

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN BABIARZ
(CRD No. 3047247),

Respondent.

Disciplinary Proceeding
No. 2009018486401

Hearing Officer – AWL

DEFAULT DECISION

January 9, 2013

Respondent is (1) fined \$5,000 and suspended in all capacities for 30 business days for settling customer complaints without the knowledge of his firm, in violation of NASD Rule 2110 and FINRA Rule 2010; (2) fined \$5,000 and suspended in all capacities for 30 business days for miscoding customer orders and causing his firm's books and records to be inaccurate, in violation of NASD Rules 3110 and 2110 and FINRA Rule 2010; and (3) fined \$10,000 and suspended in all capacities for 30 business days for exercising discretion without written authorization, in violation of NASD Rule 2510(b) and 2110 and FINRA Rule 2010. The suspensions run consecutively. The fines are due and payable when and if Respondent seeks to re-enter the security industry.

Appearances

Samuel Barkin, Esq., and David Jaffe, Esq., for the Department of Enforcement,
Complainant.

John Babiarz, Respondent appeared *pro se*.

DECISION

I. Introduction

During a branch examination of Jesup & Lamont Securities Corp. ("J&L") in June 2009, FINRA discovered an unreported customer complaint regarding Respondent John Babiarz, an associated representative terminated by J&L on June 3, 2009. FINRA's resulting investigation

led to the filing of the Complaint against Babiarz, alleging three causes of action: (1) settling two customer complaints without his firm's knowledge or consent, in violation of NASD Rule 2110 and FINRA Rule 2010; (2) miscoding solicited order tickets as "unsolicited," which caused J&L to have inaccurate books and records, in violation of NASD Rules 3110 and 2110 and FINRA Rule 2010; and (3) exercising discretion in three customers' accounts without written authorization, in violation of NASD Rules 2510(b) and 2110 and FINRA Rule 2010.¹

Babiarz failed to file an answer, after entering an appearance and requesting an extension of time in which to file his answer. Based on the Complaint and evidence Enforcement submitted in support of its Motion for the Entry of Default and Imposition of Sanctions ("Default Motion"), the Hearing Officer concludes that Babiarz committed the violations alleged. As sanctions for these violations, the Hearing Officer suspends Babiarz in all capacities for a total of 90 business days and fines him a total of \$20,000, to be paid if and when Babiarz seeks to re-enter the securities industry.

II. Motion for Entry of Default and Imposition of Sanctions is Granted

Initially, Babiarz did not respond to the Complaint filed by Enforcement on June 6, 2012. He did not respond until he received an order issued by the Hearing Officer directing Enforcement to file a motion for entry of a default decision.² At that point, Babiarz requested an extension until August 13, 2012, in which to file his answer. Enforcement did not oppose the request, and the Hearing Officer granted Babiarz's motion. Babiarz still failed to file an answer to the Complaint.

¹ Jurisdiction exists in this matter, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after Babiarz's registration termination date with Bishop, Rosen & Co., Inc., and (2) the Complaint charges Babiarz with misconduct committed while registered or associated with a member firm. See Article V, Section 4 (a) FINRA By-Laws, available at www.finra.org/Rules (then follow the "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

² The Hearing Officer's order was dated July 30, 2012. Enforcement properly served Babiarz with the Notice of the Complaint on June 6, 2012, and the Second Notice of Complaint on July 6, 2012, in accordance with Rule 9134.

The Hearing Officer issued an order on September 4, 2012, finding Babiarz in default. Consequently, Enforcement filed its Default Motion. Babiarz failed to file any response to the Default Motion. Accordingly, the Hearing Officer hereby grants Enforcement's Default Motion and deems the allegations in the attached Complaint admitted.³

III. Findings of Fact

Babiarz started his career in the securities industry in 1998. In October 2004, he joined member firm J&L and worked as a registered general securities representative and general securities principal until J&L terminated him for the lack of sales production on June 3, 2009.⁴ Babiarz thereafter associated with two other member firms, including Bishop, Rosen & Co., Inc. in October 2009. Bishop, Rosen & Co., Inc. terminated Babiarz on September 1, 2011, because of customer allegations that Babiarz misrepresented the features of a certificate of deposit.⁵ Babiarz is no longer associated with any member firm.⁶

During a branch examination of J&L in June 2009, FINRA staff began investigating an unreported customer complaint about Babiarz. That investigation and discovery of other misconduct led to the filing of the Complaint.⁷

A. Babiarz Settled Two Customer Complaints without J&L's Knowledge.

Babiarz settled complaints from J&L customers TT and Mr. MK, without J&L's knowledge or approval. In the spring of 2007, TT complained to Babiarz about losses sustained

³ Rules 9215(f) and 9269(a).

⁴ Compl. ¶ 3; CX-1, at 3-4.

⁵ Compl. ¶ 3; CX-1, at 2-3. Bishop, Rosen & Co., Inc. filed with FINRA a Uniform Termination Notice for Securities Industry Registration ("Form U5") on September 7, 2011, reflecting Babiarz's termination as of September 1, 2011. CX-2.

⁶ Compl. ¶ 3; CX-1, at 2.

⁷ Decl. ¶ 27.

in his investment account that Babiarz handled.⁸ Between September 2007 and August 2008, Babiarz agreed to pay TT \$11,000, in \$1,000 monthly installments as settlement of his complaint.⁹ Babiarz negotiated TT's settlement without the knowledge or approval of J&L.¹⁰

In March 2008, Mr. MK, complained to Babiarz about investment losses sustained when Babiarz failed to follow Mr. MK's instructions.¹¹ On March 25, 2009, Babiarz gave Mr. MK a written promise to pay \$8,300 as settlement of his complaint.¹² Babiarz settled Mr. MK's complaint without the knowledge or approval of J&L.¹³

B. Babiarz Miscoded Trade Orders, Causing J&L's Books and Records to be Inaccurate.

From April 2006 through May 2009, Babiarz caused over 200 solicited trading orders to be miscoded as unsolicited.¹⁴ During July 2008 through May 2009, Babiarz miscoded order tickets in 25 customers' accounts.¹⁵ Consequently, J&L's trade confirmations sent to customers, generated from the order entry information, falsely identified solicited orders as unsolicited.¹⁶ Due to Babiarz's misconduct, J&L's books and records, including the orders and trade confirmations, were inaccurate and contained false information.¹⁷

⁸ Compl. ¶ 6.

⁹ *Id.* ¶ 7.

¹⁰ *Id.* ¶ 8.

¹¹ *Id.* ¶ 9.

¹² *Id.* ¶ 10.

¹³ *Id.* ¶ 12.

¹⁴ *Id.* ¶ 16.

¹⁵ Decl. ¶ 28.

¹⁶ *Id.* ¶ 37.

¹⁷ Compl. ¶ 17.

C. Babiarz Exercised Discretion without Written Authorization.

Customers TT, Ms. MK, and RC gave verbal grants of discretion to Babiarz.¹⁸ However, none of the customers provided Babiarz with written authorization to exercise discretion.¹⁹ Further, J&L never accepted the accounts of customers TT, Ms. MK, or RC as discretionary.²⁰ In fact, during the time that Babiarz was employed by J&L, J&L prohibited its registered representatives from exercising discretion in customer accounts.²¹ Nevertheless, between September 2005 and June 2009, Babiarz exercised discretion approximately 200 times in these three customers' accounts.²²

IV. Conclusions of Law

A. Babiarz Settled Two Customer Complaints without J&L's Knowledge.

NASD Conduct Rule 2110 and FINRA Rule 2010 require members to uphold a high standard of commercial honor and equitable principles of trade.²³ Settling or attempting to settle a customer complaint without the knowledge of a registered person's employer is inconsistent with just and equitable principles of trade.²⁴ The Hearing Officer concludes that Babiarz

¹⁸ Decl. ¶¶ 40-42.

¹⁹ Compl. ¶¶ 20-22.

²⁰ *Id.*

²¹ Decl. ¶ 43.

²² Compl. ¶¶ 20-22; Decl. ¶¶ 40-42.

²³ Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50 (Oct. 2008). As part of the first phase of that process, NASD Conduct Rule 2110 was adopted without material change as FINRA Conduct Rule 2010. Because the complaint in this case was filed after December 15, 2008, the procedural rules that apply are those that became effective on December 15, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue. Rule 0140 obligates persons associated with a FINRA member to have the same duties and obligations as the member. The rules are available at www.finra.org/Industry/Regulation/FINRARules.

²⁴ *Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 (N.A.C. Mar. 7, 2008).

violated NASD Rule 2110 and FINRA Rule 2010 by settling TT and Mr. MK's complaints without the knowledge or approval of his firm.

B. Babiarz Miscoded Trade Orders, Causing J&L's Books and Records to be Inaccurate.

NASD Conduct Rule 3110(a) requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3."²⁵ Record-keeping rules are the "keystone of the surveillance of brokers and dealers."²⁶ Causing a member firm to have false information in its books or records violates NASD Rule 3110. Violating Rule 3110 also violates NASD Rule 2110 and FINRA Rule 2010 as "it is well established that a violation of a Commission or NASD [FINRA] rule or regulation is inconsistent with just and equitable principles of trade, and is therefore also a violation of Rule 2110 [2010]."²⁷

The Hearing Officer concludes that Babiarz caused J&L's books and records to contain inaccurate information by miscoding order tickets, in violation of NASD Rules 3110 and 2110 and FINRA Rule 2010.

C. Babiarz Exercised Discretion without Written Authorization.

NASD Rule 2510(b) prohibits a registered representative from exercising "any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the member, as evidenced in writing by the member." Here, Babiarz violated both requirements of

²⁵ See also 17 C.F.R. §240.17a-3(a)(6)(i) and §240.17(a)-4(b)(1) for the Exchange Act's rules requiring member firms to make and keep current books and records relating to their business activities.

²⁶ *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979).

²⁷ *Dep't of Enforcement v. Kirlin Sec.*, 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, at *42 (Dec. 10, 2009).

Rule 2510 (b) by failing to obtain the customers' written authorization and failing to get J&L's written acceptance of the accounts as discretionary accounts. Since violating an NASD or FINRA rule is inconsistent with just and equitable principles of trade,²⁸ Babiarz's violation of NASD Rule 2510(b) also violates NASD Rule 2110 and FINRA Rule 2010.

V. Sanctions

The FINRA Sanction Guidelines ("Guidelines")²⁹ provide guidance for determining the proper remedial sanctions for Babiarz's misconduct. The Guidelines provide that when imposing sanctions, Babiarz's disciplinary history³⁰ may be considered as an aggravating factor.³¹

A. Babiarz Settled Two Customer Complaints without J&L's Knowledge.

According to the Guidelines, the principal considerations for determining sanctions when a respondent settles customer complaints without the firm's knowledge are two-fold: (1) whether the employer received verbal notice and acquiesced to the settlement or if the respondent deceived his employer; and (2) if the respondent's actions delayed or obviated the filing of the required Forms U4 or U5 or NASD Rule 3070 filings.³² The Guidelines recommend a fine of \$2,500 to \$50,000, a suspension in any and all capacities for up to two years, and, in egregious cases, a bar.³³

²⁸ *Id.*

²⁹ See <http://www.finra.org/Industry/MarketRegulation/SanctionGuidelines> (2011).

³⁰ See CX-10 at 29-30. Babiarz signed an Acceptance, Waiver and Consent dated January 24, 2006, agreeing to a \$5,000 fine and a suspension for 20 business days in all capacities, based on FINRA's finding that Babiarz improperly made an annuity exchange recommendation without a reasonable basis, in violation of IM-2310-2 and NASD Conduct Rules 2310 and 2110.

³¹ Guidelines at 2, General Principles Applicable to all Sanction Determinations, No. 2.

³² Guidelines at 34.

³³ Guidelines at 34.

Here, Babiarz deceived J&L by concealing the customer complaints, keeping J&L from participating in or approving the settlements. Settling customer complaints without the knowledge or authorization of the firm is a “type of clandestine activity that harms customers whose interests are not properly served; it also harms member firms by preventing them from properly supervising their brokers.”³⁴ As to the second principal consideration, Babiarz’s actions also delayed the regulatory filings requiring the disclosure of complaints and settlements. Babiarz’s misconduct is serious and without any mitigating factors. Thus, the Hearing Officer finds that the appropriate sanctions for Babiarz having settled customer complaints without the firm’s knowledge are a \$5,000 fine and suspension in all capacities for 30 business days.

B. Babiarz Miscoded Trade Orders, Causing J&L’s Books and Records to be Inaccurate.

For record-keeping violations, the Guidelines consider the nature and materiality of the inaccurate or misleading information. The recommended fine is between \$1,000 and \$10,000, and the recommended suspension is up to 30 business days.³⁵ For egregious cases, the Guidelines recommend imposing a fine of \$10,000 to \$100,000 and a suspension of up to two years, or a bar.³⁶

A broker falsifying order tickets and confirmations constitutes serious misconduct.³⁷ Babiarz’s misconduct continued over an extended period of time and involved hundreds of trades and several customers.³⁸ The number of mismarked order tickets demonstrates a pattern of

³⁴ *Paratore*, 2008 FINRA Discip. LEXIS 1, at *22.

³⁵ Guidelines at 29.

³⁶ *Id.*

³⁷ See *James F. Novak*, Exchange Act Rel. No. 19660, 1983 SEC LEXIS 2023, at **14-17 (Apr. 8, 1983).

³⁸ Guidelines at 6-7, Principal Considerations in Determining Sanctions Nos. 9, 18.

wrongdoing by Babiarz that negates the possibility of mistake or negligence.³⁹ His repeated failure to enter orders correctly appears to be intentional or at least reckless.⁴⁰ J&L could not properly supervise Babiarz when the firm was unaware of and misled as to the true nature of the trades.⁴¹ No mitigating factors exist. Accordingly, the Hearing Officer finds that appropriate sanctions for Babiarz miscoding order tickets and causing J&L's books and records to be inaccurate are a fine of \$5,000 and suspension in all capacities for 30 business days.

C. Babiarz Exercised Discretion without Written Authorization.

The Guidelines identify two principal considerations when determining the sanctions for exercising discretion without written authority: (1) whether a customer gave an express or implied grant of discretion; and (2) whether the firm's policies prohibited discretionary trading or prohibited the respondent from engaging in it.⁴² The Guidelines recommend sanctions of a fine between \$2,500 and \$10,000 and, in egregious cases, suspension in any or all capacities for 10 to 30 business days.⁴³

While Babiarz's customers may have given Babiarz verbal grants of discretion, J&L's policy prohibited the use of discretion. Babiarz violated his firm's policy by obtaining verbal authority from the three customers. In addition, Babiarz either intentionally or recklessly disregarded his obligations under NASD Rule 2510(b) to obtain the customers' written authorization and his firm's written acceptance of the accounts.⁴⁴ Further, Babiarz concealed the

³⁹ Guidelines at 6, Principal Considerations in Determining Sanctions No. 8.

⁴⁰ Guidelines at 7, Principal Considerations in Determining Sanctions No. 13.

⁴¹ Guidelines at 6, Principal Considerations in Determining Sanctions No. 10.

⁴² Guidelines at 85.

⁴³ *Id.*

⁴⁴ Guidelines at 7, Principal Considerations in Determining Sanctions No. 13.

discretionary nature of his trading from J&L for almost four years.⁴⁵ Given the number of discretionary trades in multiple customers' accounts,⁴⁶ the appropriate sanctions must deter Babiarz from future misconduct and protect the investing public.⁴⁷

The Hearing Officer concludes that Babiarz's misconduct is egregious in nature and no mitigating facts exist. Babiarz's prior disciplinary history, which also involved his failure to adhere to the requirements of industry rules, is an aggravating fact when determining the appropriate sanctions.⁴⁸ Accordingly, the Hearing Officer fines Babiarz \$10,000 and suspends him in all capacities for 30 business days for exercising discretion in customers' account without written customer authorization or written acceptance by his firm.

VI. Order

Respondent John Babiarz is fined a total of \$20,000 and suspended in all capacities for a total of 90 business days, consisting of (1) a fine of \$5,000 and suspension in all capacities for 30 business days for settling or attempting to settle customer complaints without his firm's knowledge, in violation of NASD Rule 2110 and FINRA Rule 2010; (2) a fine of \$5,000 and suspension in all capacities for 30 business days for improperly coding trade orders which created inaccurate books and records of his firm, in violation of NASD Rules 3110 and 2110 and FINRA Rule 2010; and (3) a fine of \$10,000 and suspension in all capacities for 30 business days for exercising discretion without authorization, in violation of NASD Rules 2510(b) and 2110 and FINRA Rule 2010.

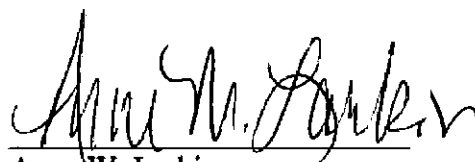
⁴⁵ Guidelines at 6, Principal Considerations in Determining Sanctions Nos. 9-10.

⁴⁶ Guidelines at 6, Principal Considerations in Determining Sanctions No. 8.

⁴⁷ Guidelines at 2, General Principles Applicable to All Sanction Determinations No. 1 (sanctions to seek to deter future misconduct and improve overall business standards).

⁴⁸ Guidelines at 2, General Principles Applicable to all Sanction Determinations, No. 2 and Guidelines at 6, Principal Considerations in Determining Sanctions No. 1.

If this Default Decision becomes FINRA's final disciplinary action, the suspensions shall run consecutively, commencing on February 19, 2013, and ending on at the close of business on June 26, 2013. The fines shall be due and payable when and if Babiarz seeks to re-enter the securities industry.



Anne W. Larkin
Hearing Officer

Copies to:

John Babiarz (*via overnight courier and first-class mail*)
Samuel Barkin, Esq. (*via electronic and first-class mail*)
David Jaffe, Esq. (*via electronic mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN BABIARZ (CRD No. 3047247),

Respondents.

DISCIPLINARY PROCEEDING
No. 2009018486401

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. In 2007 and 2008, while registered with FINRA through former member firm Jesup & Lamont Securities Corp (BD. No. 39056) ("J&L"), Respondent John Babiarz settled, or attempted to settle, two separate customer complaints without the knowledge or approval of J&L. In addition, during the period April 2008 through May 2009, Babiarz miscoded order tickets in numerous customers' accounts. In addition, at various times during the period September 2005 through June 2009, Babiarz improperly exercised discretion in three customers' accounts.
2. Accordingly as set forth in greater below, Babiarz violated NASD Conduct Rules 2110, 2510 and 3110 and FINRA Rule 2010.

RESPONDENT(S) AND JURISDICTION

3. Babiarz initially became registered as a general securities representative ("GS") in June 1998 through a FINRA member firm. Thereafter, he became registered through

a different member firm as a general securities principal (“GP”) in May 2000. From October 2004 through June 2009, Babiarz was registered as a GS and GP through former member firm Jesup & Lamont Securities Corp (BD. No. 39056) (“J&L”). From October 2009 through September 2011, he was registered as a GS and GP through another member firm. Babiarz is not currently associated with a member firm.

4. Although Babiarz 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 Babiarz’s registration with Bishop, Rosen & Co., namely September 1, 2011, and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member.

FIRST CAUSE OF ACTION

(Settling Away – FINRA Rule 2010 and NASD Conduct Rule 2010)

5. The Department realleges and incorporates by reference paragraphs 1-5 above.
6. In or around the spring of 2007, J&L customer TT complained to Babiarz about losses he had sustained as a result of Babiarz’s handling of his account.
7. Between September 2007 and August 2008, Babiarz settled, or attempted to settle, TT’s complaint by paying TT \$11,000 in monthly installments of \$1,000.
8. Babiarz’s settlement with TT as described above was made without the knowledge or approval of J&L.

9. In or around March 2008, J&L customer MK complained to Babiarz about losses he had sustained as a result of Babiarz failing to follow instructions.
10. On or about March 25, 2009, Babiarz settled, or attempted to settle, MK's complaint by giving MK a written promise to pay MK the amount of \$8,300 (the "Promissory Note").
11. In or around April 2009, Babiarz defaulted on the Promissory Note payable to MK.
12. Babiarz's settlement with MK as described above was made without the knowledge or approval of J&L.
13. By settling, or attempting to settle, TT's and MK's complaints without the knowledge or approval of J&L, Babiarz violated NASD Conduct Rule 2110 and FINRA Rule 2010.
14. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 and FINRA Rule 2010.

SECOND CAUSE OF ACTION

(Miscoding Trade Orders – NASD Conduct Rules 3110 and 2110 and FINRA Rule 2010)

15. The Department realleges and incorporates by reference paragraphs 1-14 above.
16. During the period from April 2006 through May 2009, Babiarz caused over 200 orders for trades in numerous customers' accounts to be coded as unsolicited when in fact the trades were solicited.

17. By coding orders for solicited trades as "unsolicited," Babiarz caused the books and records, including trade confirmations, of J&L to contain false and erroneous information.
18. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 3110 and 2110 and FINRA Rule 2010.

THIRD CAUSE OF ACTION

(Exercising Discretion without Written Authorization – NASD Conduct Rules 2510(b) and 2110 and FINRA Rule 2010)

19. The Department realleges and incorporates by reference paragraphs 1-18 above.
20. During the period from September 2005 through September 2006, Babiarz exercised discretion in the account of J&L customer TT without written authorization from the customer or acceptance of the account as discretionary by J&L.
21. During the period from March 2006 through June 2009, Babiarz exercised discretion in the account of J&L customer MK without written authorization from the customer or acceptance of the account as discretionary by J&L.
22. During the period from March 2006 through June 2008, Babiarz exercised discretion in the account of J&L customer RC without written authorization from the customer or acceptance of the account as discretionary by J&L.
23. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 2510(b) and 2110 and FINRA Rule 2010.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent 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, be imposed; and
- C. order that Respondent 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: June 6, 2012



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