

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

CHRISTOPHER LOONEY
(CRD No. 1836267),

Respondent.

Disciplinary Proceeding
No. 2009016159104

Hearing Officer – LOM

DEFAULT DECISION

August 14, 2013

First Cause of Action: Respondent violated FINRA Rule 2010 by engaging in unauthorized trading.

Second Cause of Action: Respondent violated NASD Rules 3110 and 2110 by creating false and inaccurate New Account Forms that misrepresented customers' investment objectives, risk tolerances, and financial conditions.

Third Cause of Action: Respondent violated NASD Rules 2310 and 2110 and IM-2310-2 by engaging in excessive and unsuitable trading in the account of an elderly customer that Respondent controlled.

Fourth Cause of Action: Respondent violated Securities Exchange Act 10(b) and Rule 10b-5, along with NASD Rules 2120 and 2110, by engaging in the excessive and unsuitable trading in the elderly customer's account with the intention of generating commissions and not to serve the interests of the customer.

Sanctions: Respondent engaged in a pattern and practice of related misconduct. He is sanctioned in the aggregate for the non-fraud charges in the First, Second, and Third Causes of Action, and is barred from associating with any FINRA registered firm in any capacity for those violations. Respondent is separately sanctioned for the fraud charge in the Fourth Cause of Action. Respondent is barred from associating with any FINRA registered firm in any capacity for that violation and ordered to pay restitution plus pre-judgment interest to the customer he injured through his fraud.

Appearances

Jonathan Golomb, Rockville, Maryland, for the Department of Enforcement.

No appearance on behalf of Christopher Looney.

I. Introduction

The Respondent, Christopher Looney ("Respondent" or "Looney"), failed to answer a Complaint served on him twice at his residential address as shown in the Central Registry Depository ("CRD") by the Department of Enforcement ("Enforcement") for the Financial Industry Regulatory Authority ("FINRA").¹ As a consequence, Enforcement filed a Motion For Entry Of Default Decision And Imposition Of Sanctions ("Default Motion"). The Default Motion is accompanied by a Declaration In Support Of Motion For Entry Of Default Decision ("Declaration") in which Jonathan Golomb, an Enforcement attorney, describes the efforts made by Enforcement to serve the Complaint.

The Default Motion attaches the Complaint and, pursuant to FINRA Rule 9269, seeks to have its allegations deemed admitted. The Complaint alleges four Causes of Action against Respondent: (i) unauthorized trading for five customers when they had not authorized Looney to trade or open accounts for them; (ii) the creation of false books and records by misrepresenting the investment objectives, risk tolerances, and financial conditions of three customers on their New Account Forms; (iii) frequent and excessive trading in an account held by an elderly customer that Respondent effectively controlled, which trading resulted in the near total loss of

¹ FINRA, which is responsible for regulatory oversight of securities firms that do business with the public and their associated persons, was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange ("NYSE"). FINRA is developing a new "Consolidated Rulebook" of FINRA Rules that includes NASD Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, FINRA's procedural rules apply. The conduct rules that apply are those that existed at the time of the conduct at issue. FINRA's Rules (including NASD Rules) and its By-Laws are available at www.finra.org.

value in the account in only four months; and (iv) securities fraud with respect to the excessive and unsuitable trading described in the Third Cause of Action, which trading generated substantial commissions for Respondent at the same time that the customer lost most of the value in the account. The Complaint alleges violations of FINRA Rule 2010, NASD Rules 2110, 2120, 2310, 3110, IM-2310-2, and Securities and Exchange Act 10(b) and Rule 10b-5 promulgated thereunder.

For the reasons set forth below and pursuant to authority granted by FINRA Rule 9269(a), the Hearing Officer finds Respondent in default, grants Enforcement's Default Motion, and deems the allegations against Respondent admitted. On that basis, the Hearing Officer also issues this Decision finding the violations alleged and imposing sanctions.

II. Procedural History And Grant Of Default Motion

On March 25, 2013, Enforcement served the Notice of Complaint and Complaint against Looney by certified mail, return receipt requested, and first-class mail to Looney's CRD address. The certified mail receipt was signed. The signature is for someone with the last name Looney, "Michele Looney." The regular mailing was not returned to FINRA.

Enforcement received no response to the Notice of Complaint.

On May 7, 2013, Enforcement served a Second Notice of Complaint with the Complaint by certified mail, return receipt requested, and first-class mail to Looney's CRD address. The certified mailing was returned unclaimed, with the notation "NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD." The regular mailing was also returned. It had the notation "ATTEMPTED, NOT KNOWN."

As of the date of the Default Motion, Enforcement had received no response to the Second Notice of Complaint. As of the date of this decision, the Office of Hearing Officers has

received no Answer from Looney.²

Service on Looney was valid under FINRA Procedural Rule 9134, because Enforcement served him by certified mail at the residential address reflected in the CRD, as specified in the Rule. Pursuant to FINRA Rules 9215(f) and 9269(a) and based on Looney's failure to file and serve an Answer, the Hearing Officer grants Enforcement's Default Motion, finds Looney in default, and deems the allegations in the attached Complaint admitted.

III. Findings Of Fact And Conclusions Of Law As To Underlying Violations

A. Looney's Background And Position

Looney was employed by a dozen FINRA member firms between May 1989 and April 2011, when his last registration with a FINRA member terminated. Looney has held licenses as a general securities representative (Series 7), general securities principal (Series 24), and state agent (Series 63).³ During the period relevant to the Complaint in this proceeding, June 2009 through December 2009, Looney was a registered representative with iTradedirect.com ("iTrade"). He left iTrade on April 26, 2010.⁴

B. Jurisdiction

FINRA has jurisdiction over Looney in this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws. The Complaint was filed on March 27, 2013, which was within two years after the last date on which he was registered (April 11, 2011), and the

² Declaration ¶¶ 4-9.

³ Complaint ¶ 3; Declaration ¶ 2; CX-1, CX-2.

⁴ Complaint ¶¶ 1, 3. Looney settled a prior FINRA disciplinary proceeding in June 2010 for failing to disclose an outside business activity. Pursuant to that settlement, he was suspended for ten business days and fined \$10,000. Complaint ¶ 4. As set forth in CX-1, Looney's registration terminated on May 4, 2010.

Complaint charges him with misconduct that occurred while he was registered with FINRA member firm iTrade.⁵

C. Rules Alleged To Have Been Violated

NASD Conduct Rule 2110 and FINRA Rule 2010 (J&E Rule). At the time that Looney falsified books and records by creating New Account forms that misrepresented customers' investment objectives, risk tolerances, and financial conditions, as alleged in the Second Cause of Action, NASD Rule 2110 applied. The NASD Rule also applied at the time of the misconduct alleged in the Third and Fourth Causes of Action, the non-fraud and fraud charges relating to excessive trading in the elderly customer's account. At the time that Looney engaged in the unauthorized trading, FINRA Rule 2010 had superseded the NASD Rule.⁶

The two Rules, NASD 2110 and FINRA Rule 2010, contain identical language requiring the observance of "high standards of commercial honor and just and equitable principles of trade." Sometimes these are referred to as the "J&E" Rule, which refers to just and equitable principles of trade.⁷

⁵ Complaint ¶¶ 3, 5; Declaration ¶¶ 2-3; CX-1, CX-2. See Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

⁶ FINRA Rule 2010 superseded NASD Conduct Rule 2110 on December 15, 2008. See note 1 above.

⁷ *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 SEC LEXIS 14, *9 (Jan. 9, 2009) (discussing New York Stock Exchange counterpart of the FINRA and NASD Rules), *aff'd*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, *Heath v. SEC*, 2010 U.S. LEXIS 3029 (U.S. Apr. 5, 2010).

The J&E Rule applies to all business-related conduct and is a broad prohibition against unlawful, unfair and unethical activities.⁸ The Rule “serve[s] 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.”⁹

Conduct can constitute a violation of the J&E Rule without another Rule violation.¹⁰ The First Cause of Action in this case alleges the unauthorized trading on behalf of persons who had not authorized the trading or the opening of an account as such a stand-alone violation of the J&E Rule.

It is also well-established that a violation of other NASD or FINRA Rules is inconsistent with the “high standards” required by the J&E Rule.¹¹ Accordingly, the Second Cause of Action alleges a violation of NASD Rule 3110, relating to books and records, along with a violation of the J&E Rule; the Third Cause of Action alleges excessive trading in violation of NASD Rule

⁸ *Dep’t of Enforcement v. Trende*, No. 2007008935010, 2011 FINRA Discip. LEXIS 54, *11 and nn.12 & 13 (OHO Oct. 4, 2011).

See also Dep’t of Enforcement v. Brokaw, No. 2007007792902, 2012 FINRA Discip. LEXIS 53, at *45-46 (NAC Sept. 14, 2012); *Dep’t of Enforcement v. Gallagher*, No. 2008011701203, 2011 FINRA Discip. LEXIS 40, at *17-18 and n.46 (OHO June 13, 2011) (“Rule 2110 is an ethical rule...FINRA’s authority to pursue disciplinary action for violations of Rule 2110 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security.”), *aff’d*, 2012 FINRA Discip. LEXIS 61 (NAC Dec. 12, 2012); *Dep’t of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *22 (NAC Feb. 24, 2011) (“FINRA’s disciplinary authority under NASD Rule 2110 is also broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.”) (internal citations and quotations omitted)) *aff’d in part*, John Edward Mullins, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012); *Dep’t of Enforcement v. DiFrancesco*, No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *16 n.11 (NAC Dec. 17, 2010) (citing cases) (“There is a long line of cases stating that a member can be disciplined for “business-related conduct” that violates NASD Rule 2110, even when the activity does not involve a security.”) *aff’d*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012); *Dep’t of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NAC June 2, 2000) (citing *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff’d*, 104 F.3d 285 (9th Cir. 1997)).

⁹ *Dep’t of Enforcement v. Hunt*, No. 2009018068701, 2012 FINRA Discip. LEXIS 62, at *9 (Dec. 18, 2012) (quoting *DiFrancesco*, 2012 SEC LEXIS 54, at *17) (citation omitted).

¹⁰ *Heath*, 2009 SEC LEXIS 14, at *13 n.9.

¹¹ *See Dep’t of Enforcement v. CMG Inst. Trading, LLC*, No. 2006006890801, 2010 FINRA Discip. LEXIS 7, at *3 n.2 (NAC May 3, 2010). *See also Dep’t of Enforcement v. Simbric*, No. 2011026168901, 2012 FINRA Discip. LEXIS 29, *11-13 (OHO Apr. 23, 2012); *Dep’t of Enforcement v. Pascucci*, No. 2010025751301, 2012 FINRA Discip. LEXIS 34, at *11-14 (OHO Apr. 13, 2012).

2310 and IM-2310-2, along with the J&E Rule; and the Fourth Cause of Action alleges that the excessive trading was intentional churning in violation of Section 10(b) of the Securities Exchange Act, Rule 10b-5, and NASD Rule 2120, along with the J&E Rule.¹²

NASD Rule 3110 (books and records). NASD Conduct Rule 3110 (now superseded by the FINRA Rule 4500 Series) was in effect when Respondent created false and inaccurate New Account Forms for customers. NASD Conduct Rule 3110 requires every FINRA member firm to make and preserve books and records in conformity with applicable law and regulation. Implicitly, the Rule requires that such books and records be truthful and accurate. The accuracy of a firm's books and records is vitally important to FINRA's oversight function. "The entry of accurate information on official firm records is a predicate to [FINRA's] regulatory oversight of its members. It is critical that associated persons, as well as firms, comply with this basic requirement."¹³ As the SEC has recognized, "preserved records are the primary means of monitoring compliance with applicable securities laws."¹⁴ Under NASD Rule 115, Rule 3110 is applicable to persons associated with FINRA members. A registered representative violates

¹² For example, a violation of NASD Conduct Rule 2310 is a violation of the J&E Rule: *Dep't. of Enforcement v. Evans*, No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *22 (NAC Oct. 3, 2011) ("A violation of NASD Rule 2310 also constitutes a violation of NASD Rule 2110."); *James B. Chase*, Exchange Act Rel. No. 47476, 2003 SEC LEXIS 566, at *21 n.28 (Mar. 10, 2003) (same); *Clinton Hugh Holland, Jr.*, Exchange Act Rel. No. 36621, 1995 SEC LEXIS 3452, at *12 n.20 (Dec. 21, 1995) (same), *petition for review denied*, 105 F.3d 665 (9th Cir. 1997) (Table).

A violation of FINRA Rule 8210, concerning cooperation with investigations, also is a violation of the J&E Rule: *See Gallagher*, 2012 FINRA Discip. LEXIS 61, at *11 n.9 (finding that respondent's refusal to respond to request made pursuant to FINRA Rule 8210 violated FINRA Rule 2010); *Dep't of Enforcement v. Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18, at *28-29 (NAC July 21, 2011) (same).

¹³ *Dep't of Enforcement v. Cohen*, No. EAF0400630001, 2010 FINRA Discip. LEXIS 12, at *36 (NAC Aug. 18, 2010) (quoting *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996)). *See also Edward Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979).

¹⁴ *See* Rel. No. 34-44238; 66 Fed. Reg. 22916, *22917 (May 7, 2001).

Rule 3110 when he or she submits false information that causes books and records preserved by a FINRA member firm to be inaccurate.¹⁵

NASD Conduct Rule 2310 and IM-2310-2 (excessive trading). NASD Conduct Rule 2310 (now FINRA Rule 2111) was in effect at the time of the excessive and unsuitable trading alleged in the Third Cause of Action.¹⁶ NASD Conduct Rule 2310 requires that a registered representative who makes a recommendation for a securities transaction have “reasonable grounds” for believing that the recommendation is suitable for the customer. The Rule provides that the “reasonable grounds” be developed “upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.” The Rule requires that a recommendation be in the customer’s best interest.¹⁷

There are three aspects to consider in determining whether a recommendation is in the customer’s best interest. First, a broker must consider the nature and risk of the investment being recommended.¹⁸ As to this first aspect, a broker must have a reasonable basis to believe that the investment is suitable for *some* investors.¹⁹ Second, a broker must take into account the

¹⁵ *Dep’t of Enforcement v. Taylor*, No. 20070094468, 2011 FINRA Discip. LEXIS 17, at *13 n.12 (NAC Aug. 5, 2011).

¹⁶ NASD Rule 2310 has been superseded by FINRA Rule 2111, but NASD Rule 2310 is available on FINRA’s website under “Retired NASD Rules.”

¹⁷ *Scott Epstein*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217, at *40 n.24 (Jan. 30, 2009) (“In interpreting the suitability rule, we have stated that a [broker’s] ‘recommendations must be consistent with his customer’s best interests.’”); *Raghavan Sathianathan*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572, at *21 (Nov. 8, 2006) (“[A] broker’s recommendations must be consistent with his customers’ best interests.”); *Dep’t of Enforcement v. Bendtsen*, No. C01020025, 2004 NASD Discip. LEXIS 13, at *12 (NAC Aug. 9, 2004) (a recommendation should “serve [the] client’s best interests” and be “consistent with the client’s financial situation and needs”).

¹⁸ This reasonable diligence as to the recommended security is sometimes referred to as “reasonable-basis suitability.” *In re Cody*, Exchange Act Rel. No. 64565, 2011 SEC LEXIS 1862, *26-32 and nn. 8-16 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. Sept. 7, 2012). See also *Hanly v. SEC*, 415 F.2d 589, 595-596 (2d Cir. 1969); *Dep’t of Enforcement v. Siegel*, No. C05020055, 2007 NASD Discip. LEXIS 20, at *38 (NAC May 11, 2007).

¹⁹ *Dep’t of Enforcement v. Medeck*, No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at *31 (NAC July 30, 2009).

particulars of the customer's financial status and investment objectives and needs.²⁰ As to this aspect, a broker must have a reasonable basis to believe that the investment is suitable for this particular investor. Third, a broker must consider whether a particular investment strategy is consistent with the customer's best interest, which includes an evaluation of the size and frequency of transactions.²¹ Even if a particular security may be appropriate for a particular customer, a trading strategy of moving in and out that investment frequently may not be suitable.²²

Where the issue is quantitative suitability and excessive trading, a two-step analysis is applied. First, one must examine whether the broker had control over the account in question, either through express authority or through *de facto* control.²³ Second, one must examine whether the level of trading was inconsistent with the customer's best interest, taking into account the customer's financial condition and investment objectives.²⁴ The Securities and Exchange Commission recently explained,

²⁰ Sometimes this is referred to as "customer-specific suitability." *Id.*

²¹ See *Jack H. Stein*, Exchange Act Rel. No. 47335, 2003 SEC LEXIS 338, at *7 (Feb. 10, 2003); *Paul C. Kettler*, 51 1992 SEC LEXIS 2750, at *5 (Oct. 26, 1992) ("depending on a particular customer's situation and account objectives, the extent of trading alone may render transactions unsuitable"). Sometimes this is referred to as "quantitative suitability." *Dep't of Enforcement v. Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *26 (NAC Apr. 26, 2013) (quantitative suitability focuses on whether the number of transactions within a given timeframe is suitable in light of the customer's circumstances and investment objectives) (citing *Medeck*, 2009 FINRA Discip. LEXIS 7, at *32 n.27).

²² As the NAC has explained, "Quantitative suitability ... focuses not on the underlying characteristics of a particular security but on whether the number of transactions within a given timeframe is suitable in light of the customer's financial circumstances and investment objectives. Put another way, certain recommended transactions, viewed individually, might be suitable for a customer under customer-specific and reasonable-basis analyses, but those transactions, taken together, may be excessive and quantitatively unsuitable for that same customer." *Medeck*, 2009 FINRA Discip. LEXIS 7, *32 (footnote omitted).

²³ *Dep't of Enforcement v. Kelly*, E9A2004048801, 2008 FINRA Discip. LEXIS 48, at *13 (NAC Dec. 16, 2008) ("Control is established if a broker has formal discretionary authority over an account....A broker who does not have formal discretionary authority may still exercise *de facto* control of the account if the customer so relies on the broker that the 'broker' is in a position to control the volume and frequency of transactions in the account.") (quotations and citations omitted).

²⁴ *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *27.

Excessive trading occurs when a registered representative has control over the trading in an account and the level of trading in that account is inconsistent with the customer's objectives and financial situation. A registered representative's control over an account may be established when the customer relies on the representative such that the representative controls the volume and frequency of transactions. Thus a registered representative's exercise of de facto discretionary control over a client's account (even if the exercise of discretion is not properly authorized) satisfies the element of control for the purpose of demonstrating excessive trading.²⁵

Where a broker has actual or de facto control of investment decisions in an account, excessive trading may be found solely on the annual turnover rate in the account. The annual turnover rate measures the number of times in a year that the securities in an account are replaced by new securities. Generally, an annual turnover rate of six times or higher reflects excessive trading. Commission-to-equity and cost-to-equity ratios may also be indicative of excessive trading.²⁶

IM-2310-2 was in place at the same time as NASD Rule 2310 and, like that Rule, has been superseded by FINRA Rule 2111. IM-2310-2 expressly states that excessive trading activity in a customer's account can violate the duty of fair dealing that is implicit in all relations between customers and member firms and registered representatives. IM-2310-2 explains that there are no specific standards for measuring excessiveness because what is excessive will depend on the objectives and financial situation of the customer involved.

Section 10(b) of the Securities Exchange Act, Rule 10b-5 thereunder, and NASD Rule 2120 (fraud). Section 10(b) of the Securities Exchange Act and Rule 10b-5, promulgated thereunder by the Securities and Exchange Commission are antifraud provisions. Section 10(b) and Rule 10b-5 prohibit deceptive practices in connection with the purchase or sale of securities.

²⁵ William J. Murphy, Exchange Act Rel. No. 69923, 2013 SEC LEXIS 1933, at *49 (July 2, 2013) (quotations and footnotes omitted).

²⁶ Kelly, 2008 FINRA Discip. LEXIS 48, at *16.

A violation of these provisions requires scienter. “Scienter is established either by evidence of intent to defraud or by evidence of willful and reckless disregard of the customer’s interests.”²⁷

Excessive trading rises to the level of fraud where there is scienter. Where there is scienter, excessive trading becomes churning.²⁸

Scienter is demonstrated where the circumstances support the inference that a securities broker has entered into transactions and managed a client’s account for the purpose of generating commissions and in disregard of the client’s interests.²⁹ In circumstances where frequent trading generates large losses in an account while providing substantial commissions for the broker, scienter may be inferred.³⁰ In such a case, the trading betrays a reckless disregard of the customer’s best interest. The trading generates commissions, which benefit only the broker, while increasing costs to the customer and without regard to whether the investments are consistent with the customer’s financial condition and investment objectives.³¹ Also, where the volume of trading is extremely excessive, in light of the customer’s circumstances and investment objectives, the facts support the inference that the broker’s purpose was to create a profit for himself at the expense of the customer.³²

²⁷ *Murphy*, 2013 SEC LEXIS 1933, at *64 (citing *Michael T. Studer*, Exchange Act Rel. No. 50543A, 2004 WL 2004 SEC LEXIS 3157, at *16 (Nov. 30, 2004)).

²⁸ *Murphy*, 2013 SEC LEXIS 1933, at *64-65 and n.85-86.

²⁹ *Murphy*, 2013 SEC LEXIS 1933, at *64-68. See also *Barbato*, 1999 SEC LEXIS 276, at 35-37 (Feb. 10, 1999).

³⁰ *Kelly*, 2008 FINRA Discip. LEXIS 48, at *18 (“In a churning case, scienter may be established by showing a broker’s ‘reckless disregard for the customer’s interests.’”). In *Kelly*, an account with an initial value of roughly \$282,000 saw a decline in value of approximately \$90,000 while the broker generated more than \$33,000 in net commissions from the account. On these facts, reckless disregard amounting to scienter was found.

³¹ *Murphy*, 2013 SEC LEXIS 1933, at *64. As the SEC explained elsewhere in *Murphy*, even where a loss does not result from excessive trading, the trading may still be excessive and constitute churning. This is because the effect of churning is to reduce the customer’s return on investments by increasing the commissions generated by the account. *Murphy*, 2013 SEC LEXIS 1933, at *58 n.75.

³² E.g., *Bukantz*, Exchange Act Rel. No. 41827, 1999 SEC LEXIS 1780 (Sept. 2, 1999).

NASD Rule 2120 (like its successor, FINRA Rule 2020) provides: “No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.” The SEC has held that a finding of scienter is not required to sustain a violation but that recklessness satisfies that requirement.³³ Accordingly, proof of a Section 10(b) violation would also constitute proof of this violation.

D. Conduct And Violations Found

Based on the allegations of the Complaint, which are deemed true as a consequence of Respondent’s default, and the customer declarations attached to the Declaration as CX-5, the Hearing Officer concludes that Respondent committed the violations alleged.

1. First Cause Of Action – Unauthorized Trading

The First Cause of Action concerns unauthorized trading on behalf of five identified customers. Respondent “cold called” the five customers and tried to persuade them to open an account with him at his Firm. None of the identified customers agreed to invest with Looney. In fact, they had told him they did not want to do business with him and that they did not want to open accounts with his Firm. The customers declared that Looney “bugged” them, and that he called repeatedly and refused to take no for an answer. His conduct was offensive, and the customers emphatically told him that they did not want to do business with him. Looney nevertheless put in purchase orders in the names of these five customers.³⁴

Looney’s conduct constituted unauthorized trading in violation of the J&E Rule in effect at the time, NASD Rule 2110, as alleged in the First Cause of Action.

³³ See *Meyer Blinder*, 1992 SEC LEXIS 2019 (Aug. 26, 1992).

³⁴ Complaint ¶¶ 1, 6-30; Declaration CX-5 (four customer declarations).

2. Second Cause Of Action – False Books And Records

The Second Cause of Action concerns a books and records violation. Looney filled out New Account Forms for three customers in which he misrepresented the customers' financial conditions, investment objectives, and risk tolerances. These forms constituted records of the Firm, which it was required to keep under applicable law and regulation. As noted above, the books and records were required to be true and accurate.³⁵

Looney's conduct constituted the creation of false books and records in violation of NASD Rules 3110 and 2110, as alleged in the Second Cause of Action.

3. Third Cause Of Action – Excessive And Unsuitable Trading

The Third Cause of Action concerns excessive and unsuitable trading. An elderly individual, S.P., opened two accounts with Looney in July 2008. At the time, S.P. was 83 years old. Looney effectively controlled the trading in S.P.'s account and S.P. relied heavily on Looney's advice in making investment decisions. Furthermore, Looney did not discuss all the trades he made on behalf of S.P. with S.P. before placing the orders. Thus, Looney had control of the account.³⁶

Looney traded S.P.'s account very aggressively. Between July and October, over a period of approximately four months, Looney effected numerous transactions in S.P.'s account. He caused S.P. to enter into 77 trades during that period, with 40 trades being made in September 2008 alone. Looney's trading from August 1, 2008, through October 31, 2008, generated a cost-to-equity ratio of approximately 82.42% (329.68% annualized), a commission-to-equity ratio of

³⁵ Complaint ¶¶ 31-35; Declaration CX-5 (four customer declarations).

³⁶ Complaint ¶¶ 36-44.

approximately 82.05% (328.2% annualized), and a turnover rate of approximately 66.52% (266.08% annualized).³⁷

This activity generated a total of \$54,688 in commissions, approximately 70% of which went to Looney. Thus, he received \$38,282 in commissions from the trading activity in S.P.'s account over a four-month period.³⁸

In sharp contrast, the customer, S.P., lost almost the entire value of the account. When S.P. started with iTrade in July 2008, his holdings there had a value of at least \$155,000. By the end of October 2008 Looney's trading had driven the value down to under \$1,500.

Looney's conduct constituted excessive and unsuitable trading in violation of NASD Rules 2310 and 2110 and IM-2310-2, as alleged in the Third Cause of Action.

4. Fourth Cause Of Action – Fraud

The Fourth Cause of Action concerns the excessive trading in S.P.'s account and charges that that trading amounts to fraud. As discussed above, excessive trading may occur in circumstances that support the conclusion that a broker has either intentionally engaged in the trading to benefit himself or at least acted in reckless disregard of the customer's interest. In this case, the facts compel the conclusion that Looney acted solely in his own interest and without regard for the interest of the customer. Looney benefited from the excessive trading while the value of the customer's account plunged from at least \$155,000 to almost nothing in a mere four months.

Looney's conduct constituted fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5, promulgated thereunder, and was also a violation of NASD Rules 2120 and 2110.

³⁷ Complaint ¶¶ 41-42.

³⁸ Complaint ¶ 43.

IV. Sanctions

FINRA's Sanction Guidelines ("Sanction Guidelines") provide the guideposts for sanctions in FINRA disciplinary proceedings.³⁹ The Sanction Guidelines set forth recommendations regarding sanctions for violations of specific violations. The Sanction Guidelines also instruct adjudicators to consult the Principal Considerations applicable to all determinations of sanctions,⁴⁰ and the General Principles for all sanction determinations.⁴¹ The Overview to the Sanction Guidelines expresses the overarching purpose of FINRA's disciplinary actions and the objectives served by sanctions where violations are found:

The regulatory mission of FINRA is to protect investors and strengthen market integrity through vigorous, even-handed and cost-effective self-regulation. . . . As part of FINRA's regulatory mission, it must stand ready to discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors . . . and to promote the public interest.⁴²

Principal Consideration No. 4 suggests that violations may be batched or aggregated for purposes of determining sanctions and gives some examples of situations where that might be appropriate. The Hearing Officer believes that Looney's misconduct is part of a pattern and practice in which he engaged. He attempted to bully elderly and vulnerable potential investors into giving him their business. Even when they resisted, he was relentless. When he obtained an account, as he did with S.P., he ignored the investor's condition and investment objectives or even misrepresented them on his Firm's records. This enabled him to engage in an aggressive course of frequent and excessive trading. To the extent that Looney's misconduct is subject to non-fraud charges in the First, Second, and Third Causes of Action, the sanction is imposed on

³⁹ FINRA Sanction Guidelines (2011) are available at www.finra.org/Industry/Enforcement/SanctionGuidelines.

⁴⁰ Sanction Guidelines at 1, 88, 90.

⁴¹ Sanction Guidelines at 2-5.

⁴² Sanction Guidelines at 1.

an aggregated basis. Due to the aggravating factors and the lack of any mitigating factors, a bar from association with any FINRA member firm is appropriate.

The excessive trading in S.P.'s account is pled in the Fourth Cause of Action separately as fraud. The circumstances of that trading compel the conclusion that Looney did engage in fraud, and that his purpose was to enrich himself, regardless of what happened to the value of the customer's investments. Even if this charge were the only charge, a bar from association with any FINRA member firm is appropriate.

A. The Non-Fraud Charges

Unauthorized trading, as charged in the First Cause of Action, may warrant a suspension ranging from ten days to one year, and a fine ranging from \$5,000 to \$75,000. However, in egregious cases a longer suspension or a bar may be appropriate. In determining whether a case is egregious, an adjudicator should consider, among other things, whether the number of unauthorized trades make the case egregious, whether a customer has suffered loss, and whether the unauthorized trading was the result of a reasonable misunderstanding or was motivated by the respondent's own self-interest.⁴³

Based on the noted factors, this is an egregious case of unauthorized trading that warrants a bar from association with any FINRA member firm. Looney engaged in unauthorized trades on behalf of five people despite being told that those people did not want to do business with him and did not want to trade in the security he urged them to buy. There was no possibility for misunderstanding between him and the five customers.⁴⁴

⁴³ Sanction Guidelines at 98 and note 2.

⁴⁴ The NAC has held that the number of unauthorized trades can undercut any argument that the trading was the result of a mistake or miscommunication. *See Dep't of Enforcement v. Balbirer*, No. C07980011, 1999 NASD Discip. LEXIS 29 (NAC Oct. 18, 1999) (seven unauthorized trades).

As for the books and records violation charged in the Second Cause of Action, it is related to the unauthorized trading. Looney acted to create the appearance that the unauthorized trades had occurred in accounts that had been properly opened. He also acted to make it appear that the trading was consistent with the investors' desires and financial circumstances, by falsifying information on the New Account Forms concerning the customers' financial condition and investment objectives. Where unauthorized trading is accompanied by falsification of customer records, it is appropriate to bar the respondent for both types of violations.⁴⁵

With respect to the non-fraud charge of excessive and unsuitable trading, in the ordinary case, the Sanction Guidelines suggest a suspension in any or all capacities ranging from ten business days to one year and a fine ranging from \$2,500 to \$75,000. In an egregious case, the Sanction Guidelines suggest a longer suspension or a bar. The recommendations are identical to the recommendations for unauthorized trading.⁴⁶

This is an egregious case because of several aggravating factors. The misconduct benefited Looney by generating substantial commissions for him.⁴⁷ The misconduct was the result of intentional or, at a minimum, reckless acts.⁴⁸ The misconduct was part of a pattern and practice,⁴⁹ and was not an aberration.⁵⁰ The excessive trading injured Looney's customer, S.P., almost completely depleting the account of any value.⁵¹ The injured customer was not a sophisticated investor.⁵² There are no mitigating factors.

⁴⁵ *Dep't of Enforcement v. Hardy*, No. 2005001502703, 2009 FINRA Discip. LEXIS 35 (OHO July 21, 2009).

⁴⁶ Sanction Guidelines at 94.

⁴⁷ Sanction Guidelines at 5, General Principle 6; Sanction Guidelines at 7, Principal Consideration 17.

⁴⁸ Sanction Guidelines at 7, Principal Consideration 13.

⁴⁹ Sanction Guidelines at 6, Principal Consideration 8.

⁵⁰ Sanction Guidelines at 7, Principal Consideration 16.

⁵¹ Sanction Guidelines at 6, Principal Consideration 11.

⁵² Sanction Guidelines at 7, Principal Consideration 19.

Accordingly, it is appropriate to impose the bar from the industry on Looney for this non-fraud violation, along with the other non-fraud violations.

B. The Fraud Violation

The Sanction Guidelines for intentional or reckless misconduct – fraud – suggest a suspension ranging from ten days to two years in the ordinary case. In an egregious case, an individual may be barred. The Sanction Guidelines also suggest a fine of \$10,000 to \$100,000 where the conduct is intentional or reckless.⁵³

Looney's misconduct was egregious and warrants the most stringent sanction. The record demonstrates that he ignored his duty to act in the interest of his customer and that he used his position as a registered representative to gain access to vulnerable people for the purpose of enriching himself. There was no reason for the aggressive, excessive, and unsuitable trading in S.P.'s account except to generate a profit for Looney, regardless of the destruction of the value of the account.

For the fraud violation, Looney is barred from association with any member firm in the future to protect the investing public. He is ordered to pay restitution to S.P. in the amount of \$153,844, which is the amount of the loss as calculated by Enforcement, plus interest from the date of the end of the relevant period, October 31, 2008. If at all possible, the customer should be made whole.⁵⁴

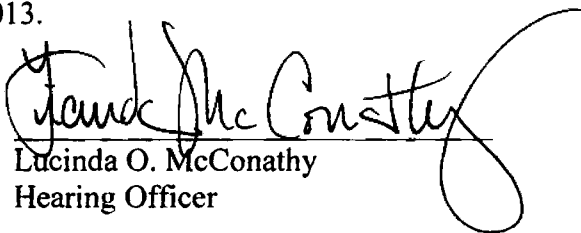
V. Order

For the non-fraud misconduct alleged in the First, Second, and Third Causes of Action (unauthorized trading, falsification of books and records, excessive and unsuitable trading),

⁵³ Sanction Guidelines at 88.

⁵⁴ Sanction Guidelines at 4, General Principle 5. The customer is identified here by his initials. In the addendum to this decision, which is served only on the parties, the customer is identified by name.

Respondent is barred from associating with any member firm in any capacity. For the fraud misconduct alleged in the Fourth Cause of Action (fraudulent excessive and unsuitable trading, or churning), Respondent is barred from associating with any member firm in any capacity, and, in addition, ordered to pay S.P. restitution in the amount of \$153,844, which is the amount of the loss as calculated by Enforcement. Respondent is further ordered to pay interest on the amount of restitution from the date of the end of the relevant period, October 31, 2008, until he makes full payment. Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).⁵⁵ If this decision becomes FINRA's final disciplinary action, both bars shall take effect immediately and the restitution shall be due in full on October 11, 2013.


Lucinda O. McConathy
Hearing Officer

Copies to:
Christopher Looney (via overnight courier and first-class mail)
Jonathan Golomb, Esq. (via electronic mail)
Jeffery D. Pariser, Esq. (via electronic mail)

⁵⁵ The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.

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

DEPARTMENT OF ENFORCEMENT,

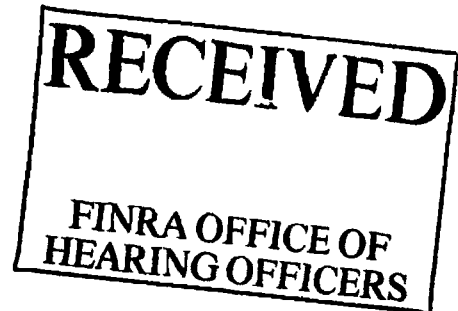
Complainant,

v.

CHRISTOPHER LOONEY
(CRD No. 1836267),

Respondent.

Disciplinary Proceeding
No. 2009016159104



COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. During the period June 2009 through December 2009, Respondent Christopher Looney, a registered representative at iTRADEdirect.com (iTrade), submitted purchase orders for five potential customers who never agreed to open an account with Looney or his firm, and never agreed to purchase any securities through him. In addition, he falsified new account information records regarding three of those potential customers. By virtue of this conduct, Looney violated FINRA Rule 2010 and NASD Rules 2310 and 3110.

2. In addition, Looney engaged in excessive trading and churning in the account of another customer during the period July through October 2008, thereby violating NASD Rules 2110, 2120, and 2310; IM-2310-2; Section 10(b) of the Securities Exchange Act of 1934; and Rule 10b-5 thereunder.

RESPONDENT AND JURISDICTION

3. Looney was employed by twelve FINRA firms between May 1989 and April 2011. He was a registered representative with iTrade from May 20, 2008 until April 26, 2010. After leaving iTrade, he worked for two other firms until April 11, 2011. Looney has held Series 7 (general securities representative), Series 24 (general securities principal), and Series 63 (state agent) licenses.

4. In June 2010, Looney submitted an Offer of Settlement in a FINRA disciplinary proceeding (Complaint No. 2008013531001) pursuant to which he was suspended for ten business days and fined \$10,000 for failing to disclose an outside business activity.

5. Although Looney is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the effective date of termination of Looney's last registration with a FINRA member, April 11, 2011, and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member.

FIRST CAUSE OF ACTION

Unauthorized Trading (FINRA Rule 2010)

6. Paragraphs 1-5 are repeated and realleged herein.

J.K.

7. In June 2009, Looney cold called "J.K.,"¹ a resident of Chicago, Illinois, numerous times in an effort to convince J.K. to open an account with iTrade and buy Citigroup stock.

8. J.K. repeatedly told Looney he was not interested in doing so, but Looney persisted, and on or about June 29, 2009, J.K. told Looney to send some information.

9. On June 29, 2009, Looney bought 300 shares of Citigroup stock for J.K., although J.K. never agreed to open an account or purchase any stock with Looney or anyone at iTrade.

10. Shortly thereafter, J.K. received a Federal Express package from iTrade, but threw it out because he was not interested in doing business with Looney.

11. Looney represented on a New Account Information sheet that J.K. had an annual income of \$100,000, net worth of \$4,000,000, extensive experience in stocks, bonds, and mutual funds, and moderate experience in options. In reality, J.K.'s income was approximately \$25,000. His net worth had never been \$4,000,000, and he had never bought a bond, mutual fund, or option.

M.K.

12. In or about December 2009, Looney cold called "M.K.," a resident of Los Angeles, California. Looney tried to convince M.K. to open an account at iTrade and buy Citigroup stock.

13. M.K. agreed to consider opening an account with iTrade, but specifically told Looney he wanted to research the stock.

¹ Enforcement will submit a supplemental filing identifying the customers with filing of this Complaint.

14. Looney placed an order for the purchase of 250 shares of Citigroup on December 4, 2009.

15. M.K. filled out and returned the new account forms Looney sent him, but decided to buy Citigroup through another account he had elsewhere. When he called Looney to tell him he had decided against doing business with iTrade, Looney told M.K. he had already bought the Citigroup stock for him.

C.J.

16. In or about November 2009, Looney cold called "C.J.," a resident of Toledo, Ohio. Looney tried unsuccessfully to convince C.J. to open an account at iTrade and purchase Citigroup and other stocks.

17. On or about November 17, 2009, Looney placed an order to purchase 1,000 shares of Citigroup stock for C.J. without C.J.'s authorization.

18. C.J. received a package from iTrade, which he shredded.

19. Looney represented on a New Account Information sheet that C.J. had extensive experience in stocks, bonds, and mutual funds, moderate experience in options, and a net income of more than \$100,000.

20. In reality, C.J. had limited to no experience in stocks, bonds, options, and mutual funds and an annual income of approximately \$55,000. C.J. never told Looney that he had extensive trading experience or a net income of \$100,000.

P.V.

21. In or about November 2009, Looney cold called "P.V.," a resident of Chicago, Illinois. Looney tried to convince P.V. to open an account at iTrade and purchase Citigroup stock.

22. P.V. told Looney he could send some information about Citigroup for P.V. to review, but never agreed to open an account or purchase any stock with Looney or anyone at iTrade.

23. On November 23, 2009, Looney placed an order to purchase 500 shares of Citigroup for P.V. without authorization.

24. Looney created a New Account Information sheet indicating that P.V. had annual income of \$175,000, a net worth of \$1,000,000, extensive experience in stocks, bonds, and mutual funds, moderate experience in options, high risk tolerance, and an investment objective of trading/speculation.

25. Looney never asked P.V. about his income or net worth. In reality, P.V.'s income and net worth were lower than that reported by Looney, and P.V. was a risk-averse investor who had minimal experience with stocks and mutual funds.

G.F.

26. On or about December 1, 2009, Looney cold called "G.F.," a resident of Broken Arrow, Oklahoma. Looney tried to convince G.F. to open an account at iTrade and buy Citigroup stock.

27. G.F. told Looney that while he might be inclined to buy Citigroup at some point, he was not interested in purchasing any stock with someone over the phone. G.F. never agreed to open an account or purchase any stock with Looney or anyone at iTrade.

28. Looney never asked G.F. about his investment objectives or risk tolerance.

29. On December 1, 2009, Looney placed an order to buy 500 shares of Citigroup for G.F. without his authorization.

30. Looney violated FINRA Rule 2010 by making unauthorized purchases of securities on behalf of J.K., M.K., C.J., P.V., and G.F.

SECOND CAUSE OF ACTION

False Books and Records **(NASD Rules 3110 and 2110)**

31. Paragraphs 1-30 are repeated and realleged herein.

32. Looney created New Account Information sheets for potential customers C.J., J.K., and P.V. which misrepresented their investment objectives, risk tolerances, and financial conditions.

33. The New Account Information sheets were records relating to iTrade's securities business, and contained information required under Securities Exchange Act Rule 17a-3(a)(17)(i)(A).

34. In addition, the firm used the information on the New Account Information sheets to generate New Account Forms, which were also records containing information required under Securities Exchange Act Rule 17a-3(a)(17)(i)(A).

35. By creating these false books and records, Looney violated NASD Rule 3110 and FINRA Rule 2010.

THIRD CAUSE OF ACTION
Excessive and Unsuitable Trading
(NASD Rules 2310 and 2110; IM-2310-2)

36. Paragraphs 1-5 are repeated and realleged herein.

37. "S.P." opened two accounts with Looney in July 2008, an individual account and a trust account. At the time he opened the account, S.P. was 83 years old.

38. Contrary to the information on S.P.'s new account documentation at iTrade, S.P. had a moderate risk tolerance and an investment objective of growth. He was not seeking speculative investments.

39. Looney effectively controlled the trading in S.P.'s account. In fact, Looney did not even discuss all trades with S.P. before placing them, and S.P. relied heavily on Looney's advice in making investment decisions.

40. Looney traded S.P.'s account very aggressively. Between July and October 2008, Looney, while exercising effective control over S.P.'s account, effected numerous and excessive transactions in S.P.'s account.

41. When S.P. opened his individual account at iTrade in July 2008, it had a value of at least \$155,000. By October 31, 2008, Looney had driven the value down to under \$1,500 dollars. He caused S.P. to enter into 77 trades in four months, with 40 trades being made in September 2008 alone.

42. Looney's trading in S.P.'s account during the period August 1, 2008 through October 31, 2008 generated a cost-to-equity ratio of approximately 82.42% (329.68%

annualized), a commission-to-equity ratio of approximately 82.05% (328.2% annualized), and a turnover rate of approximately 66.52 (266.08 annualized).

43. This activity generated a total of \$54,688 in commissions, approximately 70% of which, or \$38,282, went to Looney.

44. By virtue of the foregoing, Looney violated IM-2310-2 and NASD Rules 2310 and 2110.

FOURTH CAUSE OF ACTION

Excessive and Unsuitable Trading

**(Securities Exchange Act §10(b); Rule 10b-5
thereunder; NASD Rules 2120 and 2110)**

45. Paragraphs 1-5 and 36-44 are repeated and realleged herein.

46. Looney engaged in the acts and practices described in the Third Cause of Action above with the intention of generating commissions and not to serve the interests of S.P.

47. As part of this course of conduct, Looney, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, or of any facility of any national securities exchange, knowingly or recklessly employed devices, schemes or artifices to defraud; made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon any person; or effected transactions in, or induced the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.

48. By virtue of the foregoing, Looney violated Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and NASD Rules 2120 and 2110.

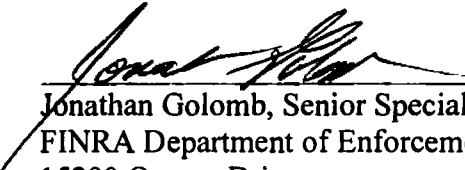
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent(s) committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, including that Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest, be imposed; and
- C. order that Respondents bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: March 25, 2013


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