

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Dion R. Padilla
(CRD No. 4432230),

Respondent.

DISCIPLINARY PROCEEDING
No. 2014040362001

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Dion R. Padilla ("Padilla" or "Respondent") effected an unauthorized purchase of a variable annuity for a firm customer and concealed this information from the customer for over nine months through repeated misrepresentations that he had not invested the customer's funds into a variable annuity.
2. As a result of the foregoing misconduct, Padilla willfully violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder, and violated FINRA Rules 2020 and 2010.

RESPONDENT AND JURISDICTION

3. Padilla entered the securities industry in August 2001, as a General Securities Representative of a member of FINRA. Padilla, during all periods mentioned herein,

was associated with NEXT Financial Group, Inc., and was registered with FINRA under Article V of the By-Laws as a General Securities Representative. Padilla is currently associated with NEXT Financial Group, Inc. and registered with FINRA, and thus remains subject to FINRA's jurisdiction.

BACKGROUND AND FACTS

4. Customer RS and his wife JS met with Padilla on October 3, 2011 to discuss the transfer of their accounts to Padilla. RS and JS stressed to Padilla that they did not want any of their funds invested in a variable annuity due to the high fees associated with variable annuities and because of their desire for liquidity.
5. In January of 2012, JS transferred her account (in excess of \$70,000) to Padilla. Following the transfer of JS's account, Padilla acknowledged the couple's objections to variable annuities in an email he sent to them on January 25, 2012. The subject of the email was "No Annuity in your investment portfolio." In order to further reassure JS that he had not invested her account into a variable annuity, Padilla wrote:

I simply want to provide you an e-mail to simply confirm that we are NOT investing any of your funds that were transferred over to our institution and for me to manage into a Variable Annuity – of any sort . . . we will be utilizing mutual funds and ETFs as your investment vehicles. Please be advised that we are NOT using or purchasing any sort of annuity "type" product.

I hope this email clarifies and identifies your investment vehicle within the WE2 platform and eases your concerns that I was NOT and will NOT be investing your funds into an annuity product.

6. Regarding JS's account, Padilla complied with the wishes of RS and JS that the account be invested in products other than a variable annuity.

7. At the initial meeting on October 3, 2011, RS and JS also discussed with Padilla investment options for a lump-sum distribution that RS would receive from his 401(k) plan upon his retirement. At the time of the meeting, RS was 59 years old and working as a technician for AT&T, his employer for over 39 years.
8. Over the next 18 months, Padilla met with RS and JS on approximately six occasions to discuss RS's retirement income needs and the rollover of approximately \$780,000 from RS's 401(k) plan.
9. During these meetings, Padilla repeatedly pitched the idea of a variable annuity investment to RS. RS, however, was steadfast in his refusal to purchase a variable annuity.
10. In April of 2013, RS retired from his employer.
11. On a new account form dated April 19, 2013, RS stated that he had a moderate risk tolerance and a liquid net worth of \$886,000. RS specified that his investment objectives were growth and income and that he planned to start immediate withdrawals of \$4,000 in monthly income.
12. On the same date, RS signed documents to complete the purchase of a Jackson National Life Perspective L Series Variable Annuity with contract number xxxxxx7776 ("Variable Annuity"). RS funded the Variable Annuity with an initial amount of \$220,787. At the meeting with RS on April 19, 2013, Padilla represented to RS that the investment was a type of managed money investment and specifically stated that it was not a variable annuity. Due to the oral misrepresentations made by

Padilla, RS was unaware that the documents pertained to the purchase of a variable annuity.

- 13. On April 23, 2013, RS's variable annuity contract was issued by Jackson National Life Insurance Company ("Jackson Life"), and Jackson Life sent RS a letter thanking him for his "recent purchase of a Jackson National Life Insurance Company annuity product!"**
- 14. Upon receipt of the letter, RS became alarmed that Padilla had invested his retirement funds in a variable annuity contract.**
- 15. On April 29, 2013, as a result of the Jackson Life letter, RS called Padilla to verify that the product he had purchased was not a variable annuity. Over the telephone, Padilla again made the misrepresentation that the investment was not a variable annuity. At the conclusion of the phone call, Padilla sent an email to RS confirming that RS's investment was not in a variable annuity, but rather, "structured . . .into an investment vehicle with Jackson National Life." Padilla specifically affirmed "First and foremost, we will not and have not invested your funds into a variable annuity product as you have previously mentioned to me in past meetings."**
- 16. Significantly, at the time Padilla wrote the email to RS, the only Jackson Life products that Padilla sold were variable annuities.**
- 17. On the date of this misrepresentation, RS was still within the parameters of the Right to Examine provision (20 days from the date of the contract issuance), which would have allowed him to surrender the variable annuity without incurring a surrender charge.**

18. If Padilla had admitted to RS on April 29, 2013, that RS was invested in a variable annuity, RS could have surrendered the Variable Annuity under the Right to Examine provision without incurring a penalty.
19. In reliance on Padilla's misrepresentations that the investment was not a variable annuity, approximately three weeks after the initial purchase, on May 14, 2013, RS contributed an additional \$558,889 to the same variable annuity, resulting in a total principal investment of \$789,676 – a rollover of RS's entire 401(k).
20. Padilla earned a net commission on the total Variable Annuity investment of approximately \$42,000.
21. Following the second contribution, RS withdrew funds on May 24, 2013 and noticed that the confirmation had a heading entitled "Perspective L Series Fixed & Variable Annuity Holdings Summary" and showed a portfolio invested 100% in "JNL Disc Mod Growth." The reference on the confirmation to a variable annuity renewed RS's concern, and he again called Padilla to inquire about the nature of the investment. Padilla reassured RS that the investment vehicle was not a variable annuity, explaining that the confirmation stated "annuity" because RS was receiving monthly disbursements. RS continued to make monthly withdrawals of approximately \$4,000.
22. Over the next several months, JS and RS met or talked with Padilla on several occasions about the status of their accounts. RS complained to Padilla that, unlike JS, he could not access his account information online to view the products in which his account was invested. Padilla continued to conceal the true nature of the investment. Padilla reassured RS that Padilla could see all the account information and that RS's funds were not invested in a variable annuity.

23. In November of 2013, Jackson Life notified RS by letter that he had exceeded the withdrawal limitation for the year (approximately \$30,000) and that the excessive withdrawals could affect the values of the endorsements and riders associated with the Variable Annuity. RS had been unaware of any withdrawal limitation on his account, and based upon the wording of the letter, RS was convinced that Padilla had misrepresented the product.
24. After receipt of the Jackson Life letter, RS immediately tried to reach Padilla, but Padilla was unavailable. As a result, RS called Jackson Life and spoke to one of their representatives. RS expressed his concern that his account was invested in a variable annuity and asked what the letter meant. The Jackson Life representative confirmed that RS was invested in a variable annuity and told RS that he needed to contact Padilla.
25. When RS confronted him by telephone, Padilla initially denied that the account was invested in a variable annuity and stated that he would straighten out the paperwork with Jackson Life. Over the course of the next month, Padilla continued to make excuses and avoided meeting with RS.
26. Finally, on January 2, 2014, Padilla met with RS and JS to discuss RS's account. Padilla admitted, for the first time, that RS's account was invested in a variable annuity. During the first 30 minutes of the meeting Padilla attempted to convince RS that the Variable Annuity was a great investment and that RS should retain the annuity. When RS rejected Padilla's recommendation that he stay in the Variable Annuity, Padilla disclosed that there would be a surrender charge of approximately \$62,000 to exit the product.

27. Because RS did not want his funds invested in a variable annuity, RS decided to surrender the Variable Annuity and pay the surrender charge of \$62,617.30.

28. Padilla's continued misrepresentations concealed the true nature of the Variable Annuity from RS, causing RS to remain invested in the Variable Annuity beyond the expiration of the Right to Examine provision and caused RS to incur surrender charges in excess of \$60,000.

FIRST CAUSE OF ACTION

Willful Misrepresentations and Omissions of Material Facts - (Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010)

29. The Department realleges and incorporates by reference paragraphs 1 through 28 above.

30. Section 10(b) of the Exchange Act prohibits any person, in connection with the purchase or sale of a security, to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

31. Rule 10b-5 of the Exchange Act prohibits "any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) to employ any device, scheme or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) 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.”

32. A violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, constitutes a violation of FINRA Rule 2010.
33. FINRA Rule 2010 requires members and associated persons, in the conduct of their business, to “observe high standards of commercial honor and just and equitable principles of trade.”
34. FINRA Rule 2020 also provides that: “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.”
35. In connection with the sale of the Variable Annuity, Padilla directly or indirectly, by the use of means or instrumentalities of interstate commerce, or of the mails, knowingly, willfully or recklessly: (i) employed devices, schemes, or artifices to defraud, (ii) made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, concerning the variable annuity investment, or (iii) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon customer RS. Padilla also effected transactions in, or induced the sale of securities by means of manipulative, deceptive or other fraudulent device or contrivance.
36. The Variable Annuity sold by Padilla was a security governed by the Exchange Act and the Rules thereunder, as well as FINRA Rules.

37. In April and May of 2013, Padilla knowingly, willfully or recklessly made misrepresentations of material fact in connection with the sale of the Variable Annuity to RS. In particular the misrepresentations consisted of the following: (a) at the time Padilla presented the Variable Annuity application to RS on April 19, 2013, Padilla assured RS that the application was not for a variable annuity; (b) on April 29, 2013, Padilla convinced RS to keep the Variable Annuity beyond the Right to Examine period by reassuring him orally and in writing that the investment RS had purchased was not a variable annuity; and (c) between April 19, 2013 and May 14, 2013, Padilla caused RS to invest an additional \$558,889 into the Variable Annuity by falsely claiming that the investment purchased was not a variable annuity.
38. The representations in Paragraph 37 were false because the product that Padilla sold to RS was a variable annuity.
39. Padilla's aforementioned misrepresentations were all false, misleading, and made with scienter. Padilla knew, should have known, or was reckless in not knowing that the security he sold to RS was a variable annuity, yet he continued to misrepresent the nature of the security.
40. Padilla utilized the means or instrumentalities of interstate commerce, or of the mails in connection with the sale of the Variable Annuity: (a) telephone calls to customer RS; (b) emails to customer RS; (c) mailings to send documents to RS concerning the Variable Annuity; and (d) mailings to the issuer of the Variable Annuity contract documents.

41. In reliance upon Padilla's material misrepresentations, customer RS initially invested \$220,787 in the Variable Annuity and, in further reliance on the material misrepresentations, made an additional investment in the Variable Annuity of \$558,889.
42. As a result of the foregoing conduct, Padilla willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and violated FINRA Rules 2020 and 2010.

SECOND CAUSE OF ACTION

Unauthorized Transactions - (FINRA Rule 2010)

43. The Department realleges and incorporates by reference paragraphs 1 through 42 above.
44. On April 23 and May 14, 2013, Padilla made unauthorized purchases of the Variable Annuity in RS's account.
45. RS signed an application for the purchase of the Variable Annuity; however, the application did not provide Padilla purchase authorization due to misrepresentations that Padilla made about the investment at the time the document was signed and due to misrepresentations that Padilla made about the nature of the investment during the Right to Examine period.
46. Furthermore, RS consistently and unequivocally told Padilla that he did not wish to purchase a variable annuity.
47. By making unauthorized purchases of the variable annuity in RS's account, Padilla engaged in conduct inconsistent with just and equitable principles of trade and high standards of commercial honor, and thereby violated 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;
- 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 Padilla willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

FINRA DEPARTMENT OF ENFORCEMENT

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