

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Carl M. Birkelbach (CRD No. 1177843),

Respondent.

DISCIPLINARY PROCEEDING

No. 2011025843301

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Carl M. Birkelbach ("Birkelbach") controlled five customer accounts pursuant to his approved discretionary authority in the accounts. The level of trading by Birkelbach in the accounts was excessive and unsuitable for all the customers in violation of NASD Rule 2310 and FINRA Rules 2360 and 2010. Moreover, the trading had such extraordinarily high turnover and cost-to-equity ratios that it constitutes fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

RESPONDENT AND JURISDICTION

2. Birkelbach entered the securities industry on August 1, 1978, as owner of Birkelbach Investment Securities, Inc., a FINRA registered firm. Between July 1999 and November 10, 2011, he was a General Securities Principal, Financial & Operations Principal, and General Securities Representative for Birkelbach Investment

Securities, Inc. ("BIS"). Birkelbach is not currently registered with any FINRA registered firm.

3. Although Birkelbach 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 Birkelbach's registration with BIS, namely, November 10, 2011, and (2) the Complaint charges Birkelbach with misconduct committed while he was registered or associated with a FINRA member.

FIRST CAUSE OF ACTION

Excessive and Unsuitable Trading

(NASD Rule 2310 and FINRA Rules 2360(b)(19) and 2010 and Securities Exchange Act of 1934 Section 10(b) and Rule 10b-5)

4. The Department realleges and incorporates by reference paragraphs 1-3 above.
5. In October 2009, Customer DZ opened an account with BIS that was serviced by Birkelbach. DZ was born in 1942 and was retired. DZ reported an income of \$50,000-55,000 and a net worth of \$750,000-780,000. The account had a Primary Risk Tolerance of "Moderate," with "Speculation" as secondary. The Investment Objectives were "Short-term Growth" and "Long-Term Growth." DZ gave Birkelbach discretion to effect trades within his account.
6. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in DZ's account. On January 1, 2010, DZ's account value was approximately \$99,185. During calendar year 2010, Birkelbach's trading activity

resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 28.89% and an annualized Turnover Ratio of approximately 10.16 with the total monthly fees reaching approximately \$28,352. Accordingly, DZ's account would have had to earn an annual return of 28.89% just to break even. The account value by December 31, 2010 was approximately \$83,905. In 2010, DZ withdrew a total of \$10 from this account.

7. In October 2008, Customer KW opened an account with BIS that was serviced by Birkelbach. KW was born in 1984 and was unemployed. KW reported an income of \$10,000 and a net worth of \$200,000. The account had a Primary Risk Tolerance of "Moderate," with "Speculation" as secondary. The Investment Objectives were "Short-Term Growth" and "Long-Term Growth." KW gave Birkelbach discretion to effect trades within his account.
8. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in KW's account. On January 1, 2010, KW's account value was approximately \$127,964. During calendar year 2010, Birkelbach's trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 24.40% and an annualized Turnover Ratio of approximately 7.17 with the total monthly fees reaching approximately \$28,753. Accordingly, KW's account would have had to earn an annual return of 24.40% just to break even. The account value by December 31, 2010 was approximately \$97,811. In 2010, KW withdrew a total of \$30 from this account.
9. In September 2007, Customer JR opened an account with BIS that was serviced by Birkelbach. This account was a trust account created for the benefit of JR's son. The

account had a Primary Risk Tolerance of “Moderate,” with “Speculation” as secondary. The Investment Objectives were “Long-Term Growth” and “Short-Term Growth.” JR gave Birkelbach discretion to effect trades within this account.

10. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in the account that was created for the benefit of JR’s son. On January 1, 2010, the account value was approximately \$672,646. During calendar year 2010, Birkelbach’s trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 22.97% with the total monthly fees reaching approximately \$147,878. Accordingly, this account would have had to earn an annual return of 22.97% just to break even. The account value by December 31, 2010 was approximately \$526,133. In 2010, a total of \$69 was withdrawn from this account.

11. In September 2007, Customer JR opened an account with BIS that was serviced by Birkelbach. This account was a trust account created for the benefit of JR’s wife who was born in 1925. The account had a Primary Risk Tolerance of “Moderate,” with “Low” as secondary. The Investment Objectives were “Long-Term Growth” and “Short-Term Growth.” JR gave Birkelbach discretion to effect trades within this account.

12. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in the account that was created for the benefit of JR’s wife. On January 1, 2010, the account value was approximately \$321,043. During calendar year 2010, Birkelbach’s trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 32.11% with the total monthly

fees reaching approximately \$87,734. Accordingly, this account would have had to earn an annual return of 32.11% just to break even. The account value by December 31, 2010 was approximately \$160,200. In 2010, a total of \$75,034 was withdrawn from this account.

13. In May 2008, Customer HL opened an account with BIS that was serviced by Birkelbach. This account was a trust account created for the benefit of HL's family. The account had a Primary Risk Tolerance of "Moderate," with "Low" as secondary. The Investment Objectives were "Long-Term Growth" and "Income." HL gave Birkelbach discretion to effect trades within this account.
14. Between January 1, 2010 and November 23, 2010, Birkelbach used his discretion to place all the trades in the account that was created for the benefit of HL's family. On January 1, 2010, the account value was approximately \$70,153. Between January 1, 2010 and November 23, 2010, Birkelbach's trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 43.67% with the total monthly fees reaching approximately \$14,929. Accordingly, this account would have had to earn an annual return of 43.67% just to break even. This account was closed on November 23, 2010. At the time the account was closed, its value was approximately \$2,003. In 2010, a total of \$60,000 was withdrawn from this account.
15. The transactions recommended and executed by Birkelbach were excessive and unsuitable for all the customers described above, based on their investment objectives, financial situation and needs, and lack of knowledge and experience necessary to understand the risks associated with the transactions recommended.

16. By engaging in the foregoing conduct, Birkelbach, in connection with the purchase or sale of a security, directly or indirectly, by use of means or instrumentalities of interstate commerce, or the mails, or the facilities of a national securities exchange, knowingly or recklessly, employed a device, scheme or artifice to defraud; made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon other persons, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder, and in violation of NASD Conduct Rule 2310, and FINRA Rules 2360 and 2010.

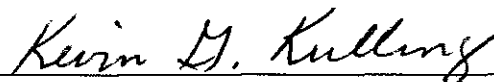
RELIEF REQUESTED

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) be imposed, including that Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- C. order that Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330; and
- D. make specific findings that Respondent willfully violated Section 10(b) of the Securities Exchange Act.

FINRA DEPARTMENT OF ENFORCEMENT

Date: October 15, 2012



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