

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOEY W. DEAN
(CRD No. 3061136),

Respondent.

Disciplinary Proceeding
No. 2008012833801

Hearing Officer – LBB

DEFAULT DECISION

For willfully violating Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, NASD Conduct Rules 2120 and 2110, and FINRA Conduct Rules 2020 and 2010, by making material misrepresentations in the sale of securities, Respondent is barred from associating with any member firm. For unauthorized trading in customer accounts in violation of NASD Conduct Rule 2110 and FINRA Conduct Rule 2010, Respondent is also barred. In light of the bars, no additional sanction is imposed for recommending unsuitable investments in violation of NASD Conduct Rules 2310 and 2110, and FINRA Conduct Rule 2010.

Appearances

Laura Leigh Blackston, Esq., Senior Regional Counsel, New Orleans, Louisiana, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

The Department of Enforcement filed the Complaint in this disciplinary proceeding on September 10, 2010, asserting three causes of action against Respondent Joey W. Dean ("Respondent"). The First Cause of Action charges Respondent with violating Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, NASD Conduct Rules 2120 and 2110, and FINRA Conduct Rules 2020 and 2010, by making material misrepresentations in the sale of

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securities. The Second Cause of Action charges Respondent with violating NASD Conduct Rule 2110 and FINRA Conduct Rule 2010 by selling securities from customer accounts without authorization from the customers. The Third Cause of Action charges Respondent with violating NASD Conduct Rules 2310 and 2110, and FINRA Conduct Rule 2010, by recommending unsuitable transactions, resulting in overconcentration of customer accounts in certain securities.

I. Respondent's Default

On September 10, 2010, FINRA staff served the Notice of Complaint and Complaint on Respondent by certified mail at his Central Registration Depository ("CRD") address, and to a second address that he had provided to FINRA staff. Decl. ¶ 53; DX-1, DX-4.¹ Both mailings were returned marked "Unclaimed." Decl. ¶ 54; DX-5. On October 12, 2010, FINRA staff served a Second Notice of Complaint and Complaint on Respondent by certified mail at his CRD address and at the alternative address. Decl. ¶ 57; DX-1, DX-6. Both mailings were returned marked "Unclaimed." DX-7.

Despite being properly served with the Complaint, Notice of Complaint, and Second Notice of Complaint, Respondent has not filed an answer or otherwise responded to the Complaint. On December 7, 2010, Enforcement filed a Motion for Entry of Default Decision, to which Respondent did not respond. Accordingly, pursuant to Procedural Rules 9215(f) and 9269, the allegations in the Complaint will be deemed admitted and Enforcement's motion will be granted.

¹ The factual determinations in this decision are based on the allegations of the attached Complaint and the materials Enforcement filed with its default motion, which included the Declaration Supporting Motion for Entry of Default Decision, and supporting documentation that was attached to counsel's declaration. Counsel's declaration is cited herein as "Decl. ¶ ____." The supporting documentation was marked by Enforcement as "DX-____," and is cited herein as "DX-____." At the direction of the Hearing Officer, Enforcement filed a supplemental declaration on December 22, 2010, providing information about the nature of the securities referenced in the Complaint and evidentiary support for the allegation in the Complaint that the transactions referenced in the Complaint were in interstate commerce. The supplemental declaration is cited as "Supp. Decl. ¶ ____."

II. Jurisdiction

Respondent entered the securities industry with a FINRA member firm in 1998. He was registered with member firm Morgan Stanley & Co., Inc., ("Morgan Stanley") from June 2006 until Morgan Stanley terminated his employment on May 8, 2009. Decl. ¶ 6; DX-1.

Although Respondent is not currently registered with a FINRA member firm, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after the termination of his registration with a member firm, and it charges him with misconduct while he was registered with a member firm.

III. Origin of FINRA's Investigation

FINRA's investigation of Respondent began on March 24, 2008, following the staff's receipt of a complaint filed by customer P.G., alleging that Respondent had made material misrepresentations and omissions concerning the rate of return of Morgan Stanley structured note products known as Protected Buy-Write Securities ("Securities"). Decl. ¶ 9.

IV. Violations

A. First Cause of Action: Misrepresentations in Connection with the Sale of Securities

The First Cause of Action charges Respondent with willfully violating Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, NASD Conduct Rules 2120 and 2110, and FINRA Conduct Rules 2020 and 2010, by making material misrepresentations and omissions in the sale of securities.

Section 10(b) of the Exchange Act provides that it is "unlawful for any person ... to use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the

Commission may prescribe.”² SEC Rule 10b-5 makes it unlawful “[t]o employ any device, scheme, or artifice to defraud; to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”³ To establish a violation of Rule 10b-5, Enforcement must prove that Respondent: (1) made misrepresentations or omissions of material facts; (2) acted with scienter; and (3) made such misrepresentations or omissions in connection with the purchase or sale of a security.⁴ In addition, Enforcement must prove that Respondent used “any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.”⁵ NASD Conduct Rule 2120 and its successor, FINRA Conduct Rule 2020, are similar to Rule 10b-5.⁶ A violation of NASD Conduct Rule 2120, FINRA Conduct Rule 2020, or SEC Rule 10b-5, is also a violation of NASD Conduct Rule 2110 and FINRA Conduct Rule 2010.⁷

From November 2, 2006, through May 8, 2009, Respondent made material misrepresentations to eight customers in connection with the sale of the Securities. The Securities were structured products issued by Morgan Stanley that offered protection of principal if held to maturity, and variable monthly income that was determined by a formula linked to the Russell 2000 or the S&P 500. Complaint ¶¶ 2, 3, 8. The Securities were unsecured debt of

² 15 U.S.C. § 78j(b).

³ 17 C.F.R. § 240.10b-5.

⁴ *Dep’t of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *25-26 (N.A.C. Feb. 12, 2007).

⁵ 17 C.F.R. § 240.10b-5; *see SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997) (finding that the jurisdictional requirements of the federal antifraud provisions are interpreted broadly and are satisfied by intrastate telephone calls and the use of the U.S. mail), *aff’d*, 159 F.3d 1348 (2d Cir. 1998).

⁶ *Dep’t of Enforcement v. Kirlin Securities Inc.*, No. EAF0400300001, 2009 FINRA Discip. LEXIS 2, at *39 (N.A.C. Feb. 25, 2009), *aff’d*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168 (Dec. 10, 2009).

⁷ *Kirlin*, 2009 SEC LEXIS 4168, at *59-60 n.81.

Morgan Stanley, and the indices were used as references to establish the returns, if any. Supp. Decl. ¶¶ 13, 14. Respondent told the customers that their principal was protected, which was accurate only if they held the securities to maturity, which was five years. He told six customers that they would receive a 10% rate of return, and two others that they would receive an 8% rate of return. This was also a misrepresentation, because there was no guaranteed rate of return. Complaint ¶¶ 2, 9, 10.

The misrepresentations were material. A fact is material if there is a substantial likelihood that a reasonable investor would have considered the misstated or omitted fact important in making an investment decision, and if disclosure of the misstated or omitted fact would have significantly altered the total mix of information available to the investor.⁸ Price or earnings predictions are material representations.⁹ A representation that a return is guaranteed is clearly something that reasonable investors would consider in making their investment decisions. In fact, each of the customers made substantial investments in the Securities based upon Respondent's misrepresentations. Complaint ¶¶ 11, 12.

Respondent made these misrepresentations with scienter. Scienter is established if a respondent acted intentionally or recklessly.¹⁰ Respondent's misrepresentations were contrary to the disclosures in the prospectuses, and Respondent knew when he made them that the returns were not guaranteed. The misrepresentations were therefore either intentional or reckless. Complaint ¶¶ 17, 20(a).

⁸ *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

⁹ *Kevin M. Glodek*, Exchange Act Rel. No. 60937, 2009 SEC LEXIS 3936, at *7 (Nov. 4, 2009); *SEC v. Hasho*, 784 F.Supp. 1059, 1109 (S.D.N.Y. 1992); *Steven E. Muth*, Exchange Act Rel. No. 8622, 2005 SEC LEXIS 2488, at *45 (Oct. 3, 2005).

¹⁰ *Gebhart v. SEC*, 595 F.3d 103, 1040-41 (9th Cir. 2010); *Irfan Mohammed Amanat*, Exchange Act Rel. No. 54708, 2007 SEC LEXIS 2558, at *35 (Nov. 3, 2007), *aff'd*, 269 F. App'x 217 (3d Cir. 2008).

Respondent used means and instrumentalities of interstate commerce and the mails. He spoke with his customers by telephone, sent prospectuses to some customers by the Internet, and his firm mailed statements to the customers showing their investments in the Securities. Supp. Decl. ¶¶ 6-12.

Respondent's misrepresentations were willful. Under the securities laws, willfulness means that Respondent voluntarily committed the act that constituted the violation, and does not require proof of intent to violate the laws or rules.¹¹ The finding that Respondent acted with scienter supports a finding that his violations were willful.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent willfully made material misrepresentations to eight customers in connection with the purchase of securities, and thereby violated Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, NASD Conduct Rules 2120 and 2110, and FINRA Conduct Rules 2020 and 2010.

B. Second Cause of Action: Unauthorized Trading

Unauthorized trading is a "serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade," and violates NASD Rule 2110 and FINRA Rule 2010.¹²

In January 2008, the Securities ceased paying monthly income. Respondent did not inform Customers J.D., M.D., or B.M. that income was no longer being paid, knowing that the customers expected regular monthly income. Instead, he began selling shares of their investments in the Securities to generate funds to permit the customers to make their accustomed

¹¹ *Dep't of Enforcement v. Zayed*, No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *13 n.11 (N.A.C. Aug. 19, 2010); *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

¹² *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (citation omitted); *Dep't of Enforcement v. Wiard*, No. C8A030078, 2005 NASD Discip. LEXIS 45, at *8 (N.A.C. Oct. 18, 2005).

withdrawals. The customers did not authorize Respondent to sell their shares, and Respondent did not inform the customers that the funds for their monthly withdrawals were the proceeds of sales of their shares. Complaint ¶ 22. Respondent executed unauthorized sales of 1,940 shares of the Securities from the joint account of J.D. and M.D. from January through August 2008, and 17,000 shares of the Securities from the account of customer B.M. from June 2008 through January 2009. Complaint ¶¶ 23, 24.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent made unauthorized transactions in the accounts of J.D., M.D., and B.M., and thereby violated NASD Conduct Rule 2110 and FINRA Conduct Rule 2010.

C. Third Cause of Action: Suitability

The suitability requirement of NASD Conduct Rule 2310 is violated when a registered representative recommends an undue concentration in speculative securities.¹³ High concentration is not necessarily unsuitable. The NAC has recently declined to find that a representative's recommendations were unsuitable despite high concentration because there was insufficient evidence that the security was speculative, noting that expert testimony would have been helpful in that case.¹⁴

The Complaint charges that Respondent recommended and effected unsuitable transactions in the accounts of customers P.G., D.G., J.M., J.D. and M.D., G.B., B.M., and B.R. For customer P.G., a 51-year-old recent retiree, Respondent recommended that the customer invest 82% of his net worth in the Securities. Complaint ¶¶ 30-32. Respondent recommended to

¹³ *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *26 (Feb. 10, 2004). "[H]igh concentration of investments in one or a limited number of speculative securities is not suitable for investors seeking limited risk."

¹⁴ *Dep't of Enforcement v. Cody*, No. 2005003188901, 2010 FINRA Discip. LEXIS 8, at *26 n.16 (N.A.C. May 10, 2010).

customer D.G., a 63-year-old who had recently retired, that he invest 97% of his net worth in the Securities. Complaint ¶¶ 33-35. Customer J.M., a 61-year-old retiree, invested 86% of his liquid net worth in the Securities based on Respondent's recommendation. Complaint ¶¶ 36-37. Customers J.D. and M.D., a 60-year-old recent retiree and his 59-year-old wife who was about to retire, invested 73% of their net worth in the Securities as a result of Respondent's recommendation. Complaint ¶¶ 38-40. Customer G.B., a 65-year-old who had never worked outside the home, invested 82% of her liquid net worth in the Securities as a result of Respondent's recommendation. Complaint ¶¶ 42-44. As a result of Respondent's recommendation, Customer B.M., a recent retiree, invested 75% of her net worth in the Securities. Complaint ¶ 47. Customer B.R., who had recently accepted an early retirement package, invested 93% of his liquid net worth in the Securities as a result of Respondent's recommendation. Complaint ¶¶ 50-52.

In arguing that the concentration of the customers' investments in the Securities was excessive, Enforcement focuses on the risks associated with the Securities. However, there is insufficient information in the Complaint to determine whether the Securities were risky enough to be considered speculative, or whether the features of the Securities are consistent with the customers' needs. Nevertheless, the Hearing Officer finds that Respondent's recommendations were unsuitable because of the extraordinary concentration of the securities of a single issuer in the customers' accounts. The recent failures and difficulties of a number of apparently solid companies, and the devastating impact of the concentration of their employees' retirement plans in their employers' securities, serve as reminders that it is inherently risky to concentrate almost all of one's investments, and especially retirement funds, in the securities of a single issuer. Investing the substantial majority of retirees' funds in unsecured Morgan Stanley securities, from

73% to 97% of the customers' net worth, staked the customers' entire financial futures on the state of Morgan Stanley's financial condition. Taking such a gamble on the condition of any one issuer is unsuitable.¹⁵

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent recommended unsuitable investments to customers, and executed unsuitable transactions in their accounts, and thereby violated NASD Conduct Rules 2310 and 2110, and FINRA Conduct Rule 2010.

V. Sanctions

A. Sanctions for Misrepresentations

For intentional or reckless material omissions of material fact, the FINRA Sanction Guidelines ("Sanction Guidelines") provide for fines ranging from \$10,000 to \$100,000, suspension for a period of 10 business days to two years, and, in an egregious case, a bar.¹⁶

These misrepresentations were egregious. The misrepresentations were likely intentional, but were at least grossly reckless, directly contradicting statements in the offering documents of Respondent's own firm. Respondent covered up his misrepresentations by subsequent communications and unauthorized trades. The expectation of a guaranteed attractive rate of return was likely to cause the customers to make financial decisions that could cause financial hardship if the securities earned less than the guaranteed rates of return.

Enforcement recommends a bar. The Hearing Officer finds that a bar is the appropriate sanction.

¹⁵ "We have also found that recommendations leading to high concentration of customer accounts in particular securities is 'beyond what is consistent with the objective of safe, non-speculative investing.'" *Luis Miguel Cespedes*, Exchange Act Rel. No. 59404, 2009 SEC LEXIS 368, at *23-24 (Feb. 13, 2009), citing *Stephen Thorlief Rangen*, 1997 SEC LEXIS 2198, at *10 (Oct. 20, 1997).

¹⁶ *FINRA Sanction Guidelines* at 93 (2007).

B. Sanctions for Unauthorized Trading

For executing unauthorized transactions in a client's account, the FINRA Sanction Guidelines recommend a fine of \$5,000 to \$75,000 and a suspension of 10 business days to one year, or a longer suspension or a bar in egregious cases. The principal considerations are whether Respondent misunderstood his authority or the terms of the customer's orders, and whether the unauthorized trading was egregious. Sanction Guidelines at 103.

The Complaint alleges that Respondent engaged in the unauthorized trading to cover up the fact that his customers were not receiving the guaranteed returns they had expected to receive. The unauthorized trading could have caused harm to customers, who were deprived of the opportunity to make adjustments to their financial planning because Respondent concealed the true state of their finances from them.

Enforcement argues that Respondent's unauthorized trading was egregious, and recommends a bar. A bar is the appropriate sanction.

C. Sanctions for Recommending Unsuitable Investments

The Sanction Guidelines for recommending unsuitable investments suggest a fine of \$2,500 to \$75,000, a suspension for ten business days to one year, and in egregious cases, a suspension of up to two years or a bar.

The Complaint and Motion do not provide sufficient information to determine whether the unsuitable recommendations were egregious. Furthermore, the Hearing Officer has imposed separate bars for the fraud and unauthorized trading causes of action. Accordingly, no additional sanction is imposed for recommending unsuitable investments.

D. Restitution

The Department of Enforcement is not seeking restitution because Morgan Stanley settled with all of the customers.

VI. Conclusion

For willfully violating Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, NASD Conduct Rules 2120 and 2110, and FINRA Conduct Rules 2020 and 2010, by making material misrepresentations in the sale of securities, Respondent Joey W. Dean is barred from associating with any FINRA member firm in any capacity. For unauthorized trading in violation of NASD Conduct Rule 2110 and FINRA Conduct Rule 2010, Respondent is also barred. In light of the bars, no additional sanction is imposed for recommending unsuitable investments in violation of NASD Conduct Rules 2310 and 2110, and FINRA Conduct Rule 2010. The bars will become effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding.



Lawrence B. Bernard
Hearing Officer

Copies to: Joey W. Dean (*via first-class mail*)
 Laura Leigh Blackston, Esq. (*via e-mail and first-class mail*)
 Mark P. Dauer, Esq. (*via e-mail*)
 David R. Sonnenberg, Esq. (*via e-mail*)