

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of
Department of Enforcement,
Complainant,
vs.
Timothy Joseph Golonka
Collegeville, PA,
Respondent.

DECISION

Complaint No. 2009017439601

Dated: March 4, 2013

A registered representative participated in four telephone calls in which associates impersonated customers in order to obtain confidential information from the customers' insurance companies. Held, findings affirmed, and sanctions increased.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Jonathan M. Prytherch, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Andrew W. Barbin, Esq.

Decision

Pursuant to FINRA Rule 9311, Timothy Joseph Golonka ("Golonka") has appealed a March 22, 2012 Hearing Panel decision, and the Department of Enforcement ("Enforcement") has cross-appealed. The Hearing Panel found that, on November 5, 2008, Golonka participated in four telephone calls in which associates impersonated their customers to obtain confidential information from such customers' insurance companies, in violation of NASD Rule 2110.¹ For that violation, the Hearing Panel suspended Golonka from associating with any FINRA member firm in any capacity for nine months, imposed a \$7,500 fine, and assessed costs. Both Golonka and Enforcement challenge only the sanctions that were imposed. After a complete and independent review of the record, we affirm the Hearing Panel's findings, but we increase the sanctions to an 18-month suspension and a \$20,000 fine.

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

I. Golonka

Golonka entered the industry in 1988. From October 14, 2005, to March 18, 2009, Golonka was a general securities representative and an investment company products/variable contracts limited representative with Hartford Equity Sales Company, Inc. (“HESCO” or “the Firm”). Golonka’s Central Registration Depository (“CRD”®) record reflects that he was registered with another member firm as recently as September 2011, but that he is not currently in the industry. During the relevant period, Golonka also was a senior account executive with HESCO’s affiliated insurance company, Hartford Life, and functioned as a wholesaler of insurance policies.

II. Factual Background

A. Smith Barney Representatives Approach Golonka to Perform Life Insurance Policy Reviews for Smith Barney Customers

Golonka’s responsibilities with HESCO and Hartford Life included performing life insurance policy reviews for other member firms’ registered representatives and customers. The purpose of such reviews was to evaluate customers’ existing life insurance policies to determine if a replacement insurance policy would better serve the customers’ needs. Golonka’s main account was Smith Barney, and he regularly conducted insurance policy reviews for Smith Barney’s branch office in Lancaster, Pennsylvania. In that office was a team of brokers named the DST Group, with which Golonka had sought to work for years. The DST Group consisted of three senior financial advisers and two junior ones, Jordan Arnold (“Arnold”) and Clark Stoltzfus (“Stoltzfus”).

At some point prior to November 5, 2008, the DST Group decided to review its customers’ insurance policies.² An in-house insurance specialist recommended that the DST Group work with Golonka. Arnold stated that she was assigned the lead role of identifying the policies to be reviewed and gathering relevant information.

Arnold, Stoltzfus, and Golonka provided conflicting explanations concerning when the DST Group first approached Golonka to work on the insurance policy reviews. Arnold and Stoltzfus claimed that they approached Golonka months before November 2008. Golonka offered a contrary version, stating that a DST Group partner and Arnold first approached him on

² Arnold, Stoltzfus, and Golonka offered various explanations of what prompted the project. Arnold stated that the DST Group was reacting to a problem with one of its customers’ insurance policies, to the turmoil in the financial industry, and to an in-house insurance representative’s warning to ensure that customers’ policies were not exposed to certain risks. Stoltzfus testified that, after attending a series of lunch seminars on insurance topics, “it was just kind of an idea that we had to review the policies.” Golonka stated that a DST Group partner told him that they simply “want[ed] to integrate life insurance into [their] practice,” but Golonka speculated, as explained more below, that the group’s true purpose was to gather customer information before its imminent departure for another firm.

November 3, 2008. It is undisputed, however, that at some point prior to November 5, 2008, Arnold gave Golonka a spreadsheet that listed 17 customers for whom the DST Group wanted to conduct insurance policy reviews. The list contained certain information about the customers and their insurance policies that had been gathered by Arnold and Stoltzfus, including the customers' ages, the types of insurance products owned, the issuer, the policy numbers, the current values, the dates of inception, and, if known, the death benefit. Arnold and Stoltzfus explained that they had gathered this information from Smith Barney's records and, where possible, from the customers' insurance companies.

To do a thorough review of the insurance policies, however, Golonka needed more information than Arnold and Stoltzfus had gathered. Golonka obtained such information for seven of the customers because their existing insurance policies were issued by Hartford. The policies held by the remaining 10 customers, however, were issued by other insurance companies, including Metlife, Genworth Financial, and John Hancock. The only persons who were authorized to obtain the needed information from those insurance companies were the persons listed as the agents on such companies' records or the policy owners (i.e., the customers). Arnold and Stoltzfus were not listed on the insurance carriers' records as the agents with respect to any of the customers' policies that are relevant to this case.³ As a result, neither they nor Golonka were entitled to obtain confidential information about such policies without either the agent's participation or the customer's consent. At some point, Golonka was informed that Arnold and Stoltzfus had been unable to contact at least some of the customers who owned the non-Hartford policies.⁴

B. The Decision to Participate in an Impersonation Scheme

On or around November 5, 2008, a decision was made to obtain the needed information by calling the non-Hartford insurance companies and having Arnold and Stoltzfus impersonate the customers and pretend to give consent for the insurance company representatives to answer Golonka's questions about such customers' policies. The parties' primary factual disputes concern who, and what, drove the decision to proceed with the impersonations.

³ As explained more below, the misconduct at issue involved a scheme to impersonate Smith Barney customers SG, EM, VM, JE, and JD for the purpose of obtaining confidential information about their insurance policies. A FINRA investigator testified that he learned that, during November 2008, the agents listed on the insurance companies' records for SG's, EM's, and VM's policies had left Smith Barney, but that the agent listed for JE's policy, DT, was a member of the DST Group. There is no evidence concerning the identity of the agent for JD's policy, other than the fact that it was neither Arnold nor Stoltzfus.

⁴ Golonka says he was informed of that on November 5, 2008, while Enforcement asserts it was weeks or months earlier. Further, the record contains almost no evidence concerning which, if any, of the 10 non-Hartford customers Arnold and Stoltzfus contacted or attempted to contact, and limited evidence concerning their purported efforts to do so. Golonka questions Arnold's and Stoltzfus' purported efforts to contact the customers, noting that Stoltzfus had no trouble reaching JD not long after the misconduct.

Enforcement, relying primarily on Arnold's and Stoltzfus' assertions and Golonka's statements and demeanor as captured on various audio recordings of the impersonation calls (as described more below), argues that Golonka "orchestrated" the impersonation scheme and "pressur[ed]" Arnold and Stoltzfus "on multiple occasions" over several weeks to impersonate the customers. Allegedly, Golonka's pressure tactics included warning about risks to which such customers' policies may be subject and minimizing impersonations as conduct that was "done all the time."

While Golonka denied being the orchestrator, he offered varying explanations concerning his share of the responsibility. At times, Golonka shifted nearly all of the blame to the DST Group, claiming that he did not intend to participate in an impersonation scheme. In this regard, Golonka asserted that he had understood that the DST Group was the agent on the insurance carriers' records and was fully authorized to request confidential information; that he had told Arnold they could call the insurance companies without the customer provided that Arnold was the agent at the insurance carrier level; and that Arnold did not disclose to him until immediately before they were to call the insurance companies that she had been unable to reach the customers and planned to engage in impersonations. Golonka capped his blame-shifting arguments by asserting that the DST Group pressured him to complete the reviews and "used their 'innocent appearing' junior [financial adviser], Ms. Arnold, to manipulate" him into participating in the impersonations "for their planned improper competition" with Smith Barney.⁵ He also suggested that the DST Group may have been acting with urgency because the insurance policies involved were "high revenue products."

At other times, Golonka accepted more personal responsibility for the decision to proceed with the impersonations. He testified that he could not recall who first proposed the idea to impersonate, conceded that he should have understood at the outset of the calls that the DST Group was not the agent on the carriers' records, and stated that he, Arnold, and Stoltzfus made the "mutual decision" to proceed. And in his briefs, he argues that "haste motivated by a volatile market tempted them all . . . to take a patently deceptive and unacceptable shortcut."⁶

The Hearing Panel did not make credibility determinations concerning these factual disputes, and the reliability of many of the statements provided by Golonka, Arnold, and Stoltzfus cannot be determined. For these reasons, the record does not support Enforcement's claim that Golonka orchestrated the impersonation scheme, Golonka's speculation that he was manipulated into participating, or his related suggestion that the DST Group held the lion's share of the blame. Nor does it permit findings concerning the length of time over which Golonka

⁵ On or around November 28, 2008, the DST Group left Smith Barney to join another broker-dealer. Arnold and Stoltzfus denied having any knowledge as of November 5, 2008, of any decision by the DST Group to leave Smith Barney, but Stoltzfus admitted that the search for possible alternatives to Smith Barney began prior to that date.

⁶ Golonka's, Arnold's, and Stoltzfus' stories also diverged on the issue of who recruited Stoltzfus. Golonka asserted that Arnold recruited Stoltzfus, but Arnold appeared to deny that. Likewise, Stoltzfus implied that he had no discussions with Arnold about the impersonations.

interacted with the DST Group, the question of who recruited Stoltzfus, Arnold's and Stoltzfus' purported inability to contact customers, or the extent to which, if at all, the DST Group's late-November 2008 departure contributed to the urgency of the insurance policy review project.

On the other hand, the preponderance of the evidence supports Golonka's concession that, at the very least, the decision to impersonate was a "mutual" one, especially considering that Golonka and Arnold each admitted having reasons to act with urgency. In this regard, Golonka admitted that he "did not want to risk closing an opening [with the DST Group] that took so long to get," and Arnold claimed that, at the time of the calls, she understood that the DST Group was concerned about the soundness of some of their customers' insurance policies.

C. Golonka's and Arnold's Calls Concerning the Female Customers

The customers for whom Golonka and the DST Group needed additional insurance policy-related information included three female customers, JE, EM, and SG, and one male customer, JD. The impersonation scheme began with calls to insurance companies concerning the female customers. On November 5, 2008, Golonka and Arnold called John Hancock to obtain information about a policy held by a trust in JE's name, and called Genworth Financial twice to obtain information about policies held by EM and SG.⁷ Because Golonka and Arnold worked in different locations, these calls were three-way calls. In addition, Golonka had invited JL, a new Hartford Life regional marketing specialist, to his office to observe the calls.⁸ The calls were on recorded lines, and Enforcement submitted the audio recordings into evidence.

During those three calls, Arnold impersonated the female customers, and Golonka deceptively addressed Arnold as if she was the customer. At the beginning of each call, Golonka introduced himself to the insurance company representative and stated falsely that the insured customer was also on the line. On the two calls where Arnold pretended to be JE and SG, Arnold expressly gave the insurance company representative "permission" to discuss policy information with Golonka. On all three calls, Golonka asked about various aspects of the insurance policies, including the type of policy, the beneficiaries, the current death benefit, the cash surrender value, and the cost basis, among other characteristics, and the insurance company representatives provided responsive information. Golonka also requested that the insurance company representatives send him an "in-force ledger," a document that shows how the insurance policy works, its features and benefits, specific policy details, its past performance, and its expected performance going forward.⁹

⁷ Golonka admitted that he participated in another call to John Hancock during which Arnold impersonated female customer VM. Enforcement's complaint contained no allegations concerning that call.

⁸ According to Golonka, JL could hear only his statements during all of the calls to the insurance companies because Golonka wore a headset.

⁹ See Charles L. Ratner, *Planning Techniques for Large Estates*, in 1 *ALI-ABA Course of Study Materials: Life Insurance Planning and Products* (Nov. 2005) ("The in-force ledger

Two of the recordings captured Golonka and Arnold discussing the impersonation scheme itself. Towards the end of the call to John Hancock concerning JE, Golonka concluded his questioning, the insurance representative said “bye,” and Golonka continued to converse with Arnold, unaware that the call was still being recorded. Golonka laughed and praised Arnold’s impersonation of JE, saying “you sounded exactly like an older woman.” Arnold, also laughing by this point, responded “[t]rying.” Golonka then told Arnold that JL was with him and “wanted to see how we do these things.” Golonka said to JL, “[Arnold] did a terrific job,” which Golonka conceded was intended to convey that “Arnold impersonated an older woman well.” Arnold responded, “[w]e have enough older clients and I have had problems with the call desk before.” Shortly before the recording stopped, Golonka stated, “[a]gain a grieving widow and she did such a great job.”

Golonka was recorded making additional inculpatory statements on the call to Genworth Financial concerning EM’s policy, during times when he believed that the Genworth Financial representative, J, was not on the line. During the initial part of the call, before Golonka and Arnold launched into the effort to impersonate EM, Golonka told Arnold, “[I]et [Stoltzfus] know that he’s got to be [male customers JD] and [TL].”¹⁰ Towards the end of the call, after Golonka said goodbye to J, Golonka is heard praising Arnold on her impersonation and resuming the earlier discussion about having Stoltzfus impersonate male customers:

Golonka: [Laughing] Okay, you sounded like you were 82.

Arnold: [Laughing] Perfect.

Golonka: So if you would tell [Stoltzfus] to call me. All right.

* * *

. . . And tell him that we need to call on [male customer TL].
He’s got to sound really old. He’s 85.

* * *

. . . [A]lso, if [Stoltzfus] can take a little bit of time and pretend
to be [male customer BB], we can get [BB] knocked out

* * *

[cont’d]

illustration shows where the policy stands today and how the insurer projects it will perform in the future.”).

¹⁰ The record contains a transcription of this statement that reads, “let him know that he’s got to *meet* [JD] and [TL].” Based on our review of the audio recording, however, that transcription is incorrect.

Arnold: I'm sure he could. Let me . . . just pop over there, I think he's there, and see if he can call you right back.

Golonka: Okay . . . [I]f he's busy, . . . just have him call me . . . , and we can knock out these last three, and then the rest are all Hartford contracts okay?

Arnold: Okay. Great.

* * *

Golonka: All right, Jordan. [Laughing] Thanks for a real nice job

Arnold: Sure.

Immediately after this exchange, J said, "[t]hank you both." Golonka testified that when he heard J's voice, "I knew I had been caught."¹¹

D. Golonka's and Stoltzfus' Call Concerning a Male Customer

Despite believing that he had been caught, later that same day Golonka called Genworth Financial again, with Stoltzfus, to attempt to obtain confidential information concerning male customer JD. As before, Golonka called from his office, JL was present, and the call was recorded. Coincidentally, the call was again connected to J, and Golonka began with a clumsy attempt to cover up the prior impersonation of EM.¹² Golonka then falsely stated that JD was on the call, and Golonka asked if he could obtain some information about JD's insurance policy. J replied "[j]ust one moment, please," and placed Golonka and Stoltzfus on hold. Within seconds, Golonka decided to terminate the call and tell Stoltzfus that they would need to contact the customers to proceed:

¹¹ At one point during this call, when Golonka was waiting for J to answer a question he had posed about EM's policy, Golonka is heard whispering to JL, "This is how it works. It's wonderful." Enforcement implies that this was an example of Golonka exposing JL to the misconduct, whereas Golonka testified that his remark was not about the impersonations but about the usefulness of a script he was using. We need not resolve what Golonka meant because, as he concedes, he made numerous other statements in JL's presence that made her aware of the impersonations.

¹² Golonka said to J, "We are – if you – just, I want you to know, again, we were on the last call for [EM]. What I was – and when I was on the phone there, I was in and I am in the Smith Barney office right now, and they are their [a]gents of [r]ecord on that contract, [J] was there with us and we happened to call on that – on that number." (Golonka testified that he misspoke when he referred to "J" instead of EM.). Contrary to Golonka's representations, the prior call he had placed was neither with EM, nor from Smith Barney's offices.

Golonka: Hey Clark?

Stoltzfus: Yeah.

Golonka: If she gives you some sh__ because of that last call, I'm just going to hang up and have [JD] call some other day.

Stoltzfus: That's fine.

Golonka: . . . [Y]ou know what, as a matter of fact, I'm going to drop this off. Okay?

Stoltzfus: That's fine.

Golonka: I don't like – I don't like her tone. I'm going to drop off. We're going to do – we're going to need to get [male customers BB], [TL], and [JD]. Okay?

Stoltzfus: Okay.

All four calls at issue were made without the authorization, knowledge, or consent of the customers.¹³

E. Events After the Impersonation Calls

As noted above, the DST Group left Smith Barney by November 28, 2008. Golonka, however, continued to work with Smith Barney on the insurance policy reviews. On December 1, 2008, Golonka apprised Smith Barney that there was “a lot of opportunity to write new, guaranteed policies,” and he asked to discuss “our next steps” regarding four of the customers, VM, EM, SG, and JD. Golonka ultimately earned a \$700 commission when EM exchanged her insurance policy. Golonka had the potential to earn an additional \$1,000 commission from a policy exchange for SG, but she ultimately did not switch policies.¹⁴

F. The Hartford Investigation

On February 27, 2009, nearly four months after the impersonations, John Hancock's Privacy Office sent a letter to Hartford's privacy officer about Golonka's call concerning JE. In

¹³ Subsequently, Arnold placed a call to Genworth Financial with TL, and Golonka and Stoltzfus placed a call to Genworth Financial with JD. Stoltzfus agreed that “sometime between November 5 and November 17, [he] had no trouble getting ahold of [JD].”

¹⁴ Golonka also argues that these two clients “saved money,” but he has not supported that assertion with sufficient evidence. The record does not reflect the potential commissions, if any, that Golonka could have earned on policy exchanges for JD and VM.

that letter, John Hancock stated that JE and her daughter (the trustee of the trust owner of the insurance policy) neither knew Golonka nor had authorized anyone named Golonka to obtain policy-related information from John Hancock. The letter also enclosed a transcript of the call and invited further discussions.

This prompted Hartford to open an investigation. On March 10, 2009, Hartford investigator WY interviewed Golonka. WY began by asking Golonka why he thought WY wanted to speak with him, and Golonka responded by beginning to talk about the call he had placed to Genworth Financial concerning EM. Subsequently, WY played the recording of Golonka and Arnold's call to John Hancock concerning JE. WY testified that while the recording was playing, Golonka assured him that JE's voice was on the recording "until . . . it . . . became obvious that it wasn't [JE's voice]." WY further testified that Golonka then became "contrite and cooperative." After the interview, Golonka signed a statement admitting that Arnold and he, respectively, "falsely presented ourselves . . . to John Hancock's customer representative . . . to be . . . [JE] and . . . [JE's] authorized third party representative" and, as a result, "improperly received . . . John Hancock's and [JE's] confidential financial information." Golonka further admitted that Arnold and he acted similarly on other calls concerning female customers EM, SG, and VM. Golonka summarized his misconduct as a "mistake," a "one time event," and a "lapse in judgment," and he promised that it "will never happen again."

About one week later, WY conducted a follow-up interview to explore whether the problems were more widespread, and Golonka signed another statement. In it, Golonka claimed that, apart from the misconduct he had already admitted, "[t]here are no other events either prior to or subsequent to" such calls "wherein I witnessed, initiated, or participated in the presenting of false information and or identities to other parties, including insurance companies, for any purposes whatsoever." Golonka also represented that "Arnold and I never recruited or convinced a male employee of Smith Barney to pose fictitiously as an insured during a telephone contact with an insurance company," and that "I never posed fictitiously as a male insured to an insurance carrier." WY testified that Golonka never informed him that Stoltzfus may have been involved in the impersonation effort.

On March 18, 2009, shortly after the second interview, Hartford terminated Golonka. On April 3, 2009, HESCO filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), which stated that Golonka "had been involved in a scheme to obtain confidential policy information from [a competitor insurance company] without authorization from the insured."

III. Procedural History

The Form U5 filed by HESCO led FINRA to open an investigation. On April 28, 2009, pursuant to FINRA's request, Golonka provided a written statement that addressed his termination from Hartford. On August 3, 2010, FINRA conducted an on-the-record interview with Golonka. On February 1, 2011, Enforcement brought the one-cause complaint that commenced this proceeding. Golonka filed an answer in which he admitted that his conduct had been "wrongful" but sought a hearing "to address the proportionality and mitigating circumstances." After presiding over a hearing, the Hearing Panel issued its decision, making the findings and imposing the sanctions as described above. This appeal and cross-appeal followed. Both parties challenge only the sanctions.

IV. Discussion

Golonka “fully accepts” the Hearing Panel’s finding that his conduct was unethical and a violation of Rule 2110. We affirm that finding.

NASD Rule 2110 provides that “[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”¹⁵ As the Commission recently explained, just and equitable principles of trade (“J&E”) rules “state ‘broad ethical principles’ and center on the ‘ethical implications’ of . . . conduct.” *Dante J. DiFrancesco*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54, at *17 (Jan. 6, 2012) (quoting *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 SEC LEXIS 14, at *13 (Jan. 9, 2009), *aff’d*, 586 F.3d 122 (2d Cir. 2009)). They “serve[] as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession.” *DiFrancesco*, 2012 SEC LEXIS 54, at *17 (internal quotation marks omitted). J&E Rules “set forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.” *Id.* at *18 (internal quotation marks omitted).

The Commission has “long applied a disjunctive bad faith or unethical conduct standard to disciplinary action under . . . J&E rules.” *Id.* at *17 (internal quotation marks omitted). The heart of the inquiry is “frequently . . . on whether the conduct implicates a generally recognized duty owed to clients or the firm.” *Id.* at *19. Moreover, “conduct that reflects negatively on an applicant’s ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade.” *John M.E. Saad*, Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761, at *13 (May 26, 2010) (quoting *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008)), *appeal filed*, No. 10-1195 (D.C. Cir. July 22, 2010). A violation of J&E Rules like Rule 2110 “need not be premised on a motive or scienter finding.” *Heath*, 2009 SEC LEXIS 14, at *15.

Golonka’s participation in an impersonation scheme for the purpose of obtaining confidential customer information was in complete disrespect of the duty to maintain the confidentiality of customer information. That duty is “one of the most fundamental ethical standards in the securities industry.” *Id.* at *10. It also ran counter to “fundamental principles of agency law” that required Golonka to obtain the customers’ prior consent before retrieving their confidential information. *See Louis Feldman*, 52 S.E.C. 19, 22 (1994) (finding a violation of J&E rules where conduct violated agency law principles). Moreover, Golonka’s conduct was similar, at least for liability purposes, to an assortment of other misconduct that has been found to run afoul of NASD Rule 2110, such as circumventing customer consent requirements to

¹⁵ NASD Rule 0115(a) makes rules that apply to members, such as NASD Rule 2110, applicable to associated persons.

transfer customer accounts, improperly obtaining and transferring an employer's confidential customer information, misrepresentations, and forgery.¹⁶

Hartford's Code of Ethics and Business Conduct, which HESCO representatives were required to follow, provides further support for the finding that Golonka's conduct violated Rule 2110. *See Heath*, 2009 SEC LEXIS 14, at *18 & n.21 (holding that internal firm compliance policies inform a determination of whether conduct violates J&E Rules). That ethics code contained a section titled "competitive intelligence" that expressly instructed employees to "comply with all applicable laws in acquiring competitive intelligence" and "not . . . engage in . . . improper methods," "respect the confidentiality" of a competitor's information, and "not misrepresent who they are or for whom they work in obtaining such information." Golonka acted in contravention of his Firm's policies.¹⁷

Accordingly, we affirm the Hearing Panel's findings that Golonka engaged in unethical conduct in violation of NASD Rule 2110.

V. Sanctions

The crux of the parties' dispute concerns the appropriate sanctions. Golonka argues that sanctions are unnecessary because the consequences that have already resulted from his violation will deter him and others from similar violations. Alternatively, Golonka argues that if sanctions are required, then a probationary period, a 10-to-90 day suspension, or a suspension that expressly permits him to communicate with specific FINRA members regarding insurance matters would suffice. Enforcement argues that a bar is warranted due to various aggravating factors and a risk of recidivism. As explained below, the sanctions imposed by the Hearing

¹⁶ *Feldman*, 52 S.E.C. at 22 (finding that transfer of customer accounts to new firm without prior customer consent violated J&E Rules because "under fundamental principles of agency law such prior consent is required"); *DiFrancesco*, 2012 SEC LEXIS 54, at *21 (finding that downloading and transferring to future firm confidential nonpublic information relating to 36,000 customers violated Rule 2110 because it "breached [respondent's] duty of confidentiality"); *Ronald Pellegrino*, Complaint No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *15 n.13 (FINRA NAC Jan. 4, 2008) (holding that misrepresentations violate NASD Rule 2110), *aff'd*, Exchange Act Rel. No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008); *Mark F. Mizenko*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655, at *11-12 (Oct. 13, 2005) (holding that forgery is inconsistent with just and equitable principles of trade where the forged documents defraud another person or otherwise result in a benefit to the forger).

¹⁷ We also note that, although Golonka's misconduct did not involve a security, "[i]t is well established that FINRA's disciplinary authority under Rule 2110 'is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade.'" *DiFrancesco*, 2012 SEC LEXIS 54, at *17 n.18 (quoting *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) and citing *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 & n.8 (2002)). Golonka's misconduct involved his business relationship with a broker-dealer customer and his commercial activity in the insurance business of an affiliate of a member firm.

Panel do not reflect the seriousness of the violation, and we increase them to an 18-month suspension in all capacities and a \$20,000 fine.

A. Relevant Guidelines

In assessing sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions set forth therein and any other case-specific factors. The Hearing Panel noted that while the Guidelines do not specifically address the misconduct at issue, the Guidelines for forgery or falsification of records were the "most nearly comparable."¹⁸ Golonka disagrees, but we concur with the Hearing Panel that these Guidelines offer appropriate guidance. The Guidelines for misrepresentations or material omissions of fact are also useful, considering that Golonka's misconduct involved intentional misrepresentations to insurance company representatives.¹⁹ Both of these Guidelines have similar sanction ranges. The Guidelines for forgery and falsification of records violations recommend a fine between \$5,000 and \$100,000, a suspension in any or all capacities for up to two years in cases where mitigating factors exist, and a bar in egregious cases. For intentional misrepresentations or material omissions of fact, the Guidelines recommend a fine between \$10,000 and \$100,000, a suspension with respect to any or all activities or functions from 10 days to two years, and a bar in egregious cases.

B. Aggravating and Mitigating Factors

To begin, Golonka's misconduct reflects negatively on his ability to comply with the regulatory requirements that are fundamental to the securities industry. As the Commission recently reiterated, "disclosing confidential client information . . . violate[s] one of the most fundamental ethical standards in the securities industry." *DiFrancesco*, 2012 SEC LEXIS 54, at *20 (internal quotation marks omitted).²⁰ Golonka's conduct reflects his disregard of this important principle.²¹ But equally troubling is the deceptive manner in which Golonka procured

¹⁸ See *FINRA Sanction Guidelines* 37 (2011 ed.), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter "*Guidelines*"].

¹⁹ *Id.* at 88.

²⁰ Expounding on the harm that can result from such disclosures, the Commission stated, "[t]he ability to credibly assure a client that [confidential nonpublic information] will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship." *Id.* at *34-35 (quoting *Heath*, 2009 SEC LEXIS 14, at *43-44).

²¹ Attempting to temper the gravity of the confidentiality breach, Golonka argues that the customers previously gave Smith Barney access to all of the confidential information at issue. There is no evidence, however, concerning the customers' understanding of the extent to which

the improper disclosure of confidential information. In *Geoffrey Ortiz*, the Commission explained bluntly the danger that misrepresenting a customer's consent poses for the industry. While *Ortiz* specifically concerned forgeries, the Commission's admonishment is equally apposite here:

The public interest demands honesty from associated persons of [FINRA] members; anything less is unacceptable. This is especially true with respect to forgery of documents on which [FINRA] members depend to ensure that they act with their customers' consent when such consent is required. . . . If customers of [FINRA] members cannot expect to be protected from forgery of documents evidencing their consent, and [FINRA] members cannot trust the documents submitted to them by their associated persons, the industry cannot operate.

2008 SEC LEXIS 2401, at *29-30. Thus, the nature of Golonka's misconduct involved serious ethical breaches.²²

Pursuant to the Guidelines, we also have considered the number, size, and character of the transactions at issue, whether Golonka engaged in numerous acts or a pattern of misconduct, whether he engaged in the conduct over an extended period of time, and whether his violation was the result of an intentional act, recklessness, or negligence.²³ Golonka's misconduct involved four instances of participating in an impersonation scheme to obtain confidential information concerning insurance policies. The misconduct was more than just an isolated

[cont'd]

Smith Barney brokers with whom they had no personal dealings would have access to their confidential information. Moreover, Golonka's argument is undermined by the fact that the insurance companies involved disclosed confidential information only to the person listed on its records as the agent, not to the firm that employs (or employed) such person, and that Smith Barney did not have the power, by itself, to request that such insurance carriers change the agent.

²² Golonka argues that the calls to the insurance companies were only "preliminary." But that misses the point. The fact that there is no evidence that Golonka continued to participate in impersonations after these "preliminary" phone calls does not minimize the seriousness of his misconduct. While the potential for any financial harm to the customers was indirect, *Ortiz* teaches that a dishonest breach of confidentiality undermines the trust that is critical for the industry to function. Likewise, Golonka's assertion that there was no customer harm is similarly inconsequential. It is well established that the absence of customer harm is not mitigating. *Howard Braff*, Exchange Act Rel. No. 66467, 2012 SEC LEXIS 620, at *26 (Feb. 24, 2012); *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004), *aff'd*, 2005 SEC LEXIS 2655.

²³ *Guidelines*, at 6, 7 (Principal Considerations in Determining Sanctions, No. 8, 9, 13, and 18).

incident, but all of the phone calls occurred on a single day and, thus, did not extend over a period of time. These circumstances do not aggravate Golonka's misconduct in a significant way. And as explained above, the record does not support Enforcement's contention—one of its primary arguments in support of its bar request—that Golonka was the “orchestrator” of the impersonation scheme. Nevertheless, it is aggravating that Golonka's conduct was the result of intentional acts, including his persisting with the impersonation scheme even after realizing he had been caught once.

The Hearing Panel did not address Golonka's intent, but it did explore his motives. It found that Golonka “sought to promote a positive working relationship with [Smith Barney's DST Group], which he had hoped to cultivate for some time.” We concur that Golonka's conduct was motivated by the potential for gain in the form of a new, and potentially lucrative, business relationship with the DST Group, a fact that we find to be aggravating.²⁴ Even if, as Golonka submits, he was trying “to help clients who had been neglected,” his conduct remained self-interested.

It is further aggravating, as the Hearing Panel found, that Golonka, an industry veteran, “engaged in the misconduct with younger, less experienced” colleagues, including JL who was observing the calls as a part of her training. By doing so, Golonka essentially put his imprimatur on the impersonations and risked fostering a more widespread use of similar unethical conduct at the Firm.

We also have considered whether Golonka “attempted to conceal his . . . misconduct or to . . . mislead [or] deceive . . . regulatory authorities or . . . the member firm with which he . . . was associated.”²⁵ Enforcement contends that Golonka attempted to deceive Hartford's and FINRA's investigators. Golonka concedes that he provided several false statements during Hartford's and FINRA's investigations, but he attributes them primarily to memory lapses. The Hearing Panel made no findings concerning this issue. We find, however, that there are two clear examples where Golonka attempted to mislead or conceal his misconduct.

First, Golonka falsely represented to Hartford's investigator, less than four months after the violative conduct, that he had not recruited any male Smith Barney employees to engage in impersonations. Golonka testified that, during his interview with Hartford, he had forgotten his phone call with Stoltzfus. But if participating in impersonations was conduct in which Golonka never previously engaged—as he claimed—it is beyond credulity that Golonka would have forgotten his call with Stoltzfus. Golonka remembered getting “caught” during the call where Arnold impersonated female customer EM. When he made his call with Stoltzfus, Golonka coincidentally reached the *same* insurance company representative who had caught him, and he

²⁴ *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17); *cf. Heath*, 2009 SEC LEXIS 14, at *11 (finding that respondent's disclosure of confidential information “was ultimately self-interested” as it was an effort “to build trust and . . . collegiality” with a future colleague).

²⁵ *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10).

abruptly ended the call when he became uncomfortable. That is something that Golonka would be highly unlikely to forget so soon after it had occurred.²⁶

Second, Golonka attempted to mislead FINRA regulators when he claimed that he felt “extremely uncomfortable” during the impersonations. The Hearing Panel “discount[ed] that testimony” and, indeed, it is belied by the recordings. On them, Golonka is heard participating in the deceptions in an assured and deliberate manner, laughing and praising Arnold about her impersonations of female customers, and planning the phase that he sought to implement concerning the male customers. Golonka’s claim that he felt “extremely uncomfortable” reveals a clear attempt to mislead investigators about the risks he posed to the public.

Golonka’s misrepresentations to Hartford’s and FINRA’s investigators aggravate his misconduct. The degree of aggravation is lessened, however, considering that once Golonka knew that Hartford was aware of one of the impersonation calls, he was forthcoming by admitting his participation in three other calls that Hartford had not yet detected.

We have also taken Golonka’s remorse into account. The Hearing Panel found that Golonka “is genuinely contrite,” now “recognizes the seriousness of his misconduct,” and was “sincere” in claiming that participating in the impersonations “was the ‘dumbest decision I’ve ever made both personally and professionally.” The Hearing Panel based such findings on “the substance of Golonka’s testimony and his demeanor at the hearing.” We defer to these credibility determinations because even though there is some evidence that weighs against them, it is not substantial enough to overcome them.²⁷ See *Ortiz*, 2008 SEC LEXIS 2401, at *18 & nn.14-15 (explaining that credibility determinations are given great weight and deference). Nonetheless, we assign only limited mitigative weight to Golonka’s remorse because he did not express it until after his Firm had detected some of his violations.²⁸

²⁶ Enforcement further contends that Golonka’s similarly false statements at an on-the-record interview, which took place nearly two years after the relevant events, were attempts to mislead FINRA investigators; Golonka attributes such statements to a memory lapse. Because resolving this factual dispute would not materially impact the sanctions, we do not address it.

²⁷ Golonka’s efforts to blame the DST Group run somewhat counter to his expressions of remorse. See, e.g., *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *26 (Nov. 8, 2006) (rejecting claim of remorse given attempts to shift blame to others).

²⁸ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2); see *Dep’t of Enforcement v. Kelly*, Complaint No. E9A2004048801, 2008 FINRA Discip. LEXIS 48, at *33 n.34 (FINRA NAC Dec. 16, 2008) (giving some mitigative weight to respondent’s “frank admission” of a violation at a hearing); *Mizenko*, 2004 NASD Discip. LEXIS 20, at *18 (admission of misconduct was not mitigating because it came after respondent’s firm detected the forgery and confronted respondent with evidence).

C. Golonka's Various Arguments

Golonka's arguments in support of lower sanctions are unsound. He notes that, in September 2009, the Pennsylvania Insurance Department issued a consent order finding that he had violated state insurance laws and imposing a \$5,000 fine, a cease and desist order, and a five-year probation period. That consent order, however, addressed only one instance of Golonka's participation in an impersonation scheme and, therefore, covered only a small portion of the misconduct at issue here. Moreover, the sanctions imposed by the Pennsylvania Insurance Department were not sufficient to remedy Golonka's violation of FINRA's rules, which included several instances of misconduct as well as efforts to conceal it.²⁹

In a related argument, Golonka contends that the consequences from his misconduct—which in his view include the Pennsylvania Insurance Department consent order, the loss of his job and book of business, the denial of his claim for unemployment insurance, the non-compete clauses to which his most recent employers subject him, and the attorney's fees he has incurred—are sufficient deterrents. As the Commission has explained, however, “[w]e . . . do not consider mitigating the economic disadvantages [respondent] alleges he suffered because they are a result of his misconduct.” *Jason A. Craig*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) (rejecting argument that the “amount of time, money, and loss of work” suffered as a result of misconduct was mitigating); *see also Robert L. Wallace*, 53 S.E.C. 989, 996 (1998) (holding that “[f]inancial loss to a wrongdoer as a result of his wrongdoing,” including termination of unemployment and a subsequent inability to find work, “does not . . . serve to mitigate the gravity of his conduct”).

Equally without merit is Golonka's assertion that “there was no reason to believe that if contacted, the clients would not have consented.” Even if Golonka's claim was true, it would not have provided him with a basis for believing that he possessed authority to facilitate any impersonations.³⁰

Golonka also complains that the Hearing Panel's sanctions were disproportionately high compared to the Cautionary Action issued to Stoltzfus for his role in the impersonation scheme. We have previously stated, however, that “the appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases.” *Dep't of Enforcement v. Winters*, Complaint No. E102004083704, 2009 FINRA Discip. LEXIS 5, at *22 (FINRA NAC July 30, 2009) (internal quotation marks omitted); *see also Guidelines*, at 1 (noting the “broadly recognized principle that settled cases generally result in lower sanctions than fully litigated cases”).

²⁹ *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 14) (directing adjudicators to consider “whether another regulator sanctioned the respondent for the same misconduct at issue and whether that sanction provided substantial remediation”).

³⁰ *Cf. Guidelines*, at 37 (Principal Considerations in Determining Sanctions, No. 2) (directing adjudicators to consider, for forgery and falsification of records violations, “[w]hether the respondent had a good-faith, but mistaken, belief of express or implied authority”).

* * * * *

Golonka's recommended sanctions, several of which are lower than the Guidelines' recommended sanctions ranges, would be insufficient considering the gravity of Golonka's misconduct. Although the bar that Enforcement requests would be excessive, stronger sanctions than what the Hearing Panel imposed are needed to deter Golonka and others from engaging in similar misconduct, considering the numerous aggravating factors that are present. While we acknowledge that the Hearing Panel found Golonka to be remorseful, it accorded too much weight to that factor. Golonka expressed such remorse only after his violations were detected. And Golonka's remorse is overcome by other aggravating factors, including his intentional deception of insurance company representatives, his engaging in the misconduct in front of a new colleague who was still in training, and his concealment of his misconduct from his firm's investigator. Weighing the serious nature of Golonka's misconduct and the mix of aggravating and mitigating factors, we impose an 18-month suspension in all capacities and a \$20,000 fine.³¹ These sanctions are intended both to discourage Golonka from further violations and to deter others from engaging in similar misconduct.³²

³¹ Golonka argues that a suspension would "result in a third set of non-compete obligations" and "effectively ban[] him from the industry for a much longer period." Our sanctions, however, are consistent with the Guidelines. Moreover, "we do not consider as evidence of mitigation the possible impact a disciplinary action might have on a respondent's career." *Dep't of Enforcement v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *22 n.17 (FINRA NAC Dec. 17, 2010), *aff'd*, 2012 SEC LEXIS 54. As for the fine, Golonka asserts that he has an inability to pay any monetary sanction, but he has failed to prove it. Although Golonka asserts on a Statement of Financial Condition that he has a net worth of negative \$19,598, that statement is not reliable. For example, Golonka failed to submit all required supporting documentation, such as documents or appraisals supporting his estimates of assets valued at more than \$1,000. Golonka also failed to identify any of his bank accounts, 401(k) plans, pension plans, or other retirement accounts as required, despite the fact that other documents that he submitted indicate that such accounts exist. Finally, Golonka's claim of an inability to pay was belied by his counsel's concession at oral argument that Golonka could pay a fine on an installment payment plan.

³² See *Guidelines*, at 2 (explaining the specific deterrence and general deterrence purposes of sanctions).

VI. Conclusion

Accordingly, we find that Golonka participated in an impersonation scheme in violation of NASD Rule 2110. Golonka is suspended from associating with any member firm for 18 months in all capacities and fined \$20,000. We also affirm the order that Golonka pay \$4,282.65 in hearing costs, and we order that he pay \$1,511.25 in appeal costs.³³

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell
Jennifer Piorko Mitchell
Assistant Corporate Secretary

³³ We also have considered and reject without discussion all other arguments advanced by the parties.

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