co.*, Exchange Act Rel. No. 42447, 2000 SEC LEXIS 278, at *6 (Feb. 22, 2000). Reg. X is the counterpart of Reg. T, applicable to the borrower rather than the lender. Section 3(b) of Reg. X prohibits borrowers from willfully causing a broker-dealer to extend credit in violation of Reg. T. *See Roethlisberger*, 2003 NASD Discip. LEXIS 48, at *3 (NASD NAC Dec. 15, 2003).

Audifferen maintained a cash account and a margin account at May Davis. In April and May 2000, he paid for five securities purchases in those accounts with three checks (number 445 for $13,000, number 446 for $7,000, and number 449 for $30,000), which were returned for insufficient funds. Audifferen failed to submit other checks or cash to cover the cost of the purchases in the cash account or to provide a sufficient margin deposit in the margin account. Audifferen's defaults left May Davis responsible to its clearing firm for the cost of the purchases. May Davis subsequently sold one of Audifferen's stocks and cancelled the other purchases. By paying for his stock purchases with checks that subsequently were returned, Audifferen caused his firm to extend credit to him in violation of Reg. T and Reg. X and obtained the beneficial use of that credit.

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[15] Sections 220.4 and 220.12 of Reg. T establish the percentage of the value of each security purchased that must be deposited or maintained by the borrower. It provides that "(1) an initial deposit of funds or securities must be made in the account, (2) a specific percentage of the purchase price in cash or other marginable securities must be deposited or held in a margin account in conjunction with each securities purchase, (3) cash cannot be withdrawn from the account if the withdrawal would create or increase a margin deficiency, and (4) margin calls must be responded to within seven business days." *Militano*, 1994 U.S. Dist. LEXIS 8420, at *18 (S.D.N.Y. 1994). Responsibility for compliance rests with the borrower/customer and the lender/broker-dealer. *Id.*

Audifferen claims that he was unaware of the deficiencies in his bank account and that the fault lies with May Davis' operations department for failing timely to inform him of the returned checks. We disagree. As a registered person, Audifferen had a duty to ensure that he had sufficient funds in his checking account when he wrote checks to cover his stock purchases. *See John F. Lebens*, 52 S.E.C. 606, 611 (1996) (holding that it is unethical for a representative to take advantage of loose internal controls at his firm by passing bad checks); *John Gordon Simek*, 50 S.E.C. 152, 161 (1989) (holding that a registered representative had a duty to ensure that there were sufficient funds or overdraft protection available to cover the checks that he issued to the firm). Furthermore, in our view, Audifferen's attempts to assign responsibility for his own shortcomings to his firm's operations department illustrate his refusal to accept responsibility for his own misdeeds. *See Roethlisberger*, 2003 NASD Discip. LEXIS 48, at *12 (finding that a representative's attempts to blame his firm for allowing him to violate securities laws demonstrate representative's unwillingness to accept responsibility for his conduct).

We also find that Audifferen's violations in his own accounts were willful. During the course of two months, Audifferen passed three bad checks to his firm. The checks were drawn on an account that was in his name alone. Additionally, between October 1999 and April 2000, Audifferen had already bounced 13 checks totaling more than $50,000 that he wrote to cover securities transactions in his and his mother's accounts at May Davis. Some of the 13 returned checks were returned only days before he wrote the three checks at issue. Audifferen's pre-tax net commissions for February 2000 were $9,857 and for March 2000 were $2,791, and Audifferen indicated that May Davis was his only source of income. Additionally, in February 2000, Audifferen requested an advance of $21,400 from May Davis because of financial hardship. Clearly, he knew that he did not have a surplus of cash. Audifferen's explanations for the three bounced checks varied, and he ultimately claimed not to recall what happened, although he also claimed that he was able to recall other facts related to this time period, "no matter how minor." We conclude that Audifferen's violations under cause three were willful.

C. Audifferen Failed to Disclose a Customer Complaint on the Form U4 (Cause Four)

We find, as alleged in cause four, that Audifferen failed to disclose a customer complaint on the Form U4 that he submitted to member firm JPT, in contravention of NASD Rule 2110 and NASD IM-1000-1.

In September 2001, Audifferen sought employment with the Staten Island, New York branch office of JPT. He ultimately obtained registration as a general securities representative through JPT from approximately September 21, 2001 through approximately December 5, 2001. When Audifferen sought registration through JPT, RG, the branch office manager for JPT's Staten Island office, presented Audifferen with a Form U4 that Audifferen had completed for his prior employment and which RG had downloaded from CRD. He asked Audifferen to review the form, update the information as necessary, sign it, and return the form to RG for filing. The Form U4 that RG presented to Audifferen disclosed a customer arbitration and did not disclose

Inv. Customer's April 2001 complaint.[16] Audifferen signed the Form U4 without adding the Inv. Customer complaint, but contended that he had advised JPT's Vice President of Business Development, DV, about Inv. Customer's complaint during a telephone call. DV had no recollection of Audifferen's purported disclosure and testified that he first learned of Inv. Customer's complaint when Investec filed an amended Form U5.

Other members of JPT's management also testified that Audifferen did not disclose Inv. Customer's complaint to Investec in connection with the filing of his Form U4.[17] JPT filed Audifferen's Form U4 with CRD on September 21, 2001. RG learned of Inv. Customer's complaint for the first time after he reviewed Investec's October 2001 updated Form U5 filing. RG testified that, when he questioned Audifferen about the Inv. Customer complaint, Audifferen stated that he was unaware of the complaint when he signed his Form U4 in September 2001, an assertion that is contradicted by Audifferen's own admission that he learned of the Inv. Customer complaint from Investec in late April or early May 2001.[18]

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[16] Inv. Customer's April 2001 complaint letter to Investec, on which she copied Audifferen, alleged that Audifferen engaged in sales practice abuses. Inv. Customer did not claim a specific damage amount, but generally requested reimbursement of her losses. Inv. Customer's May 2001 letter to the Commission contained greater detail. Audifferen first learned of Inv. Customer's complaint when Investec notified him in late April or early May 2001. In August 2001, a FINRA examiner also provided Audifferen with a copy of Inv. Customer's May 2001 complaint letter to the Commission.

On Audifferen's Form U4, Audifferen answered "no" to Question number 23I, which asks whether, within the prior 24 months, he had been the subject of an investment-related, consumer-initiated, written complaint that alleged a sales practice abuse and claimed damages of $5,000 or greater. Audifferen argues that because Inv. Customer's original complaint letter to Investec did not quantify her damage claim and instead sought reimbursement of her losses without specifying an amount, he did not know if her damage claim exceeded $5,000, and he did not have to disclose Inv. Customer's complaint. The Form U4, however, states that, if no damage amount is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages would be less than $5,000. Audifferen offers no evidence that, when he filed the Form U4, Investec had made such a determination. Indeed, in October 2001, Investec amended Audifferen's Form U5 to reflect Inv. Customer's complaint and stated her alleged damages as $10,119.

[17] In connection with Audifferen's registration with JPT, the firm requested that he explain certain "marks" on his license, customer complaints, and departures from other member firms. On or about September 5, 2001, Audifferen submitted to JPT a detailed response in which he explained several customer complaints and arbitrations and circumstances surrounding his departure from May Davis. He did not, however, mention the Inv. Customer complaint.

[18] The Hearing Panel also rejected Audifferen's contention that he disclosed the Inv. Customer complaint to Investec when he disclosed it to a state regulator. Audifferen could not recall which state and provided no details to support this assertion other than a letter to

[Footnote continued on next page]

NASD IM-1000-1 indicates that the filing with FINRA of registration information which is incomplete or inaccurate may be deemed conduct inconsistent with just and equitable principles of trade, and therefore a violation of NASD Rule 2110. Here, Audifferen should have disclosed Inv. Customer's customer complaint, but he failed to do so. His failure violated NASD Rule 2110 and NASD IM-1000-1. *See Frank R. Rubba*, 53 S.E.C. 670, 674 (1998) (holding that the responsibility for updating the Form U4 as necessary rests with the registered representative).

D. Procedural Arguments

On appeal, Audifferen raises three procedural arguments. He contends that: (1) the Hearing Officer erred in allowing Enforcement's counsel to admonish registered representatives who testified that their failure to testify truthfully could result in a violation of NASD Rule 8210; (2) the Hearing Officer prejudiced Audifferen's defense when he asked the parties to argue sanctions before the Hearing Panel had decided liability; and (3) the Hearing Officer became an advocate for Enforcement. We reject Audifferen's arguments of procedural irregularities and unfairness and address each argument in turn.

NASD Rule 9262 states that a person who is subject to the jurisdiction of FINRA shall testify under oath. In addition, registered individuals who testify in FINRA disciplinary proceedings are required pursuant to NASD Rule 8210 to testify truthfully. Several registered persons testified before the Hearing Panel. In each instance, counsel for Enforcement reminded the witness of his or her obligations under NASD Rule 8210 to testify truthfully and completely and that the failure to do so could result in the imposition of sanctions, including a bar from the industry. As registered persons in the securities industry, all of the witnesses should have been fully familiar with the requirements of NASD Rule 8210 and the potential disciplinary fallout for violating it. *B.R. Stickle & Co.*, 51 S.E.C. 1022, 1025 (1994) (holding that associated persons are expected to be familiar with NASD's rules). There is no evidence that the Enforcement attorney's statements had an intimidating effect on the witnesses or that the attorney had improper motives when he made them. Indeed, the record is devoid of any prejudicial effect from these statements. Additionally, Audifferen was present at the hearing when the attorney made these statements, and he failed to object at the time. He could have objected to the Enforcement attorney's statements if he felt they were prejudicial. *See Brooklyn Capital and Sec. Trading, Inc.*, 52 S.E.C. 1286, 1294 (1997) (holding that the Commission is not required to consider arguments not raised at the initial hearing when the matter complained of could have been remedied). We reject Audifferen's argument that Enforcement counsel's NASD Rule 8210 reminders were improper.

We also do not find that Audifferen was prejudiced by the Hearing Officer's directive that the parties address sanctions in their closing arguments and post-hearing briefs. NASD's Code

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[cont'd]
authorities in New Jersey that Audifferen had written more than one month after JPT filed Audifferen's Form U4.

of Procedure, which was approved by the Commission, does not provide for a bifurcated proceeding in which liability is considered separate and apart from sanctions. *See Order Approving Proposed Rule Change*, Exchange Act Rel. No. 38908, 1997 SEC LEXIS 1617 (Aug. 7, 1997). The NASD Rule 9200 Series provides for one hearing in which the parties are expected to present all of their arguments regarding both liability and sanctions. Audifferen's argument seems to be premised on the idea that adjudicators cannot address liability in an unbiased manner once they have heard the parties' arguments on sanctions. This argument is belied by the countless disciplinary proceedings in which one or all of the respondents' arguments have prevailed notwithstanding FINRA's procedure of requiring parties to argue both liability and sanctions in one proceeding. We reject Audifferen's assertion of prejudice.

We further reject Audifferen's argument that the Hearing Officer lacked impartiality and inappropriately acted as an advocate for the Department of Enforcement. Audifferen offers as his prime example of the Hearing Officer's purported impartiality questions that the Hearing Officer asked during the closing argument presented by Enforcement's counsel. Rather than demonstrating that the Hearing Officer favored Enforcement, however, the questions suggest that the Hearing Officer was questioning Enforcement's theories and endeavoring to understand its legal arguments. *See Charles E. Kautz*, 52 S.E.C. 730, 735 (1996) (finding that it is not impermissible for a panel member to ask probing questions); *U.S. Sec. Clearing Corp.*, 52 S.E.C. 92, 101 (1994) (finding no bias where panel member's questions were directed at clarifying witness testimony). We do not find that the Hearing Officer acted inappropriately here.

We reject Audifferen's procedural arguments and find that FINRA afforded him a full and fair opportunity to defend himself.

V. Sanctions

The Hearing Panel barred Audifferen and fined him $17,500 for credit violations related to MD Customer's account (causes one and two),[19] imposed an additional bar for credit violations related to his accounts (cause three), and in light of the bars imposed under causes one through three, imposed no additional sanction for Audifferen's failure to disclose a customer complaint on the Form U4 (cause four). We affirm the bars, but rather than fine Audifferen $17,500, we order that Audifferen pay MD Customer restitution of $7,835 to cover her losses and reduce the fine to $9,665. We also find that it would be appropriate to impose a 30-day suspension for Audifferen's failure to disclose the Inv. Customer complaint on the Form U4. Like the Hearing Panel, however, we have chosen not to impose the suspension in light of the bars that we have imposed under causes one through three.

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[19] The Hearing Panel ordered the fine payable only if Audifferen seeks to re-enter the industry.

We first turn to the Sanction Guidelines.[20] The guideline applicable to Reg. T and margin violations recommends a fine of $1,000 to $50,000 and a suspension of up to 30 business days. For egregious cases, the guideline recommends a lengthier suspension of up to two years or a bar.[21] There is no guideline specifically applicable to improperly sharing in a customer account, but the Hearing Panel relied on the guideline applicable to violations of another section of the same rule (Rule 2330) (guaranteeing a customer against loss).[22] The guideline recommends a fine of $2,500 to $25,000 and a suspension of up to 30 business days or, for egregious cases, up to two years or a bar. The General Principles applicable to all sanctions determinations also direct that adjudicators tailor sanctions to respond effectively to the misconduct at issue.[23]

The Hearing Panel found that Audifferen's margin violations related to MD Customer's account and his own accounts were egregious. We concur with the Hearing Panel's finding that respondent's misconduct was egregious. The sanctions that we impose of a bar, restitution of $7,835, and $9,665 fine for violations in MD Customer's account and a bar for violations in Audifferen's accounts therefore are within the ranges recommended in the applicable guidelines. In connection with our decision to bar Audifferen, we have considered the principal considerations listed in the Guidelines. We also were guided by applicable precedent and have considered: (1) all mitigating factors that Audifferen has raised; (2) the seriousness of his offenses; (3) the corresponding harm that he caused to members of the trading public; (4) Audifferen's potential gain for disobeying the rules; (5) the potential for repetition of his misconduct in light of the current regulatory and enforcement regime; and (6) the deterrent value to Audifferen and others. *See McCarthy v. SEC*, 406 F.3d 179 (2d Cir. 2005).

Audifferen claims that several mitigating factors exist. Audifferen contends that he has a clean disciplinary history that should mitigate sanctions. We disagree. While the existence of a disciplinary history is an aggravating factor when determining appropriate sanctions, its absence is not mitigating. *See, e.g., Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *58-59 (NASD NAC May 17, 2001) (holding that the absence of disciplinary history is not considered part of "relevant disciplinary history" under the Guidelines for purposes of reducing sanctions); *Dep't of Enforcement v. Balbirer*, Complaint No.

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[20] The Hearing Panel issued its decision in this matter in March 2005. Audifferen requested, and was granted, the right to file a late appeal. The Hearing Panel's decision specifically cites to the 2004 edition of the Sanction Guidelines. Given the number of years that have passed between the Hearing Panel's issuance of a decision and our consideration of this appeal, we too have relied on the 2004 edition of the Sanction Guidelines.

[21] *See NASD Sanction Guidelines* (2004 ed.) ("*Guidelines*"), at 33.

[22] *See Guidelines*, at 93.

[23] *See Guidelines*, at 5 (General Principle, No. 3) (stating that, to address misconduct effectively in any given case, the adjudicator may design sanctions other than those specified in the Guidelines).

C07980011, 1999 NASD Discip. LEXIS 29, at *10-11 (NASD NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry. . . ."). A respondent should not be rewarded because he may have previously acted appropriately as a registered person. Indeed, the Commission has consistently rejected similar arguments. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1165-66 n.15 (2002); *Ronald H. V. Justiss*, 52 S.E.C. 746, 750 (1996).

Audifferen also argues that "the absence of any real profits" and the absence of customer losses should be mitigating. We do not agree that Audifferen did not profit from his misconduct and that he did not cause customer harm. Audifferen successfully persuaded MD Customer to transfer $17,500 from her personal bank account to his personal bank account. These funds were derived, at least in part, from the trades that he executed in her account in violation of Reg. T.[24] Furthermore, had May Davis allowed Audifferen to withdraw profits from his personal May Davis accounts, as Audifferen attempted to do, he would have also profited from the credit violations in his personal accounts. We also find that Audifferen's misconduct resulted in customer harm and that this fact is aggravating. Although the record is unclear as to the exact amount of MD Customer's losses, she testified that she has incurred a tax liability for the profits that Audifferen generated in her account -- profits which Audifferen, not MD Customer, withdrew.[25] Indeed, MD Customer has not even recovered her initial $5,000 investment.[26] MD Customer relied on Audifferen to her detriment, and Audifferen, by executing trades in her account for which he knew she could not pay, placed her in a position of financial risk. Ultimately, Audifferen profited at MD Customer's expense when he convinced her to transfer $17,500 from her bank account to him. In light of Audifferen's unjust enrichment and to remediate the misconduct in this case, we order that Audifferen pay restitution of $7,835 to MD Customer and the remainder of his $17,500 in ill-gotten gains ($9,665) to FINRA as a fine.

Equally aggravating is the fact that Audifferen's misconduct harmed his own employer firm, May Davis. According to the terms of May Davis' clearing agreement, May Davis was responsible for losses that resulted from the default in the payment of funds to the clearing firm from an introduced account. Audifferen's bounced checks and entering of trades for which MD Customer could not pay therefore left May Davis liable to the clearing firm. We find aggravating Audifferen's willingness to profit at the expense of both his customer and his employer firm.

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[24] Even if, as Audifferen contends, the $17,500 transfer to Audifferen's personal account was the repayment of a loan or the return of a gift, a contention that is disputed by MD Customer and for which Audifferen offers no evidence other than his own self-serving testimony, that does not change the fact that Audifferen profited from his misconduct in MD Customer's account.

[25] Based on MD Customer's testimony about her year 2000 earnings and publicly available information regarding federal tax rates in 2000, MD Customer incurred a tax liability on the profits generated in her account of approximately $4,469.

[26] MD Customer received approximately $1,634 of her initial $5,000 investment. Including tax liability, MD Customer's losses appear to be approximately $7,835.

Audifferen also argues that his lack of willfulness must be seen as mitigating. To the contrary, we find that Audifferen's misconduct was willful and consider it to be an aggravating factor.[27] Audifferen was not a novice. He had 10 years of experience in the securities industry and readily admitted his familiarity with the requirements of Reg. T. He knew when he executed the trades in MD Customer's account that she previously had had checks returned for insufficient funds, had limited resources, and claimed to be unable even to cover her check number 131 for $7,000 (which she believed she wrote for Audifferen's personal use and for which she believed Audifferen would deposit funds into her bank account). Audifferen also knew the limitations on his own personal finances. He states that his commissions from May Davis, which were as low as $2,791 in March 2000, were his only source of income, and he requested an advance from May Davis in February 2000 for which he listed his reason as financial hardship. Notwithstanding this knowledge, Audifferen executed trades in MD Customer's and his own accounts for which he knew payment would not be forthcoming. Furthermore, in MD Customer's account and his own accounts, Audifferen attempted to reap ill-gotten gains from his Reg. T violations to the detriment of both May Davis and MD Customer. Audifferen's pattern of Reg. T misconduct demonstrates a willingness to evade SEC and FINRA rules that we find disturbing. We find Audifferen's misconduct to be willful.[28]

We also have considered that Audifferen's misconduct in MD Customer's account extended over a period of several months. In his own accounts Audifferen also established a pattern of submitting checks to pay for trades for which Audifferen had insufficient funds in his bank account. Furthermore, we have considered the seriousness of Audifferen's violations. "[Section 7 and Reg. T] are integral parts of an over-all scheme designed to prevent dislocation of the economy by the excessive use of credit to finance securities transactions." *Billings Assoc., Inc.*, 43 S.E.C. 641, 650 (1967). Audifferen disregarded the requirements of Reg. T and the potential harm that he could cause to May Davis and firm customers not once or twice, but on five separate occasions. In our view, Audifferen demonstrated a disturbing lack of appreciation for the importance of Section 7, Reg. T and related FINRA rules. Audifferen admits to familiarity with Reg. T, yet tries to blame MD Customer, his victim and a novice investor who previously had bounced checks and who was not aware of the trades before they occurred, for the violations in her account. For violations in his own account, Audifferen attempts to blame May Davis' operations department. In our view, Audifferen does not recognize the wrongful nature of his misconduct and, given the repeated nature of his violations, is likely to repeat his misconduct if allowed to remain in the securities industry. Audifferen continues to present a danger to the investing public, and a bar is necessary to deter him and others similarly situated from

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27 *See Guidelines*, at 9 (Principal Considerations, No. 13).

28 Audifferen also argues that we should consider as a mitigating factor the "highly confusing and/or no evidence to establish at best remotely arguable violations." As discussed in detail above, we find that Enforcement established Audifferen's violations by a preponderance of the evidence. We therefore decline to adopt Audifferen's argument that the state of the evidence is mitigating.

undertaking similar credit violations. We do not believe that a lesser sanction would suffice to protect public investors and the integrity of the market adequately.

In light of the bars that we have imposed for Audifferen's credit violations, we do not impose a sanction for Audifferen's failure to disclose the Inv. Customer complaint on the Form U4. We note, however, that a suspension of 30 days would be appropriate for Audifferen's misconduct. The applicable guideline recommends a fine of $2,500 to $50,000 plus a suspension of five to 30 business days.[29] We have considered the nature and significance of the information that Audifferen neglected to disclose and conclude that a 30-day suspension would be commensurate with the seriousness of Audifferen's actions. In light of the bars, however, we decline to impose the suspension. Member firms and the investing public rely on information reported on Forms U4 and U5 to assess the honesty and reliability of registered individuals. The inclusion of accurate and complete information on these forms, therefore, is very important, and Audifferen's failure to ensure the accuracy of his Form U4 is significant misconduct.

VI. Conclusion

We affirm the Hearing Panel's findings that Audifferen willfully caused May Davis to extend credit to MD Customer's account and his own margin and cash accounts in contravention of Reg. T and Section 7 of the Exchange Act. We also affirm the Hearing Panel's findings that Audifferen willfully extended credit to MD Customer, obtained the beneficial use of May Davis' extensions of credit to MD Customer, impermissibly shared in the profits in MD Customer's May Davis account, and caused May Davis to free ride in MD Customer's account. We find that Audifferen's conduct violated Sections 220.4, 220.8, and 220.12 of Reg. T, Sections 7(c), (d), and (f) of the Exchange Act, Section 3(b) of Reg. X, and NASD Rules 2110, 2330(f), and 2520(f). We also affirm the Hearing Panel's findings that Audifferen failed to disclose a customer complaint on a Form U4 that he submitted to JPT, in violation of NASD IM-1000-1 and NASD Rule 2110.

We find that Audifferen's credit violations were egregious, and we bar him in all capacities, order that he pay MD Customer restitution of $7,835, and fine him $9,665 for his violative conduct related to MD Customer's account and impose an additional bar for his violative conduct related to his own accounts at May Davis.[30] In light of the bars, we have not imposed a 30-day suspension for Audifferen's failure to disclose a customer complaint on the Form U4. Finally, we affirm the Hearing Panel's assessment of $7,446.31 in costs and impose

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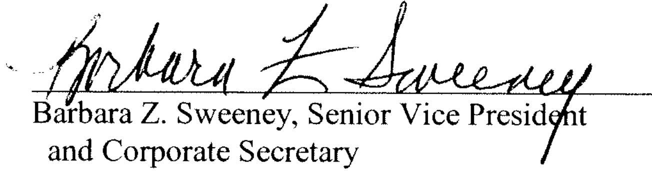
[29] *See* Guidelines, at 75.

[30] We also have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to NASD Rule 8320, 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.

appeal costs of $1,649.75. The bars imposed in this decision are effective immediately upon issuance of the decision.

On Behalf of the National Adjudicatory Council,



Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary