

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58230 / July 25, 2008

Admin. Proc. File No. 3-12892

In the Matter of the Application of

JOHN D. AUDIFFEREN
c/o Norman B. Arnoff, Esq.
Burkhart, Wexler & Hirschberg, LLP
585 Stewart Avenue, Suite 750
Garden City, NY 11530

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Federal Reserve Board Regulations T and X

Improper Extension of Credit

Free Riding

Improper Benefit from Extension of Credit

Failure to Report Customer Complaint on Form U4

Conduct Inconsistent with Just and Equitable Principles of Trade

Former registered representative improperly extended credit and caused member firm of registered securities association to extend credit to customer, engaged in free riding with respect to customer's account, and enjoyed beneficial use of and shared in the profits of the improperly extended credit. Former registered representative caused member firm to extend credit improperly in registered representative's brokerage accounts with member

firm. Former registered representative also failed to report a customer complaint on Form U4. Held, association's findings of violations and the sanctions imposed are sustained.

APPEARANCES:

Norman B. Arnoff, of Burkhardt, Wexler & Hirschberg, LLP, for John D. Audifferen.

Marc Menchel, James Wrona, and Carla Carloni, for FINRA.

Appeal filed: November 16, 2007

Last brief received: February 11, 2008

I.

John D. Audifferen, formerly a registered representative associated with a series of Financial Industry Regulatory Authority ("FINRA") member firms beginning in 1990, appeals from FINRA disciplinary action. ^{1/} FINRA found that, from January through March 2000, while Audifferen was a registered representative associated with FINRA member firm May Davis Group, Inc. ("May Davis"), Audifferen committed and caused May Davis to commit a number of violations involving the improper extension of credit for the purchase of securities in the account of Audifferen's customer, Keisha Williams. In addition, FINRA found that Audifferen engaged in "free riding" in that account, that he improperly benefitted from the extension of credit to that account, and that he shared in the profits of that account. FINRA also found that, in April and May 2000, Audifferen committed and caused May Davis to commit violations involving the improper extension of credit to Audifferen's personal May Davis cash and margin accounts by purchasing securities in these accounts with checks that were returned for insufficient funds. FINRA further found that in September 2001, Audifferen failed to disclose an April 2001 customer complaint on the Uniform Application for Securities Industry Registration or Transfer ("Form U4") filed in connection with his association with FINRA member firm J.P. Turner &

^{1/} On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the action here was taken after that date, we use the designation FINRA in this proceeding, even though the proceeding was initiated by NASD's Department of Enforcement and the initial hearing panel in the case was a NASD Hearing Panel.

Company, LLC (“JPT”). FINRA found that all of the violations constituted conduct inconsistent with just and equitable principles of trade. 2/

FINRA barred Audifferen in all capacities for his violations in connection with Williams’s account, imposed an additional bar for Audifferen’s violations in connection with his own accounts, ordered Audifferen to pay Williams restitution in the amount of \$7,835, and fined Audifferen \$9,665 for his conduct in connection with Williams’s May Davis account. 3/ Our findings are based on an independent review of the record.

II.

Williams’s May Davis Account

A. Funding the Account From July 1999 to July 2000, Audifferen was associated as a general securities representative with May Davis. Williams worked as a dancer at a night club, where she initially met Audifferen. She and Audifferen began a personal relationship in 1998.

Williams’s annual income was approximately \$48,000, and, based on her December 1999 bank statement, she had approximately \$6,500 in a checking account and approximately \$10,000 in a savings account at the time. Her only investment experience involved an account with Charles Schwab, containing the shares of a single security, valued at approximately \$20,000. Williams testified that a friend had given her the securities in the account. She did not conduct any trading in the account, merely selling small amounts of the stock from time to time when she needed money.

In December 1999, at Audifferen’s suggestion, Williams opened a May Davis cash brokerage account, for which Audifferen served as the representative. Audifferen filled out the new account form for Williams that stated that she worked in the real estate industry, had an annual income of \$100,000, total assets of \$1,000,000, and five years of investment experience. Williams testified that, although she signed the forms that Audifferen presented to her, she never read them and Audifferen did not explain them to her.

In early December 1999, Williams gave Audifferen a check for \$5,000, payable to S.G. Cowen Securities Corporation (“Cowen”), May Davis’s clearing firm, to fund her account. On or about December 17, 1999, the bank returned this check for insufficient funds. On December 26, 1999, Williams wrote a second \$5,000 check to fund the account, which subsequently

2/ NASD Rule 2110 requires members and associated persons to conduct their business in a manner consistent with just and equitable principles of trade.

3/ “In light of the bars that [it] imposed for Audifferen’s credit violations,” FINRA did not impose an additional sanction for the Form U4 violations, although FINRA found that “a suspension of 30 days would be appropriate.” FINRA also assessed costs against Audifferen totaling \$9,096.06.

cleared. Williams testified that this was the only deposit that she made into her May Davis account.

In January 2000, Audifferen asked Williams to give him a check for \$7,000, payable to Cowen. According to Williams, Audifferen claimed that “his only checking account was messed up, or he didn’t receive his checks, and he needed a check for [sic] \$7,000.” Williams provided Audifferen with a \$7,000 check, payable to Cowen, dated January 20, 2000, with the understanding that Audifferen “would deposit \$7,000 into [Williams’s] checking account to cover the check.”

Around the same time that Audifferen requested the \$7,000 check from Williams, he also asked her for two signed, otherwise blank checks. According to Williams, “[Audifferen] said the market moves quickly and he wanted to be able to respond without having to wait to receive my checks. [Audifferen] said they needed to be blank because he didn’t know how much he would need until he was ready to complete a transaction.” Williams provided Audifferen with two signed, otherwise blank checks at some point in late January 2000.

The Euniverse Purchase On January 21, 2000, Audifferen purchased 1,000 shares of the stock of Euniverse Inc. (“EUNI”) for \$6,917.50, in Williams’s May Davis account. Williams was not aware of and did not authorize this purchase. Williams did not remit any payment for the purchase. Cowen obtained an extension of the Regulation T due date, but Williams did not pay for the EUNI purchase by the extended date. ^{4/}

On February 7, 2000, Audifferen wrote a check to “Cash” from his checking account, and this check was cashed on the same date. Also on February 7, 2000, \$7,000 in cash was deposited into Williams’s checking account. Williams testified that Audifferen made this deposit. According to Williams, Audifferen had her account number and could deposit money into her account. On approximately February 9, 2000, the \$7,000 check, payable to Cowen, that Williams had given Audifferen in January 2000 was deposited into Williams’s May Davis account. Because of Audifferen’s cash deposit in Williams’s checking account, this \$7,000 check cleared. On or about March 3, 2000, Audifferen sold the 1,000 EUNI shares in Williams’s May Davis account, for \$9,644.67, a profit of \$2,727.17.

The Max Internet Communications Purchase On January 25, 2000, Audifferen purchased 3,000 shares of Max Internet Communications Inc. (“MXIP”) for \$63,105.00, in Williams’s May Davis account. Williams was not aware of and did not authorize this purchase, and she did not remit payment. Cowen obtained a Regulation T extension, but Williams did not

^{4/} Under Regulation T, 12 C.F.R. § 220, if payment due on a securities transaction exceeds \$1,000 and is not received by the end of the period specified, the broker/dealer must either liquidate the position or apply for and receive an extension from its designated examining authority (a “Regulation T extension”).

pay for the MXIP purchase by that date. Williams's bank account statements at the time show that she lacked the funds to make this purchase.

On February 10, 2008, Audifferen submitted one of the two blank checks Williams had provided, now made payable to Cowen in the amount of \$61,105, 5/ ostensibly to pay for the purchase of the MXIP shares in Williams's May Davis account. 6/ Audifferen never asked Williams whether she had sufficient funds in her checking account to cover the \$61,105 check. The bank subsequently returned the \$61,105 check for insufficient funds. Also on February 10, 2008, Audifferen sold the MXIP shares in Williams's May Davis account for \$76,392.45, generating a \$13,287.45 profit. Thus, no payment was ever made for the MXIP purchase, and the proceeds of the sale covered the initial purchase price.

On or about March 8, 2000, Williams received her February May Davis account statement and discovered the MXIP trades in her account. 7/ Williams testified that she never discussed any of these transactions with Audifferen before Audifferen entered the trades. According to Williams, after receiving her account statement, she questioned Audifferen several times about these transactions. Audifferen provided various explanations and grew angry with her for questioning him. Eventually, Williams grew frustrated with Audifferen's responses and ordered May Davis to close her account.

Transfer of Profits from Williams's Account to Audifferen Audifferen did not close Williams's May Davis account as she requested. Instead, on March 8, 2000, Audifferen requested a wire transfer of \$18,000 from Williams's May Davis account to her checking account. Soon after, Williams's bank called her to confirm wire transfer instructions from her checking account to Audifferen's checking account. Williams refused. She contacted Audifferen to determine the reason for the transfer. According to Williams's testimony, Audifferen became angry and told her it "was his money and I better send it back."

On March 9, 2000, Audifferen deposited in his checking account the second blank, signed check that Williams had given him, payable to Audifferen in the amount of \$17,500. On March 13, 2000, the bank returned the check for insufficient funds. According to Williams, Audifferen called her numerous times in the ensuing days demanding that she pay him \$17,500. On March

5/ It is unclear why the check was in the amount of \$61,105, when the purchase price of the MXIP stock was \$63,105.

6/ Williams testified that the handwriting on the \$61,105 check, other than the signature, was not hers. She further testified that she was familiar with Audifferen's handwriting and identified his handwriting on the check. The record contains other samples of Audifferen's handwriting, which he authenticated during his testimony.

7/ Because the EUNI sale did not occur until March 3, it first appeared on Williams's March 2000 May Davis account statement.

17, 2000, Williams authorized a wire transfer of \$17,500 from her checking account into Audifferen's checking account.

Williams continued to demand that Audifferen close her May Davis account. On May 23, 2000, she received a statement from May Davis that the account had been closed along with a check for her account balance. Audifferen's trading in Williams's May Davis account generated a profit of \$15,960.82, but Williams received only \$1,634.01 of the \$5,000 that she had initially invested. Williams complained to Audifferen that she should have received a greater amount of money. In addition, May Davis advised Williams that she might owe the Internal Revenue Service capital gains taxes on the full amount of the profits earned in her May Davis account, even though she did not receive any of the trading profits.

B. Pursuant to Section 19(e) of the Securities Exchange Act of 1934, 8/ we will sustain FINRA's decision if the record shows that Audifferen engaged in the violative conduct that FINRA found and that FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. Based on our independent review of the record, we find that a preponderance of the evidence supports FINRA's findings of violation against Audifferen. 9/

Credit Extensions Exchange Act Sections 7(c) and 7(d) make it unlawful for broker-dealers and associated persons, respectively, to extend credit to their customers except in

8/ 15 U.S.C. § 78s(e).

9/ Audifferen states that "substantial evidence to support each and every element of each and every charge as stated is the mandated standard of proof in administrative disciplinary proceedings." It is well-established, however, that preponderance of the evidence is the applicable standard of proof in proceedings of this type (and Audifferen appears to acknowledge this elsewhere in his brief). See, e.g., David M. Levine, 57 S.E.C. 50, 73 n.42 (2003) (holding that preponderance of the evidence is the standard of proof in self-regulatory organization disciplinary proceedings); Kirk A. Knapp, 51 S.E.C. 115, 130 n.65 (1992) (stating that "the correct standard is preponderance of the evidence" in an NASD proceeding). Further, the Supreme Court has held that "circumstantial evidence can be more than sufficient" to satisfy the burden of proof in civil actions. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983); see also Donald M. Bickerstaff, 52 S.E.C. 232, 238 (1995) (finding that testimony may be "circumstantial" in the sense that a witness did not actually see the respondent engage in the violative conduct, yet still persuasive).

We also note that the preponderance standard is a higher standard of proof than substantial evidence. See, e.g., FPL Energy Maine Hydro LLC v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002) ("The 'substantial evidence' standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.").

accordance with Regulation T. 10/ Under Section 220.8 of Regulation T, in a cash account like Williams's May Davis account, a broker-dealer may buy or sell securities for any customer if there are sufficient funds in the account or if the broker-dealer accepts in good faith that the customer will promptly make full cash payment for the security before selling it and does not anticipate selling the security prior to making payment. 11/

Audifferen's purchases of 1,000 shares of EUNI and 3,000 shares of MXIP in Williams's May Davis account violated Section 220.8 of Regulation T, and Exchange Act Sections 7(c) and 7(d). Audifferen knew that Williams did not know about the trades and that he purchased the securities without her knowledge. Moreover, Audifferen knew or should have known that Williams could not pay for the trades because she did not have the financial resources to do so. Williams bounced the initial \$5,000 check used to open her May Davis account. Williams also told Audifferen that she did not have the funds to cover the \$7,000 check she provided to Audifferen in January 2000. By purchasing stock in Williams's May Davis account for which Audifferen knew or should have known she could not pay, Audifferen caused May Davis to extend credit to Williams in violation of Section 220.8 of Regulation T and Exchange Act Section 7(c).

Audifferen also personally extended credit to Williams in connection with the purchase of 1,000 shares of EUNI in violation of Exchange Act Section 7(d), by depositing \$7,000 of his own funds into Williams's checking account to cover Williams's \$7,000 check that he submitted as payment for the EUNI purchase. Audifferen argues that there is insufficient evidence to establish that he made the \$7,000 deposit. However, Williams testified that she lacked the funds to cover the check and that Audifferen was the only person who could have made that deposit because he was the only other person who had access to her bank account. The FINRA Hearing Panel found Williams's testimony to be credible, and we find no reason to reject this credibility determination. 12/

The circumstantial evidence also supports a finding that Audifferen deposited \$7,000 in cash in Williams's account. Williams gave Audifferen the \$7,000 check in late January. On February 7, 2000, Audifferen wrote a check for \$7,000, payable to "Cash" from his checking account, which was cashed the same day. Also on February 7, 2000, \$7,000 was deposited into

10/ 15 U.S.C. § 78g(c) and 15 U.S.C. § 78g(d), respectively. See, e.g., Michael Joseph Boylan, 47 S.E.C. 680, 687 (1981).

11/ 12 C.F.R. § 220.8.

12/ "Credibility determinations of an initial fact finder are entitled to considerable weight." Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 n.21 (citing Laurie Jones Canady, 54 S.E.C. 65, 78 n.23 (1999) (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993)), petition denied, 230 F.3d 362 (D.C. Cir. 2000)), petition denied, 209 Fed. Appx. 6 (2d Cir. 2006) (unpublished).

Williams's checking account, for which Audifferen had the account number. The next day, Audifferen submitted Williams's \$7,000 check, which he had held for over two weeks, as payment for the EUNI shares. This evidence, along with Williams's testimony, supports a finding that Audifferen improperly extended credit to Williams by depositing \$7,000 into Williams's checking account to cover the payment for the EUNI purchase.

"Free Riding" NASD Rule 2520(f)(9) prohibits "free riding" in cash accounts. "Free riding" occurs where a purchaser buys a security, expecting to pay for the security through its sale before payment is due. 13/ In a "free riding" transaction, the customer essentially borrows the funds to purchase the security when the member firm purchases the security on behalf of the customer before receiving payment, and, as a result, the firm extends credit impermissibly. 14/

Audifferen's purchase and sale of 3,000 shares of MXIP violated the prohibition on "free riding" in NASD Rule 2520(f)(9). Audifferen executed the purchase and sale of these shares without Williams's knowledge. Williams never paid for these shares, and Audifferen sold the stock to cover the purchase price. The sales generated a profit of \$13,287.45.

On the same day that Audifferen sold the MXIP shares to cover the purchase price, he deposited Williams's personal check, which he had filled out in the amount of \$61,105, into her May Davis account. Williams's account had insufficient funds to cover the check, and Audifferen had no basis to believe that Williams had the funds to cover that check. By depositing the insufficient funds check on the same day that he sold the shares, Audifferen created the appearance that Williams had paid for the shares when, in fact, he sold the stock to cover the purchase price.

Audifferen disputes FINRA's finding that he filled out Williams's blank check in the amount of \$61,105 for the MXIP purchase. Audifferen argues that, pursuant to the Federal Rules of Evidence, FINRA could only establish that Audifferen's handwriting was on the check through the testimony of a handwriting expert. Although Audifferen acknowledges that the Federal Rules of Evidence do not apply in FINRA disciplinary proceedings, 15/ he suggests that the failure to apply those Rules here constitutes a violation of due process.

Audifferen's argument is unpersuasive. Williams testified that she was familiar with Audifferen's handwriting based on their two-year relationship and identified the handwriting on the \$61,105 check as that of Audifferen. The record contains numerous acknowledged and

13/ Prime Investors, Inc., 53 S.E.C. 1, 3-4 (1997).

14/ John Thomas Gabriel, 51 S.E.C. 1285, 1288 (1994), aff'd, 60 F.3d 812 (2d Cir. 1995) (Table).

15/ NASD Rule 9145(a) states, "The formal rules of evidence shall not apply in [a FINRA disciplinary proceeding]."

authenticated specimens of Audifferen's handwriting on checks and other documents. 16/ The FINRA Hearing Panel properly compared the handwriting on the \$61,105 check with those samples and found marked similarities. 17/ Based on our independent review of the record, we find no reason to overturn FINRA's conclusion.

In any event, Audifferen acknowledges that he was responsible for effecting all of the transactions in Williams's account at issue here. Thus, even were we to accept Audifferen's arguments that he did not complete the information on the \$61,105 check (which we do not), Audifferen purchased securities for Williams's account when he had no basis to believe that she had the funds to pay for the purchase. Shortly thereafter, he sold those securities to cover the purchase price and, in so doing, violated the prohibition against "free riding" in FINRA Rule 2520(f)(9).

Beneficial Use of Credit Extensions Exchange Act Section 7(f) prohibits registered persons from obtaining, receiving, or enjoying the beneficial use of an extension of credit for the purpose of purchasing securities unless the credit extension complies with Regulation T. 18/ Audifferen sold the EUNI and MXIP stock that he had purchased without Williams's knowledge or consent, using impermissible extensions of credit, for a profit of \$15,987. Audifferen then transferred funds from Williams's May Davis account into her checking account without her knowledge. Next, Audifferen attempted to transfer funds from Williams's checking account into his checking account, and when Williams refused to permit the transfer, he deposited into his checking account one of the signed, otherwise blank checks that Williams had given him. When that check was returned for insufficient funds, Audifferen importuned Williams for the next week until, on March 17, 2000, she agreed to wire \$17,500 from her checking account into Audifferen's checking account.

The proceeds from Audifferen's sales of EUNI and MXIP securities from Williams's May Davis account constituted the majority of the trading profits in that account. 19/ Audifferen

16/ In addition, the \$61,105 check was the check in Williams's checking account sequence immediately following the March 9, 2000 check for \$17,500 made out to Audifferen. This fact corroborates Williams's testimony that she provided the two blank, signed checks to Audifferen.

17/ See Daniel D. Manoff, 55 S.E.C. 1155, 1165 (2002) (holding that a handwriting expert was not necessary to authenticate a signature and that the Hearing Panel properly compared the actual signature with the purported signature and concluded they were not the same).

18/ 15 U.S.C. § 78g(f).

19/ The record indicates that Audifferen executed additional trades in Williams's account
(continued...)

purchased those securities by obtaining impermissible credit extensions and by “free riding” in Williams’s May Davis account. Accordingly, Audifferen’s receipt of those profits constitutes beneficial use of the impermissible credit extensions in violation of Exchange Act Section 7(f).

Profit Sharing NASD Rule 2330(f), as it read at the time of the transactions at issue here, restricted registered representatives from sharing directly or indirectly in the profits or losses in a customer’s account unless the representative received prior written authorization from the member firm carrying the account, and shared in the profits or losses only in direct proportion to the financial contribution that the representative made to the account. It is undisputed that Audifferen did not have permission from May Davis to share in the profits or losses in Williams’s account. Thus, by transferring trading profits from Williams’s May Davis account to her checking account and then demanding and receiving those funds, Audifferen impermissibly shared in the profits of Williams’s May Davis account.

Audifferen has argued at various points in this proceeding that Williams’s transfer of \$17,500 into his checking account constituted a repayment by Williams of an earlier cash gift or of an undocumented personal loan. As FINRA points out, Audifferen’s description of the transaction has been inconsistent; at the hearing, he described it as a gift, but later he described it as a loan. In addition, Audifferen provides no documentation to support the existence of a loan, and Williams testified credibly that Audifferen never gave or lent her any money. In any event, even if we were to accept Audifferen’s argument that the \$17,500 wire transfer from Williams was the repayment of an earlier loan, Audifferen admits that “the [\$17,500] payment was a means of giving [Audifferen] his share of a profitable trade.” Audifferen did not have authorization from May Davis to share in Williams’s profits and, thus, he was prohibited from doing so regardless of whether he characterizes those profits as a return of a gift or a repayment of a loan.

Willfulness In order to make a finding of willful conduct, we must find that Audifferen voluntarily committed the act that constitutes the violation, not that Audifferen was aware that he was violating a rule or that he acted with a culpable state of mind. 20/ The evidence shows that

19/ (...continued)
other than the EUNI and MXIP trades, but FINRA did not charge Audifferen with violations related to the other trades.

20/ Wonsover v. SEC, 205 F.3d 408, 413 (D.C. Cir. 2000). The cases Audifferen cites to support his claim that he did not willfully commit the violations in question are inapposite. In Buchman v. SEC, 553 F.2d 816 (2d Cir. 1977), the court vacated a Commission finding of willful violations of NASD Rules of Fair Practice based on a finding that the respondent’s conduct was “justified by confusion as to the true state of the market and as to the applicable law.” Here, Audifferen acknowledged that he understood Regulation T and other applicable provisions. Audifferen also relies on SEC
(continued...)

Audifferen voluntarily committed the acts that constitute the violations at issue in this proceeding. Audifferen executed the trades at issue (both purchases and sales) in Williams's May Davis account. With respect to the EUNI purchase, Audifferen personally deposited \$7,000 into Williams's checking account in order to pay for the purchase. With respect to the MXIP purchase and sale, Audifferen ordered the sale of the shares before May Davis had received any payment for their purchase and filled in and deposited the blank check Williams had provided him in the amount of \$61,105, purportedly to pay for the purchase. The evidence also shows that Audifferen induced Williams to transfer the proceeds of the EUNI and MXIP trades from her checking account to him. Audifferen was aware of what he was doing and was not coerced when he committed each of the acts constituting the violations. Thus, this evidence establishes that Audifferen acted willfully.

Audifferen claims that he did not act willfully because he believed that Williams would pay for the securities purchases he made in her May Davis account. This claim is undermined by the evidence. Audifferen consistently concealed the transactions from Williams, not informing her when he bought or sold stock in her account and providing evasive responses when she questioned him after receiving her account statement. Moreover, although not required to establish that Audifferen acted willfully, the evidence shows that Audifferen knew or should have known that Williams could not pay for the transactions he executed in her account within the required Regulation T period because she bounced the first \$5,000 check used to fund the account and she told Audifferen that she could not cover the \$7,000 check she gave him in January 2000. As a result, Audifferen also knew or should have known that he and May Davis would have to extend credit to Williams or permit her to "free ride" in order to complete the transactions. Therefore, even under a higher standard than mere willfulness, the evidence would support our findings of violations.

III.

Audifferen's May Davis Accounts

A. As noted above, Audifferen maintained both cash and margin accounts at May Davis. In April and May 2000, Audifferen deposited three checks (for a total of \$50,000) from his checking account into his May Davis cash and margin accounts to pay for securities purchases or to fund margin deposits. Two of the checks were for purchases in Audifferen's cash account, and the third check was for purchases in his margin account. Each check was returned for insufficient funds. Audifferen never provided the funds necessary to cover the bounced checks,

20/ (...continued)

v. Frank, 388 F.2d 486 (2d Cir. 1968), a case in which willfulness was not at issue, apparently in support of his argument that "an objective consideration of the complete context and all the necessary and relevant facts" would show that he did not act willfully. Our independent review of the record has included such a consideration, and we find that the record evidence supports FINRA's finding that Audifferen acted willfully.

and all of these stock purchases went unpaid. Pursuant to its clearing agreement with Cowen, May Davis was responsible for paying Cowen for these purchases. May Davis eventually sold the shares from Audifferen's margin account at a loss of \$8,362 and cancelled the trades in his cash account. May Davis suffered the loss on the sale of the shares and did not impose it on Audifferen.

Although Audifferen wrote these three checks with a total value of \$50,000, his bank statement for the period from March 16 to April 17, 2000 shows that Audifferen had only \$22,252.28 in his checking account and nothing in his savings account. His statement for the period from April 18 to May 15, 2000 states that Audifferen had only \$5,116.49 in his checking account and nothing in his savings account. In addition, May Davis's records indicate that Audifferen's income from his employment at the firm, which Audifferen testified was his sole source of income, was uneven and relatively low during the months preceding his submission of the checks in question. Further, in February 2000, Audifferen requested a pay advance from May Davis in the amount of \$21,400, citing financial "hardship" as the reason. Additionally, during the period from October 18, 1999 to July 18, 2000, Audifferen's bank account statements show seventeen returned checks, including the checks mentioned above. The record also indicates that, during the months prior to April and May 2000, Audifferen bounced checks in the May Davis accounts of his mother, over which Audifferen acknowledged having control.

B. Exchange Act Section 7(f), as discussed above, prohibits registered persons from enjoying the beneficial use of an improper extension of credit under Regulation T. Under Section 3(b) of Federal Reserve Board Regulation X, 21/ borrowers are prohibited from willfully causing broker-dealers to extend credit outside the parameters set forth in Regulation T. Section 220.8 of Regulation T, as discussed above, applies to cash brokerage accounts and prohibits broker-dealers from impermissibly extending credit to such accounts. Sections 220.4 and 220.12 of Regulation T apply to margin accounts and require that the borrower make a deposit of fifty percent of the security at issue in order to execute a purchase on margin. 22/

Audifferen violated these provisions when he deposited three separate insufficient funds checks into his May Davis accounts in April and May 2000. Audifferen acknowledges that all three checks bounced, that he never paid for the purchases made in his accounts, and that May Davis ultimately was responsible to Cowen for the cost of the purchases pursuant to the terms of its clearing agreement. By purporting to pay for stock purchases in his account with insufficient funds checks, Audifferen caused May Davis to extend credit in violation of Sections 220.8 of Regulation T with respect to Audifferen's cash account and in violation of Sections 220.4 and 220.12 of Regulation T with respect to his margin account. Audifferen violated Regulation X by willfully causing May Davis to extend credit outside the parameters set forth in Regulation T.

21/ 12 C.F.R. § 224.

22/ 12 C.F.R. §§ 220.4 and 220.12.

May Davis ultimately sold the shares that Audifferen “purchased” in his margin account at a loss. By causing May Davis to extend credit improperly to him, Audifferen was able to enjoy the potential of profiting from the purchase if the price of the shares increased without incurring any of the risk of loss if the share price decreased (as it ultimately did in this case). Thus, through this short-term ownership without risk of loss, Audifferen also violated Exchange Act Section 7(f) by obtaining the beneficial use of May Davis’s improper extension of credit.

Each of the violations in Audifferen’s May Davis accounts was willful. Audifferen knew that he was in a precarious financial situation. He had bounced a number of checks in the months prior to the transactions at issue here, and he had requested a pay advance from May Davis in February 2000, citing financial hardship as the reason. In addition, May Davis’s commission statements indicate that Audifferen’s income was erratic and likely insufficient to permit him to cover the checks at issue. Audifferen’s bank account statements from the months prior to the bounced checks indicate that he lacked sufficient funds to cover those checks. All of the evidence supports a finding that Audifferen knew that the checks he submitted to May Davis would bounce and that his brokerage accounts would have insufficient funds to cover the cost of the securities purchases. These facts are sufficient to establish willfulness.

Audifferen argues that the operations department at May Davis failed to inform him in a timely manner of the returned checks, and that neither May Davis nor Cowen made any effort to obtain a Regulation T extension. However, Audifferen was responsible for ensuring that his bank account contained sufficient funds to cover his stock purchases from his member firm. ^{23/} In addition, although knowledge and awareness of Regulation T is not necessary to establish that Audifferen acted willfully, Audifferen testified that he was familiar with Regulation T, and was aware of his obligation to pay for the securities he purchased in his May Davis accounts, a fact that further supports our finding that Audifferen was aware of what he was doing. He cannot shift the blame for his violations to his firm. ^{24/}

IV.

Audifferen’s J.P. Turner Form U4

A. On July 28, 2000, Audifferen resigned from his position with May Davis. From August 2000 through May 2001, Audifferen was associated with FINRA member firm Investec Ernst & Company (“Investec”). On April 17, 2001, Sandra Gabriele, an Investec customer, sent a letter to Investec alleging “misrepresentation and inappropriate conduct by [Audifferen]” and

^{23/} Cf. John F. Lebens, 52 S.E.C. 606, 608, 611 (1996) (holding that it is unethical for a registered person to take advantage of loose internal controls at his firm by purchasing securities when there are insufficient funds in the registered person’s account to pay for such securities).

^{24/} See, e.g., Prime Investors, 53 S.E.C. at 5-6 n.13.

complaining that Audifferen had fraudulently filled out Gabriele's options agreement and new account form and had engaged in unauthorized trading in her account. Gabriele did not specify the amount of damages she sought. On April 26, 2001, Audifferen denied Gabriele's claims in a letter he wrote to Investec's then-branch director of compliance.

On May 11, 2001, Gabriele sent a letter to the Commission's New York Regional Office in which she again set forth her complaints regarding Audifferen's conduct. The May 11 letter did not specify the damages that Gabriele claimed. On August 17, 2001, FINRA (then NASD) sent Audifferen a letter requesting a response to Gabriele's May 11 letter. On September 4, 2001, Audifferen sent a letter to FINRA denying all of the claims raised in Gabriele's complaint.

On September 5, 2001, Audifferen applied for a position with JPT, which agreed to hire him as a registered representative. In order to expedite Audifferen's registration, JPT downloaded a Form U4 that he had provided to a prior employer from the Central Registration Depository, directed Audifferen to review the Form U4 and update it as necessary, and then sign the Form U4 and return it to JPT.

Question number 23I on the Form U4 asked whether, within the prior twenty-four months, the applicant had been the subject of an investment-related, consumer-initiated, written complaint that alleged a sales practice abuse and claimed damages of \$5,000 or greater. The question stated that, if no damage amount was alleged in the written complaint, the complaint must be reported unless the member firm has made a good faith determination that the damages from the alleged misconduct would be less than \$5,000. Audifferen answered "no" to Question 23I, signed the Form U4, and submitted it to JPT.

JPT learned of Gabriele's complaint in October 2001 when Investec submitted an updated Uniform Termination Notice for Securities Industry Registration ("Form U5") for Audifferen, which included information about the complaint. The JPT branch manager, the then-chair of JPT's ethics committee, and JPT's director of compliance at the time, all testified that JPT was unaware of Gabriele's complaint until Investec filed the revised Form U5. When the JPT branch manager asked Audifferen for an explanation of the complaint, he replied "that he wasn't aware of" it.

B. NASD Membership Rule IM-1000-1 prohibits the filing, in connection with registration as a registered representative, of information so incomplete or inaccurate as to be misleading. Form U4 is used by FINRA and other self-regulatory organizations to determine the fitness of

applicants for registration as securities professionals. 25/ Consequently, the candor and forthrightness of applicants is critical to the effectiveness of the screening process. 26/

It is undisputed that Audifferen signed and submitted a Form U4 in connection with his registration with JPT that failed to include Gabriele's complaint, even though Question 23I on the Form U4 instructed the applicant to disclose such complaints. In so doing, Audifferen violated NASD Rule IM-1000-1. Audifferen contends that, although he was aware of Gabriele's letters to Investec and to the Commission's New York office at the time he signed the Form U4, he believed that the letters were not complaints. 27/ However, the letters state that Audifferen engaged in unauthorized trading in Gabriele's account and that Audifferen filled in incorrect information on her options and new account agreements after Gabriele had signed them. We find that both of Gabriele's letters were written complaints and that a reasonable person would have understood them to be complaints within the meaning of Form U4.

Audifferen next argues that the complaint did not claim damages of \$5,000 or more. Although neither of Gabriele's letters specifies a damage amount, Form U4 states that, if no damage amount is specified, the complaint must be reported on Form U4 unless the firm has made a "good faith determination that the damages from the alleged conduct would be less than \$5,000." Audifferen has offered no evidence that Investec had made any such determination at the time he submitted the Form U4. In fact, when Investec ultimately submitted its revised Form U5 for Audifferen in October 2001, it listed Gabriele's alleged damages at \$10,119.

Audifferen also claims that he provided information about Gabriele's complaint to JPT, but that JPT lost the information. Audifferen presents no evidence to support this assertion. Moreover, three JPT officials testified that they received no information from Audifferen about the complaint and that they learned of it only when Investec updated its Form U5 for Audifferen. Further undermining Audifferen's claim that he disclosed the complaint to JPT, Audifferen's

25/ See, e.g., Daniel Richard Howard, 55 S.E.C. 1096, 1101 (2002), aff'd, 77 F. App'x 2 (1st Cir. 2003) (unpublished); Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996); Thomas R. Alton, 52 S.E.C. 380, 382 (1995), aff'd, 105 F.3d 664 (9th Cir. 1996) (Table).

26/ Guang Lu, Exchange Act Rel. No. 51047 (Jan. 14, 2005), 84 SEC Docket 2639, 2648, aff'd, 179 F. App'x 702 (D.C. Cir. 2006).

27/ In support of this claim, Audifferen cites the testimony of Investec's branch compliance director in response to a question about when Investec began to investigate Gabriele's complaint. The testimony indicates that Investec may have begun its investigation when Gabriele visited Investec's office and made oral requests for documents related to her account prior to submitting the letters. Nothing in the testimony Audifferen cites, however, indicates that Investec did not consider the letter to be a complaint.

branch manager testified that when he first questioned Audifferen about Gabriele's complaint, Audifferen stated that he was unaware of it. 28/

* *

We find that Audifferen willfully caused or committed violations of Section 220.8 of Regulation T, Exchange Act Sections 7(c), (d), and (f), and NASD Rules 2520(f)(9) and 2330(f) in connection with Williams's May Davis account. We also find that Audifferen willfully caused or committed violations of Sections 220.4, 220.8, and 220.12 of Regulation T, Section 3(b) of Regulation X, and Exchange Act Section 7(f) in connection with his own May Davis accounts. We further find that Audifferen violated NASD Membership Rule IM-1000-1 in connection with the Form U4 he filed with JPT. Each of these violations also constitutes a violation of NASD Rule 2110. 29/

V.

Audifferen's Procedural and Fairness Arguments

Audifferen argues that FINRA conducted the proceeding against him unfairly. He contends that: 1) witnesses who were associated with FINRA member firms were intimidated by warnings about their duty to testify truthfully; 2) the FINRA Hearing Panel improperly required the parties to discuss sanctions during the hearing before making any findings of violation; 3) the Hearing Officer acted as an advocate for FINRA's position during the hearing; 4) the Hearing Panel improperly considered evidence related to Audifferen's personal relationship with Williams; and 5) the entire proceeding was "fundamentally unfair."

Alleged Witness Intimidation Audifferen complains that counsel for FINRA Enforcement intimidated the registered individuals who testified at Audifferen's hearing when he reminded them of their obligations to testify truthfully. NASD Rule 9262 states that a person who is subject to the jurisdiction of FINRA shall testify under oath in any FINRA proceeding, and it is critical to the efficacy of NASD Rule 8210 that registered individuals who testify in FINRA disciplinary proceedings pursuant to Rule 8210 do so truthfully. Eight registered individuals testified before the FINRA Hearing Panel in this proceeding, two called by

28/ As discussed above, Audifferen responded to Gabriele's complaint in a letter to Investec dated April 26, 2001, which is inconsistent with his statement to his branch manager that he was unaware of the complaint.

29/ A violation of any Commission or NASD rule or regulation constitutes a violation of NASD Rule 2110, which requires member firms to conduct their business in accordance with just and equitable principles of trade. Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999). NASD Rule 0115 applies all such standards to associated persons as well as member firms.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58230 / July 25, 2008
Admin. Proc. File No. 3-12892

In the Matter of the Application of

JOHN D. AUDIFFEREN
c/o Norman B. Arnoff, Esq.
Burkhart, Wexler & Hirschberg, LLP
585 Stewart Avenue, Suite 750
Garden City, NY 11530

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 findings of violation and imposition of sanctions by FINRA against John D. Audifferen be, and FINRA's assessment of costs be, and they hereby are, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary