

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 74903 / May 7, 2015

Admin. Proc. File No. 3-15935

In the Matter of the Application of

MICHAEL PINO

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY  
PROCEEDINGS

**Discretionary Trading without Written Authorization**

**Conduct Inconsistent with Just and Equitable Principles of Trade**

Registered securities association found that registered representative, while associated with two member firms, engaged in discretionary trading in a customer's accounts without written authorization. *Held*, association's findings of violations with respect to all but two sales transactions and sanctions it imposed are *sustained*.

APPEARANCES:

*Michael Pino, pro se.*

*Alan Lawhead, Jennifer C. Brooks, and Celia L. Passaro, for Financial Industry  
Regulatory Authority, Inc.*

Appeal filed: June 17, 2014

Last brief received: September 26, 2014

Michael Pino, formerly a registered representative associated with FINRA member firms Centennial Securities Company, LLC ("Centennial") and Money Concepts Capital Corp. ("Money Concepts"), appeals from FINRA disciplinary action. FINRA found that Pino engaged in discretionary trading without written authorization in the Centennial and Money Concepts accounts of one of his customers, in violation of NASD Conduct Rules 2510(b) and 2110, and FINRA Rule 2010.<sup>1</sup> Based upon these violations, FINRA fined Pino \$5,000, suspended him in all capacities for thirty business days, and imposed costs. We base our findings on an independent review of the record.<sup>2</sup>

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<sup>1</sup> On July 26, 2007, the Commission approved a proposed rule change that NASD filed seeking to amend its Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56148 (July 26, 2007), 72 Fed. Reg. 42,146 (Aug. 1, 2007). Following the consolidation, 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* Exchange Act Release No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008).

NASD Rule 2510(b) provides that "[n]o . . . registered representative shall exercise 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. . . ." NASD Rule 2510 has not yet been replaced by a new FINRA Rule in the Consolidated Rulebook, and it remains in effect.

NASD Rule 2110 provided that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." According to "our long-standing and judicially-recognized policy . . . a violation of another Commission or NASD rule or regulation . . . constitutes a violation of [NASD] Rule 2110." *Stephen J. Gluckman*, Exchange Act Release No. 41628, 54 SEC 175, 1999 WL 507864, at \*6, (July 20, 1999). In September 2008, the Commission approved the new FINRA Rule 2010, which replaced NASD Rule 2110. The new FINRA rule, which became effective December 15, 2008, does not alter, in any material respect, the prior NASD rule. *See FINRA Regulatory Notice 08-57* (Oct. 2008). NASD Rule 2110 applies to Pino's conduct before December 15, 2008, and the new FINRA Rule 2010 applies to his conduct after that date.

<sup>2</sup> Our briefing schedule in this proceeding ordered Pino to file a brief in support of his application for review by August 7, 2014. Pino missed this deadline. He asserted that he had mailed the brief on time, but it was returned to him due to insufficient postage, and that he planned to re-submit the brief (which he subsequently did). Before we received Pino's opening brief, FINRA filed a motion to dismiss Pino's application, arguing that Pino had abandoned his appeal by failing to file a timely brief. We have exercised our discretion to accept Pino's late-filed brief, and we accordingly deny FINRA's motion to dismiss.

## I. Background

Pino entered the securities industry in 1988 and became registered as a general securities representative associated with Centennial in 2002, where he stayed until the end of 2008. In January 2009, Pino became registered with Money Concepts as a general securities representative, where he remained employed until August 31, 2010. Pino currently is not employed in the securities industry. The conduct at issue took place between January 2007 and May 2010 and involved the Centennial and Money Concepts accounts of one of Pino's customers.

### A. The customer at issue opened an account with Pino at Centennial.

In 2006, the customer at issue retired and opened an account with Pino. The customer's previous investment experience was limited to an account he held at Fidelity that was part of an employee benefits program. That account was worth approximately \$48,800 at the time of his retirement. Although the customer had never worked with a broker or investment adviser, he testified that he contacted Pino because a former co-worker had an account with Pino and the customer was "impressed with how much [his former co-worker] told [the customer] he was making."

When the customer first met with Pino in late 2006, Pino did not discuss specific investments or strategies, and he generally recommended investing half of the customer's account in stocks and the rest in bonds.<sup>3</sup> The customer testified that he emphasized to Pino that he did not want to purchase any securities in the automotive industry "because at that time GM and Chrysler were talking about bankruptcy." The customer also expressed an interest in "environmental" stocks, which he considered to be the "coming thing" because he had read a newspaper article discussing the possibility of windmills in Lake Erie, although he "didn't know any of [the environmental companies] personally by name." After their initial meeting, the customer filled out and signed the necessary documents to open an account with Pino at Centennial.<sup>4</sup> Shortly thereafter, the customer transferred the entire value of his Fidelity account to his new account with Pino at Centennial.

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<sup>3</sup> Pino described the customer's investment preferences when he opened the Centennial account as "very aggressive," based on investments in emerging markets mutual funds in his Fidelity account.

<sup>4</sup> The customer filled in boxes on his account-opening form by stating that he had nineteen years of investment experience in mutual funds, stocks, and bonds. The customer testified that he filled out the form that way because that was when he started the Fidelity employee benefits account, and that he had no other investment experience besides that account.

**B. Pino executed discretionary transactions in the customer's Centennial account without the customer's written or oral authorization.**

Pino executed discretionary transactions in the customer's Centennial account, although it is undisputed that the customer never provided Pino with written authorization for discretionary trading.<sup>5</sup> First, in January 2007, Pino purchased relatively large quantities of Ford and General Motors bonds, notwithstanding the customer's instructions to Pino during their initial meeting that he did not want to invest in the automotive industry. The bonds totaled \$21,370.00, approximately forty-four percent of the account's value. The customer complained to Pino about the purchases, but, according to the customer's testimony, Pino convinced him to keep the bonds by telling him that "bonds are different from stocks and [the bonds Pino purchased] are guaranteed even if they go bankrupt they still have to pay these off." The customer also testified that he "didn't know how to stop trading and freeze the account," and he felt that there was nothing he could do about the purchases Pino had made.

After the purchase of the bonds, Pino began to make unauthorized trades in the customer's account to implement a self-described "earnings strategy." Pursuant to this strategy, Pino would wait for a positive market reaction to an earnings report of a prominent issuer and then purchase the securities of a company in the prominent issuer's "peer group" shortly before that company released its own earnings report. Pino would then sell that stock at some later point in time, preferably after the price of the security had increased as a result of the earnings news. Pino believed that, if the prominent issuer's earnings were strong, others in the industry peer group also were likely to report strong earnings.<sup>6</sup>

Although the majority of Pino's trading in the customer's account exhibited characteristics of Pino's earnings strategy—the trades involved a purchase of shares one day followed by a sale of those same shares a couple of days or, often, weeks later—a few of the transactions spanning periods longer than two months may have been executed pursuant to a strategy Pino described as

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<sup>5</sup> In fact, Centennial's policies prohibited any discretionary trading by a registered representative, except in circumstances not applicable here (such as transactions to satisfy margin requirements or exchanging one money market fund for another). Two other exceptions to Centennial's prohibition ("isolated or infrequent discretion . . . when a customer is unavailable for a limited period of time" and "buying or selling a security or type of security within limited specific parameters established by the customer") both required written authorization from the customer, which did not occur here. Further, Pino attended Centennial's 2007-08 annual continuing education meeting, at which Centennial's prohibitions against discretionary accounts were covered. And he checked "No" on a Centennial annual certification questionnaire, which asked, "Excluding fee based business, do you handle any customer accounts on a discretionary basis?"

<sup>6</sup> Pino testified that he used this strategy in no more than ten of his customers' accounts.

"buy and hold."<sup>7</sup> The customer testified that Pino called him about once a month during his time at Centennial, but that they did not discuss the specific securities that Pino planned to purchase and sell. Instead, they often discussed sports and general market conditions. The customer acknowledged that he could not recall every conversation he had with Pino during this time period, but he maintained that, with two possible exceptions, Pino: (i) did not discuss any specific securities he planned to purchase or sell in the customer's account; (ii) did not talk about the quantities of securities he planned to purchase or sell; nor (iii) did he discuss the price at which he planned to execute any transactions.<sup>8</sup> The customer's testimony applied to all sales transactions in his accounts, regardless of the strategy Pino employed. According to the customer, the trades in his account "just happened." The customer testified that he did not ever "verbally tell [Pino] to go ahead and trade on [his] behalf and just let [him] know later on after the trades were made." The customer did not complain about Pino's activity in the account because, after his experience following Pino's early unauthorized purchases of the Ford and General Motors bonds, the customer believed that he had no way to undo Pino's trading.

While Pino was at Centennial, he sold securities in the customer's account without the customer's written or oral authorization on fifty-six occasions. None of the sales in the customer's account occurred on the same business day as the purchase of that security. And, while some of Pino's sales of a security at Centennial occurred the following day after his initial

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<sup>7</sup> Pino testified that he began using the earnings strategy in the customer's accounts in March 2007 and continued to use it for at least the following two years. He testified that approximately thirty to fifty percent of the trades in the customer's accounts were earnings strategy trades, and he separately stated that sixty to eighty percent of the customer's portfolio was "subject to a buy and hold strategy." Pino did not identify which transactions were executed under each of the two strategies, but the record establishes that the majority of the transactions in the customer's account follow a pattern of trading consistent with the earnings strategy, *i.e.*, a purchase and sale of the same quantity of the same security within two months. This pattern appears as early as January 2007 and continues until May 2010. A few of the transactions at issue, spanning periods longer than two months between the purchase and sale, may have been part of Pino's "buy and hold" strategy.

<sup>8</sup> The customer testified that Pino may have discussed beforehand the sales of the Jet Blue and Noah Education Holdings securities in his accounts, "but that was it." There were approximately ten months between the purchase and sale of the Jet Blue securities and just under two years between the purchase and sale of the Noah Education securities (both much longer than the typical amount of time between purchase and sale transactions in the customer's accounts), indicating that these transactions may not have been part of the earnings strategy. The customer stated that Pino told him that "because we held [the Jet Blue stock] so long . . . even though we . . . would take a big loss it's time to get rid of it to have more capital to work with." The customer's testimony regarding Noah Education was less specific—he simply stated that when Pino sold the Noah Education stock, "he told me about it." Pino's testimony did not address either Jet Blue or Noah Education specifically.

purchase of that security, over half of the transactions spanned periods longer than one week between purchase and sale (although the overwhelming majority occurred within a period of less than two months). For example, on April 25, 2007, Pino purchased 137 shares of Halliburton Company (which announced its quarterly earnings the following day), which he then sold on May 9, 2007, fourteen days later.

**C. Pino and the customer moved to Money Concepts, where Pino continued to execute sales transactions in the customer's account without written or oral authorization.**

In approximately January 2009, Pino sent the customer a letter stating that he had moved to Money Concepts "to be able to manage assets independent of Wall Street's buy and hold strategies that have been so wrong over the last 10 years" and that he "pledge[d] to restore and grow [the customer's account]."<sup>9</sup> On January 23, 2009, the customer moved his account to Money Concepts. At Money Concepts, Pino continued a pattern of trading in the customer's account that was largely consistent with the earnings strategy, resulting in thirty-nine sales transactions between February 2009 and May 2010. All of the purchase transactions at Money Concepts had a corresponding sale within two months of the purchase date, indicating that they were made pursuant to the earnings strategy. A few sales transactions at Money Concepts involved securities that were originally purchased while Pino and the customer's account were at Centennial, and those transactions spanned periods longer than two months, possibly indicating that they were "buy and hold" trades.

As at Centennial, it is undisputed that Pino did not have written authorization to exercise discretionary authority over the customer's account at Money Concepts. And Money Concepts expressly prohibited registered representatives from "accepting an account from a customer on a discretionary basis." At the time, Money Concepts permitted only registered investment advisory accounts (which the customer's account was not) to be traded on a discretionary basis. Pino admitted that he was aware of this prohibition.

At Money Concepts, Pino's communications with the customer were more frequent. The customer testified that Pino and he talked once every week or two during the first six months of 2009, after Pino moved to Money Concepts. After that point, they spoke as often as two or three times a week, although the customer did not know why Pino suddenly started to call more frequently.

The customer testified that he may have discussed the purchase of specific securities with Pino once his account was at Money Concepts, but that they never discussed any of the subsequent sales of those same securities. None of the sales transactions occurred on the same business day as the initial purchase of that security. And, while some of Pino's sales of securities at Money Concepts occurred the day after his initial purchase of that security, over half of the

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<sup>9</sup> While Pino was at Centennial, the customer's account lost approximately half of its value in two years. The record does not include evidence regarding the cause of this loss.

transactions at Money Concepts spanned periods longer than one week between purchase and sale (although the overwhelming majority were completed in less than two months). For example, Pino purchased 333 shares of Skyworks Solutions, Inc. on January 20, 2010 (the day the company announced its first quarter fiscal year 2010 earnings), at a price of \$30.00 per share. He did not sell those shares until February 2, 2010, thirteen days after the initial purchase, at the same \$30.00 price.

#### **D. Procedural history**

On May 16, 2012, FINRA's Department of Enforcement issued a one-cause complaint against Pino, charging that he violated NASD Rules 2510(b) and 2110 and FINRA Rule 2010 when he "improperly exercised his discretion to effect approximately 95 trades." The Complaint noted that "Pino did not call [the customer] regarding the sale transactions" and "on occasion, waited several days [after the initial purchase] before selling the stock to increase profitability." In calculating the number of violative transactions, the Complaint referred specifically to the fifty-six sales transactions at Centennial and the thirty-nine sales transactions at Money Concepts.

After a one-day hearing, a FINRA Hearing Panel issued a decision finding that, as charged, "Pino exercised discretion in [the customer's] account when he sold stock without first speaking to [the customer]." In reaching its finding, the Hearing Panel stated that the customer's "testimony and statements, which were corroborated in large measure by Pino's testimony, supported [the customer's] credibility." Based on the finding of violations, the Hearing Panel suspended Pino in all capacities for thirty business days, fined him \$5,000, and ordered him to pay costs. In its sanctions determination, the Hearing Panel found it to be aggravating that Pino "made approximately 95 discretionary transactions in [the customer's] accounts."

Pino appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council. The NAC affirmed the Hearing Panel's decision and the sanctions it imposed, stating that it would not disturb the Hearing Panel's findings. Pino subsequently filed this timely appeal.

## **II. Analysis**

Section 19(e) of the Securities Exchange Act of 1934 provides that, in reviewing a disciplinary proceeding by a self-regulatory organization, we shall determine whether the associated person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules are, and were applied in a manner, consistent with

the purposes of the Exchange Act.<sup>10</sup> In conducting our *de novo* review, we apply a preponderance of the evidence standard to determine whether the record supports FINRA's findings that Pino violated its rules.<sup>11</sup> Based on our independent review of the record, we find that a preponderance of the evidence supports FINRA's findings of violations with respect to ninety-three of the ninety-five sales transactions in the customer's Centennial and Money Concepts accounts.

**A. Pino violated NASD and FINRA rules when he engaged in discretionary trading without written authorization from the customer or approval by the member firm.**

We sustain FINRA's finding that Pino engaged in discretionary trading without written authorization in violation of NASD Rules 2510(b) and 2110 and FINRA Rule 2010. Rule 2510(b) states that registered representatives shall not "exercise 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 . . . ." The Rule is significant because "[d]iscretionary trading in a customer's account is a practice that is inherently susceptible to abuse."<sup>12</sup>

It is undisputed that the customer did not give Pino written authorization for any discretionary trading in his accounts at either Centennial or Money Concepts. Likewise, neither account was accepted (as evidenced in writing) for discretionary trading by Centennial or Money Concepts, both of which prohibited such trading in accounts like the customer's. Thus, Pino lacked the required written authorization from the customer as well as the required acceptance by Centennial or Money Concepts under Rule 2510(b).

It is also undisputed that Pino executed sales transactions pursuant to his self-described earnings strategy in the customer's accounts without discussing those transactions with the customer, much less obtaining written authorization as required under Rule 2510. The customer

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<sup>10</sup> 15 U.S.C. § 78s(e); *see, e.g., Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at \*6 (Jan. 6, 2006), *petition denied*, 209 F. App'x 6 (2d Cir. 2006). Pino does not argue, and the record does not support a finding, that NASD Rules 2510(b) and 2110, and FINRA Rule 2010 are, or FINRA's application of them were, inconsistent with the Exchange Act.

<sup>11</sup> *See, e.g., Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at \*9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

<sup>12</sup> *William M. Murphy*, Exchange Act Release No. 41804, 1999 WL 668560, at \*3 (Aug. 27, 1999).



testified that, with two possible exceptions,<sup>13</sup> Pino had not discussed any of the sales transactions in the customer's accounts before executing them, and Pino himself admitted that he did not discuss the sales transactions under the earnings strategy on the day he executed them, claiming that he received oral approval from the customer for the sales transaction during an initial telephone call to discuss the purchase transaction.

Finally, it is undisputed that the customer did not authorize any sales transactions that were executed pursuant to a "buy and hold" strategy, except for the two trades discussed above. Unlike sales executed as part of the earnings strategy, Pino did not claim to have received authorization for the "buy and hold" sales during the initial discussion regarding the purchase. Pino testified regarding his belief that the customer granted discretion for the sale during the initial discussion of the purchase applied "only for [the] earnings strategy . . . not across the board."<sup>14</sup> Furthermore, the customer testified that, except for the two transactions discussed above, Pino never discussed any sales transactions (regardless of the strategy being employed). The customer's testimony was consistent with his earlier on-the-record testimony, which "supported [the customer's] credibility." Both the Hearing Panel and the NAC found the customer's hearing testimony credible. We agree with this finding.

We find that the record evidence Pino cites does not support his contention that the customer provided oral authorization for Pino to execute the transactions at issue. Pino argues that the customer's testimony was inconsistent and alleges that the customer "perjured himself when stating [Pino] rarely phoned him and did not authorize trades." In support of this claim, Pino relies on some notes taken by the FINRA examiner who conducted an initial, on-the-record telephone interview of the customer during the early stages of FINRA's investigation. Although the examiner who drafted the notes left FINRA before the hearing, the examiner's successor testified and Pino asked the successor to read aloud this sentence from the notes: "At Money Concepts Pino would call before placing trades."

But the examiner's successor was not present during the telephone interview and did not know what the customer had told the first examiner or the context for the statement in the notes. Therefore, we do not credit the notes and find that they do not call into question the customer's other testimony. Even if we determined to credit the notes, the sentence in question referred only to Money Concepts and not to Pino's activities at Centennial, which encompassed fifty-six of the

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<sup>13</sup> See *supra* note 8. The customer testified that Pino may have discussed the sales of Jet Blue and Noah Education stocks in his accounts. But it is undisputed that, even if Pino orally mentioned those sales transactions to the customer before executing them, the customer provided no written authorization for Pino to exercise discretion with respect to those, or any other, trades.

<sup>14</sup> Pino did not specifically testify regarding his discussions with the customer about "buy and hold" strategy sales transactions. We note that the overwhelming majority of the sales transactions took place less than two months after the securities were purchased, which is more consistent with the earnings strategy than a "buy and hold" strategy.

ninety-five sales transactions at issue. Thus, the sentence does not support Pino's contentions that the customer "admitted that Pino called before every transaction." Nor is there support for Pino's contention that the sentence is "entirely opposite" the customer's testimony. As discussed above, the customer acknowledged that Pino spoke to him much more frequently at Money Concepts than he had at Centennial, and that they may have discussed specific securities before the purchase transactions at Money Concepts.

Pino claims that the customer provided oral authorization, at least for the earnings strategy transactions. Pino testified during the proceeding below that there was no difference between his communications with the customer when Pino was at Centennial and those he had with the customer when Pino was at Money Concepts. Pino stated, contrary to the customer's testimony, that they had discussed each individual stock purchase at Centennial. Pino also testified that, when the customer authorized the purchase of securities pursuant to the earnings strategy, the customer also authorized Pino's later sales of those securities, regardless of when the sales transaction occurred. Pino stated that they discussed "target prices" for the earnings strategy securities, which he interpreted as granting him time and price discretion. But even if Pino had received oral authorization for the sales transactions at issue, oral permission is insufficient (with certain exceptions discussed below) to exercise discretionary power in a customer's account under Rule 2510.<sup>15</sup> Despite lacking written approval from his customer and written acceptance by Centennial or Money Concepts, Pino exercised discretionary power by selling securities in the customer's accounts on ninety-three occasions over a three-and-a-half year period (the ninety-five total sales transactions charged in the complaint minus the two transactions that Pino may have discussed with the customer before executing). The record thus amply supports, and we sustain, FINRA's finding that Pino engaged in discretionary trading without written authorization with respect to ninety-three sales transactions in the customer's Centennial and Money Concepts accounts.<sup>16</sup>

**B. The "time and price discretion" exception to Rule 2510 does not apply here.**

Pino argued in the proceeding below that the customer had granted "time and price discretion" over the earnings strategy sales transactions when the customer agreed to the initial

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<sup>15</sup> *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at \*8 (July 2, 2013).

<sup>16</sup> FINRA's decision did not specify the number of violative transactions it found, referring instead to Pino's general violation of its rules by exercising discretion in the customer's accounts. Based on FINRA's finding that the customer did not grant Pino any discretionary authority over his accounts at Centennial or Money Concepts, which we have determined to sustain, FINRA's decision necessarily included findings of violations as to the ninety-five sales transactions charged in the complaint. Because of the ambiguity of the evidence regarding the Jet Blue and Noah Education Holdings sales transactions, however, we have not included those two transactions in our findings of violative conduct. *See supra* note 8.

purchases of securities.<sup>17</sup> But a customer's approval of a general strategy does not meet the requirements of the "time and price discretion" exception to Rule 2510.<sup>18</sup> NASD Rule 2510 does not apply to a registered representative exercising "discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed."<sup>19</sup> Further, "time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer."<sup>20</sup>

We find that the time and price discretion exception does not apply to the ninety-three violative sales transactions in the customer's accounts. Pino did not meet the exception's requirements because he was not granted discretion by the customer as to the sale of definite amounts of specified securities in the customer's accounts, and Pino was not granted such discretion on the same business day that he executed the sales transactions. First, Pino could not have had discretion as to the sale of definite amounts of specified securities because he did not speak with the customer before executing these sales transactions with the possible exception of the Jet Blue and Noah Education trades.<sup>21</sup> The customer's testimony, which the Hearing Panel

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<sup>17</sup> In fact, during the hearing, Pino characterized his earnings strategy trading as not being an exercise of discretion, stating that he simply tried "to sell something based on a strategy that's been well in place, that to me is not discretion."

<sup>18</sup> See *Murphy*, 2013 WL 3327752, at \*8 (stating that approval of a covered call strategy did not mean that trading would come within the time and price discretion exception); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 WL 3228694, at \*12 (Nov. 8, 2006) (rejecting applicant's claim that the time and price discretion exception applied where a representative and customer had "discussed a general strategy" to buy and sell a specific security, but did not discuss the amounts of the security to be purchased and sold).

<sup>19</sup> NASD Rule 2510(d)(1).

<sup>20</sup> See NASD Notice to Members 04-71 (Oct. 2004); see also NASD Rule 2510(d)(1).

<sup>21</sup> See *Sathianathan*, 2006 WL 3228694, at \*12 (holding that Rule 2510(d) exception does not apply where customer and broker have not agreed as to the specific amounts of the transaction and where purchases are made pursuant to a "general strategy").

credited,<sup>22</sup> was that Pino did not discuss any of the sales transactions, regardless of the strategy employed, with the exception of the Jet Blue and Noah Education sales.<sup>23</sup> And Pino testified that he usually did not talk to the customer before selling securities pursuant to the earnings strategy, stating that it was difficult to reach the customer, who often slept late after watching sporting events on television. Because there was no discussion before the sales transactions, even under Pino's description of the purported grant of discretion, the customer could not have granted any authority with respect to the definite amount of the specified securities that Pino could sell.

Second, none of the sales in the customer's accounts occurred on the same business day as the purchases.<sup>24</sup> Although there is some evidence that Pino may have spoken with the customer on the same business day as some of the purchase transactions, Pino repeatedly admitted that he did not speak with the customer on the same day as the sales transactions.<sup>25</sup> And when a NAC panelist mentioned the requirement that time and price discretion must be exercised on the same business day that it is granted, Pino said, "then I'm guilty of the charge . . . [and] there's no need going further with this." Thus, based on Pino's own admissions, any discretion with respect to earnings strategy-related sales transactions that the customer could have granted Pino on the day of the purchase transactions did not satisfy the requirement that it

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<sup>22</sup> In assessing the credibility of the customer's testimony, the Hearing Panel found that he testified "candidly" and "confidently" about the discussions he had with Pino. Such determinations, based on hearing the witness's testimony and observing demeanor, are entitled to considerable deference. *See Wanda P. Sears*, Exchange Act Release No. 58075, 2008 WL 2597567, at \*2 (July 1, 2008) (quoting *Jon R. Butzen*, Exchange Act Release No. 36512, 52 SEC 512, 1995 WL 699189, at \*2 & n.7 (Nov. 27, 1995) ("[T]he credibility determination of the initial decision maker [in a FINRA disciplinary proceeding] is entitled to considerable weight and deference, since it is based on hearing the witnesses' testimony and observing their demeanor.")). The Hearing Panel additionally found that the consistency of the customer's hearing testimony with his earlier on-the-record testimony supported his credibility. *Cf. Robert E. Gibbs*, Exchange Act Release No. 32401, 51 SEC 482, 1993 WL 190913, at \*2 (June 2, 1993) (sustaining NASD credibility determination regarding customer's testimony by phone because testimony was comprehensive, not discredited or called into question during cross-examination, and "was consistent on the relevant facts with an affidavit that [customer] and his wife had previously submitted to the NASD").

<sup>23</sup> *See supra* note 8.

<sup>24</sup> Pino acknowledged in his hearing testimony that he frequently held the securities he purchased pursuant to the earnings strategy for more than one day because "sometimes with a blue chip you want to give it a little more time" and, at other times, "we waited until [the stock] came back up" if it had not performed as expected.

<sup>25</sup> At Money Concepts, the record indicates that Pino and the customer may have discussed specific securities before the initial purchase pursuant to the earnings strategy. But even under Pino's description of the purported grant of discretion, there was no discussion before he sold the securities.

be exercised on the same business day it was granted. And, with respect to the few sale transactions that may have been pursuant to the "buy and hold" strategy, we sustain FINRA's determination that the customer credibly testified that he gave no authorization to exercise such discretion.<sup>26</sup>

**C. Pino's other arguments are without merit.**

Pino raises a number of other arguments regarding the origins of the customer's complaint, the fairness of the proceeding against him, and the accuracy of certain FINRA factual findings. We find that all of these contentions lack merit.

Pino argues that the customer's complaint was prompted by the broker who took over the customer's account at a new firm after he left Pino. Pino contends that the customer's new broker "encourage[d] [the customer] to complain simply to get the securities firm to make whole his original investment" and asserts, without support, that the new broker "physically authored and faxed complaint demanding [the customer's] account to be made whole." Although the customer acknowledged in his testimony that he received advice from his new broker about how to file a complaint against Pino, the origins of a customer's complaint are irrelevant in determining a violation of FINRA rules. It is well established that FINRA maintains the authority to enforce its Rules regardless of whether customers themselves have complained.<sup>27</sup>

Pino also argues that the customer's testimony was "coached" and that he "submitted written and oral communications that were not authored by himself." Pino cites no evidence to support this allegation, and we have found no such evidence in our *de novo* review of the record. Pino describes as "highly irregular" FINRA staff trips to the customer's residence before the hearing. While FINRA acknowledges that its staff prepared the customer before his hearing testimony, we agree that its "preparation of its customer witness is a necessary, appropriate, and common component of trial preparation." The Hearing Panel found that the customer's hearing testimony was consistent with his earlier on-the-record interview (about which Pino makes no "coaching" claims) and that this "supported [his] credibility." Further, FINRA provided Pino

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<sup>26</sup> As discussed above, the customer testified that Pino may have discussed the Jet Blue and Noah Education sales transactions, and we have not included those two transactions in our findings of violations. *See supra* note 16.

<sup>27</sup> *See Maximo Justo Guevara*, Exchange Act Release No. 42793, 54 SEC 655, 2000 WL 679607, at \*6 (May 18, 2000) (finding that "NASD's power to enforce its rules is independent of a customer's decision not to complain"); *Bernard D. Gorniak*, Exchange Act Release No. 35996, 52 SEC 371, 1995 WL 442063, at \*2 n.5 (July 20, 1995) (same and noting that customer decisions about whether to complain "may be influenced by many factors"); *Raymond M. Ramos*, Exchange Act Release No. 26007, 49 SEC 868, 1988 WL 902244, at \*4 (Aug. 18, 1988) (finding violations of NASD Rules against misappropriating customer funds despite the fact that affected customer had written to NASD requesting leniency for applicant).

with ample opportunity to cross-examine the customer during the hearing. We have held that claims of witness coaching are undermined when the applicant had a full opportunity to cross-examine the witness.<sup>28</sup> We find that Pino's claims that the customer's testimony was "coached" by FINRA staff are unsubstantiated, and that FINRA afforded Pino a full opportunity to address any alleged false testimony through cross-examination during the hearing.

Pino indicates that his self-representation during the FINRA proceeding rendered the proceeding unfair. He claims, without reference to any specific testimony, that his self-representation led him to testify in a way that was "construed to make it appear as activity violating Rule 2510(b)." The exact import of this argument is unclear. But FINRA did not prohibit Pino from seeking the advice of counsel, and "[a]lthough FINRA's rules permit the participation of counsel, it is well established that 'there is no right to counsel in [its] disciplinary proceedings.'"<sup>29</sup>

Pino alleges that FINRA engaged in unspecified "bullying tactics to settle." But the parties ultimately did not settle the proceeding, so it is unclear how any alleged "bullying tactics" could have harmed Pino. Further, FINRA followed all of its procedural rules. It provided Pino with notice and an opportunity to be heard as required under Exchange Act Section 15A(b)(8). Its Complaint clearly set forth the charges against Pino, and Pino had an opportunity to testify on his own behalf, to call witnesses, and to cross-examine FINRA's witnesses. There is no evidence to suggest that FINRA denied Pino a fair proceeding.<sup>30</sup>

Pino "objects to . . . assertions that" the customer "was inexperienced, unsophisticated, risk adverse [sic], and an investor of conservative objectives." He does not explain the relevance of this objection to our consideration of the violations at issue, nor does he cite any evidence to support his objection. Even if the customer had been sophisticated, this would not have permitted Pino to exercise discretionary authority in the customer's accounts without the required authorizations under Rule 2510. And, in any event, we find that the record amply supports FINRA's characterization of the customer's inexperience. The customer had little prior investment experience (and no experience working with a broker) when he opened his account with Pino. The customer testified consistently throughout the investigation and proceeding

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<sup>28</sup> See *Dan Adlai Druz*, Exchange Act Release No. 36306, 52 SEC 416, 1995 WL 579536, at \*8 & n.37 (Sept. 29, 1995) (noting lack of evidence that witness was coached and pointing out that witness was subject to examination and cross-examination), *aff'd* 103 F.3d 112 (3d Cir. 1996) (Table).

<sup>29</sup> See *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at \*12 (Nov. 9, 2012) (quoting *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at \*6 (Dec. 22, 2008)).

<sup>30</sup> See *Craig*, 2008 WL 5328784, at \*6 (finding that respondent had been provided with a fair proceeding where he "had the opportunity to present evidence and arguments in his favor, to testify, and to cross-examine witnesses").

below that he did not believe he was able to do anything about Pino's unauthorized trading in his accounts.

Further, Pino contends that Centennial "compliance representatives" had "refut[ed] any violation of [Centennial's] and FINRA's rules, regulations, and conduct." Pino bases this claim on a statement in Centennial's response to a FINRA Rule 8210 request, in which a Centennial compliance officer stated that "[c]ertainly Mr. Pino was not authorized to exercise discretion in [the customer's] account, and from my talks with Mr. Pino I do not think that he did." But the Centennial Rule 8210 response merely reflects the compliance officer's own views after hearing Pino's explanation of the trading, and it confirms that Centennial had not authorized Pino to exercise discretionary authority. As discussed herein, we find that the evidence supports FINRA's finding that Pino exercised discretion in the account without authorization from the customer or acceptance by Centennial.

Finally, Pino objects to what he describes as FINRA's "admission of evidence and assertions" that Pino was "immoral to promise client he would try harder to recoup monies lost due to the devastating market decline of 2008-2010." Pino also claims repeatedly that FINRA sought to taint his reputation and describe him as "an anti-Wall Street rogue trader." Although the record includes a January 2009 letter Pino sent the customer, in which Pino "pledge[d] to restore and grow [the customer's] IRA," FINRA made no findings with respect to this letter, and made no findings about Pino's morality. Nor did it refer to him as a "rogue trader."

For all of these reasons, we sustain FINRA's findings that Pino violated NASD Rules 2510(b) and 2110, and FINRA Rule 2010, with respect to the ninety-three sales transactions in the customer's Centennial and Money Concepts accounts.<sup>31</sup>

### III. Sanctions

Section 19(e)(2) of the Exchange Act directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.<sup>32</sup> Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Section 19(e)(2).<sup>33</sup> For exercising discretion without written authorization, the Sanction Guidelines recommend a fine between \$2,500 and \$10,000 and, in egregious cases, a suspension of between ten and thirty business days.<sup>34</sup> Finding that

<sup>31</sup> A violation of any other NASD Rule also constitutes a violation of NASD Rule 2110 and FINRA Rule 2010. *See supra* note 1.

<sup>32</sup> 15 U.S.C. § 78s(e)(2).

<sup>33</sup> *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at \*11 (June 14, 2013).

<sup>34</sup> *See* FINRA Sanction Guidelines, at 85.

Pino's violations were egregious, FINRA fined Pino \$5,000 and suspended him in all capacities for thirty business days.

For violations of Rule 2510, the Sanction Guidelines recommend that adjudicators consider: (1) whether the customer's grant of discretion was express or implied; and (2) whether the member firm's policies or procedures prohibited discretionary trading and whether the firm prohibited the respondent from exercising discretion in customer accounts.<sup>35</sup> Accordingly, FINRA found it aggravating that, as we find above, Pino did not have express authority from the customer to make discretionary trades in his accounts. FINRA also found it aggravating that, to the extent the customer orally granted any time and price discretion under the earnings strategy, Pino exceeded such authority by exercising it, on every occasion, beyond the day on which any such grant may have occurred. FINRA further found it aggravating that Pino exercised discretion in the customer's accounts even though both Centennial and Money Concepts prohibited such trading in accounts like the customer's. As a result, as FINRA stated, "Pino's firms were not supervising the account as a discretionary account and [the customer] did not have the benefit of this added supervision." Finally, FINRA found it aggravating that Pino's misconduct was intentional and lasted for several years.<sup>36</sup> The record fully supports FINRA's findings of these aggravating factors, and we sustain them.<sup>37</sup>

FINRA found no mitigating factors. Specifically, FINRA found that it was not mitigating that Pino incorrectly believed that the customer had granted him time and price discretion to trade under the earnings strategy because that authority would have extended only to sales executed on the same day as the corresponding purchases. Pino exceeded any such purported authority because the purchase and sales transactions did not occur on the same day. As we have held, an applicant's belief that a customer had granted oral permission to trade is not mitigating where the applicant exceeded such purported authority or where the customer testified credibly that no such authority had been granted.<sup>38</sup>

On appeal, Pino raises two arguments that speak to mitigation of the sanctions imposed against him, and we find that those arguments lack merit. Pino claims that it is not true that he

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8 and 13). Although FINRA's sanctions analysis states that Pino's conduct lasted for two years, this appears to be a typographical error because FINRA clearly finds elsewhere (and the record supports the finding) that Pino's conduct spanned the full three-and-a-half years that the customer had accounts at Centennial and Money Concepts.

<sup>37</sup> The number of violative transactions was potentially an aggravating factor. *See id.* (Principal Considerations in Determining Sanctions, No. 8). But the NAC "decline[d] to consider the number of transactions related to [Pino's] misconduct to be an aggravating factor." In our review, we also have not considered the number of violations as an aggravating factor.

<sup>38</sup> *Murphy*, 2013 WL 3327752, at \*24 & n.138.



"lost client money through trading." According to Pino, the customer lost money due to general market conditions and "illegal mortgage activities that occurred without regulatory oversight resulting in large temporary declines of stock and bond market prices." But FINRA expressly stated that, when it assessed sanctions, it did not consider any losses the customer suffered. And even assuming Pino is correct in arguing that he did not harm the customer financially by discretionary trading, such a finding would not be mitigating.<sup>39</sup> Pino also states that his disciplinary record throughout his career is "exemplary." But we consistently have held that the lack of disciplinary history is not mitigating for sanctions purposes in our review of FINRA disciplinary proceedings.<sup>40</sup> We therefore find that the record supports FINRA's finding that there were no mitigating factors, and we reject Pino's additional mitigation arguments raised on appeal.

In light of the numerous aggravating factors and the absence of any mitigating factors, we agree with FINRA's characterization of Pino's violations as egregious and, based on our assessment of all factors bearing on the remedial nature of the sanctions FINRA imposed, we find them to be neither excessive nor oppressive. The suspension and fine imposed on Pino are remedial because they will encourage Pino to obtain the proper authorizations required under

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<sup>39</sup> *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at \*18 & n.137 (Nov. 15, 2013) ("[T]he absence of . . . customer harm is not mitigating, as our public analysis focus[es] . . . on the welfare of investors generally.") (citing *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at \*7 & n.25 (Feb. 24, 2012) (internal quotations omitted); *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at \*5 (Apr. 11, 2008) (holding that applicants' failure to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, Exchange Act Release No. 41989, 54 SEC 388, 1999 WL 798874, at \*5 (Oct. 7, 1999) (rejecting absence of customer harm as a mitigating factor for sanctions)).

<sup>40</sup> *John B. Busacca III*, Exchange Act Release No. 63312, 2010 WL 5092726, at \*16 & n.77 (Nov. 12, 2010) (citing *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at \*6 (Nov. 8, 2006) (stating that a "[l]ack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional")).

Rule 2510 from his customers before executing securities transactions in customer accounts. We further find that the sanctions will "have the salutary effect of deterring others from engaging in the same serious misconduct."<sup>41</sup>

An appropriate order will issue.<sup>42</sup>

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Brent J. Fields  
Secretary

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<sup>41</sup> See *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) ("[W]e are mindful that although 'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'").

<sup>42</sup> We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 74903 / May 7, 2015

Admin. Proc. File No. 3-15935

In the Matter of the Application of  
  
MICHAEL PINO  
  
For Review of Disciplinary Action Taken by  
  
FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Michael Pino is hereby sustained.

By the Commission.

Brent J. Fields  
Secretary