BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Wendell D. Belden, Tulsa, OK, Respondent.	DECISION Complaint No. C05010012 Dated: August 13, 2002

Respondent made an unsuitable recommendation to a customer in violation of Conduct Rules 2110 and 2310. Respondent was fined $40,000, suspended in all capacities for 90 days, ordered to pay $55,567.03 plus interest in restitution, ordered to requalify as a principal by examination, and assessed costs. Held, findings affirmed, sanctions modified and appeal costs imposed.

Appearances

For the Complainant Department of Enforcement: Mark P. Dauer, Esq., and Mitchell C. Atkins, NASD Department of Enforcement.

For the Respondent Wendell D. Belden: Steven Hunt, Esq., Southmark, Inc.

I. Introduction

Wendell D. Belden ("Belden") has appealed a November 12, 2001 decision of a Hearing Panel pursuant to NASD Procedural Rule 9311. After reviewing the entire record in this matter, we affirm the Hearing Panel's findings that Belden violated NASD Conduct Rules 2110 and 2310 by making an unsuitable recommendation to a customer. We order that Belden be suspended from association with any NASD member in all capacities for one year, be fined $40,000, pay restitution of $55,567.03 and hearing costs, and requalify as a principal by examination. Finally, we order Belden to pay transcript fees of $339.90 and appeal costs of $1,000.

II. Background

Belden first became an associated person in 1987. During the time of the alleged violations, Belden was registered as an investment company products/variable contracts limited representative (Series 6) and an investment company products/variable contracts limited principal (Series 26) with Southmark, Inc. ("Southmark"), an NASD member firm. Belden is currently registered with Southmark and he is its sole owner.

III. Factual and Procedural History

The central issue in this case is whether Belden recommended an unsuitable transaction in the account of a customer. In determining whether Belden made an unsuitable recommendation, we must first examine the facts that led Belden to place Customer J ("J") in Class B mutual fund shares ("Class B shares") and then examine whether the financial advantages of Class A mutual fund shares ("Class A shares"), if any, required Belden to recommend Class A shares to J.

A. Belden's Investment of J's Savings in Class B Shares

In mid-1997, J approached Belden about investing J's retirement savings of approximately $2.1 million. J was a retired airline pilot who was interested in long-term growth investment opportunities. Over the course of a few weeks, Belden met with J regularly and discussed the advantages and disadvantages of diversifying among five different mutual funds with two fund families as opposed to purchasing just one fund. As a result of these discussions, Belden made the following sales to J in July 1997:

MFS Emerging Growth Fund B	$495,000.00
MFS Research Fund B	310,000.00
MFS Mass. Investors Growth Stock Fund B	495,000.00
Van Kampen Amer. Capital Enterprise Fund B	495,189.45
Van Kampen Amer. Capital Pace Fund B	310,000.00
Total	$2,105,189.45

Southmark received a four percent commission on the purchases, including $52,000 on J's purchase of MFS Class B shares, and $32,207.85 on the purchase of Van Kampen Fund Class B shares. MFS Class B shares were subject to a Contingent Deferred Sales Charge ("CDSC") of four percent in the first and second years after purchase, three percent in the third and fourth years, two percent in the fifth year, one percent in the sixth year, and none thereafter. Van Kampen Class B shares were subject to a CDSC of five percent in the first year after purchase, four percent in the second year, three percent in the third year, two and one-half percent in the fourth year, one and one-half percent in the fifth year, and none thereafter.

Through a relationship that Southmark had established, many Southmark customers received investment advisory services from an investment management firm run by D. J. Kadagian ("Kadagian"), named Four Seasons Asset Management ("Four Seasons"). Kadagian operated a mutual fund timing service under which he periodically exchanged a customer's investments between equity mutual funds and money market mutual funds. Under an agreement with Southmark, Four Seasons used only two funds for Southmark's customers – the Van Kampen Enterprise Fund and a Van Kampen money market fund. At Belden's suggestion, J signed a mutual fund timing agreement with Four Seasons. Unlike his arrangements with other Southmark customers, however, Kadagian agreed to manage all five of J's mutual funds.[1] Kadagian received no commissions on the sales of the funds.[2] Four Seasons received a fee of two percent of the account value per year for its management of the account.

J also discussed the transactions with Scott Pilgrim ("Pilgrim"), an employee at Southmark who served as the point of contact between Southmark and Kadagian.[3] Pilgrim did not discuss J's investment options for his retirement account with J because, according to Belden, Pilgrim did not have enough experience to render investment advice to customers.[4] Rather, Pilgrim would set up the timing and mechanics of the transfer of funds.

In discussing J's transaction with Pilgrim, Kadagian told Pilgrim that an investment as large as J's should be placed in Class A shares rather than in Class B shares as Belden had proposed. At the inception of the business relationship between Southmark and Four Seasons, Kadagian had advised Belden to use Class A shares for all of Belden's accounts.

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1 To facilitate Kadagian's management of the mutual funds, J established a trust account and he transferred his retirement funds into the trust account. The trust account custodian submitted applications to open the mutual fund accounts. These applications designated Southmark as the broker-dealer for the account.

2 J was also interested in selling to other airline pilots the managed account program that Southmark had with Four Seasons. To that end, J negotiated an employment agreement with Southmark and began studying for NASD's Series 6 examination. J passed the Series 6 examination and was employed in that capacity with Southmark from August 1997 to April 1998. According to Belden, J, as an employee of Southmark, also hoped to receive $42,000 in commissions on his own account.

3 In June 1996, Pilgrim, who was a C.P.A., began work with Southmark as an accountant, handling personal and corporate accounting and tax matters. In April 1997, Pilgrim became the president of Southmark. While Pilgrim was with Southmark, he was registered as an investment company products/variable contracts limited representative (Series 6), and an investment company products/variable contracts limited principal (Series 26). He was paid a salary at Southmark; he did not sell securities to customers, nor did he receive any commissions.

4 Belden referred to the relationship between Pilgrim and J as "the blind leading the blind."

Kadagian testified that he preferred to purchase Class A shares for several reasons. He stated that it was his normal practice to use Class A shares because, although they generally had initial sales charges, they had lower internal expenses and did not cause the investor to incur a CDSC when the shares were sold. Kadagian was particularly concerned about the CDSC because, as a market timer who continually switched his clients in and out of funds, he knew that clients could be forced out of a specific mutual fund, or family of funds, should those funds decide to end their relationships with market timers. Any client forced out of a Class B mutual fund would have to pay the CDSC, which varied with the number of years the client had been in the fund. In fact, in June or July 2000, Van Kampen terminated its relationship with Four Seasons and Belden's clients were forced out of Van Kampen funds for that reason.

Kadagian also testified that he favored Class A shares because his large volume of business with certain mutual funds had given him rights-of-accumulation privileges, and therefore he could offer Class A shares to all his clients without a front-end load, regardless of the amount of the initial investment. Finally, Kadagian did not like to use Class B shares because he aggregated accounts to move them simultaneously between the mutual funds and money market funds. If one client elected to sell shares of a Class B mutual fund, then that client would incur a CDSC, and because Kadagian aggregated accounts, it would be difficult for him to identify properly the account and impose the applicable charge.

Notwithstanding Kadagian's concerns about Class B shares, Belden's policy was to place all of his clients who invested through Kadagian and Four Seasons in Class B shares, rather than in Class A shares.[5] Belden admitted that Class B shares generally have higher internal expenses and trade at lower net asset values than Class A shares. Nevertheless, Belden believed that he could not stay in business without getting the higher commission fees that Class B shares paid him.

As to J's investment, Belden intentionally placed J in Class B shares and structured the order to avoid the fund distributors' $500,000 limits on the size of Class B orders.[6] Belden placed J in Class B shares because he perceived a need to make high commissions to offset what he considered low commissions received from smaller accounts. Belden testified:

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[5] Belden testified that it was his policy to use only Class B shares because Southmark did not deal with any programs that earned less than eight percent. Therefore, he believed that it was better for his customers to keep the funds invested rather than pay an upfront sales load. Kadagian corroborated Belden's testimony about using only Class B shares.

[6] Many mutual fund companies request that representatives not accept orders for Class B shares in excess of a specific amount. For example, it was the policy of Van Kampen Funds, as stated in the prospectus, "not to accept any order of Class B shares in an amount of $500,000 or more because it ordinarily will be advantageous for an investor making such an investment to purchase Class A shares."

> But where my average accounts are less than a hundred thousand dollars, if I don't have some nice accounts, you know – I mean, you can say that that's, you know, that's soaking the rich to pay for the poor if you want to, but that's the way it is.
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> The rest of the rationale is, if you don't have some larger accounts, then you can't be in business to service the rest of them.

Pilgrim stated that he informed J that Belden had "cheated" J by purchasing Class B shares instead of Class A shares. J ended his involvement with Southmark, became a direct customer of Four Seasons, and, in April 1999, exchanged his Class B shares for Class A shares. In making the exchange to Class A shares, J incurred CDSCs of $84,412.58.

B. Financial Advantages of Class A Shares

J's investment in Van Kampen funds totaled $805,189.45, which was not enough to qualify for a waiver of the entire initial sales charge on a purchase of Class A shares. It was large enough, however, to reach the most favorable breakpoint for initial sales charges. For Van Kampen funds, the initial sales charge for an investment of less than $500,000 in Class A shares was 5.75 percent; on investments of more than $500,000, it was two percent. Van Kampen Funds Class A shares did not have a CDSC. J's investment in Van Kampen Funds Class B shares resulted in commissions to Southmark of $32,207.85. By comparison, the same investment in Class A shares would have resulted in commissions of $15,640.82 if Southmark had requested a cumulative purchase discount, or $18,116.76 if it had not requested the discount.

If J's funds had been invested in Class A shares of the three MFS funds, his purchases would have qualified for investment at net asset value, with no sales charge, because the total value of the investment exceeded $1 million. Jeffrey Ranahan, Vice President and Compliance Officer for MFS, testified that J's investments in the three MFS funds could have been aggregated to achieve the breakpoint for a $1 million net asset value purchase. MFS did not have a mechanism in place to monitor its policy of firmly encouraging the purchase of Class A shares by all customers who were eligible to purchase them at net asset value. Its written policy provided, however, that "orders to purchase Class B shares for investors investing $1 million or more may be rejected by [MFS]" and that any purchaser eligible to purchase shares at net asset value "should purchase Class A shares" (emphasis in original).

Belden testified that based on his reading of the MFS funds prospectuses, Class A shares could not be purchased at net asset value. He did not, however, consult with anyone at MFS to determine whether he was correctly interpreting the language of the prospectuses. J's investment in MFS Class B shares resulted in commissions to

Southmark of $52,000, while the same investment in Class A shares would have resulted in commissions totaling $13,000.

NASD staff conducted an analysis of the total internal fund expenses for J's investments in all five funds (Van Kampen and MFS), comparing the results for Class A and Class B shares over an eight-year period. The analysis demonstrated that had J's investment been placed and held in Class A shares, total expenses for all five funds would have amounted to $179,315.09. Had the investments been placed and held in Class B shares of the five funds, total expenses over the eight years would have amounted to $294,723.58.[7]

Van Kampen Investments, Inc. provided an analysis of J's investment in the Enterprise and Pace Funds from July 10, 1997 (the date of J's original investment), to April 1, 1999 (the date of J's switch to Class A shares), comparing the performance of Class A and Class B shares. The analysis assumed that the investment in Class A shares would have been net of the $16,263.78 initial sales charge, that the Four Seasons timing service was not employed, and that the Class B share value would be net of the appropriate CDSC. The analysis concluded that, at the end of the period, Class A shares would have had a value of $1,075,507.33, while Class B shares would have had a value of $1,050,744.49.

The Department of Enforcement ("Enforcement") filed the complaint in this matter on February 20, 2001, alleging that Belden made an unsuitable recommendation to J in violation of Conduct Rules 2110 and 2310. The investigation of Belden began as a result of a complaint letter dated August 11, 1998, from J.[8] In a decision dated November 12, 2001, the Hearing Panel found that Belden's recommendation that J invest in Class B shares instead of Class A shares was unsuitable.

IV. Discussion

We affirm the Hearing Panel's findings that Belden made an unsuitable recommendation to J to purchase Class B shares instead of Class A shares. We find that a registered representative's suitability obligation encompasses the requirement to minimize the sales loads that a customer pays for mutual fund shares, when consistent with the customer's investment objectives.

A. Belden's Recommendation that J Purchase Class B Shares

Conduct Rule 2310 states that "[i]n recommending to a customer the purchase, sale, or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any,

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7 At the end of eight years, any Class B shares held by J would have been converted to Class A shares, at which time the expenses would have been the same for both funds.

8 J was deceased at the time of the hearing.

disclosed by such customer as to his other security holdings and as to his financial situation and needs." A violation of NASD's suitability rule is also a violation of Conduct Rule 2110 which requires members to observe high standards of commercial honor and just and equitable principles of trade. See, e.g., Larry Ira Klein, 52 S.E.C. 1030, 1031 (1996) (general securities representative who made unsuitable recommendations did not adhere to rule requiring "high standards of commercial honor and just and equitable principles of trade.").

We begin by determining whether Belden recommended Class B shares to J. We find that he did. We reject Belden's argument that he first recommended to J the purchase of Class A shares and that J rejected this proposal. This argument is not supported by the record and is not consistent with Belden's other statements. First, J stated in his complaint letter that Belden told him that Belden only purchased Class B shares. This is corroborated by Belden's own statement that he never purchased Class A shares and that it was his policy to place customers in Class B shares. In addition, Belden maintained throughout the hearing that Class B shares outperformed Class A shares, which further indicates that he would not have recommended Class A shares. Accordingly, we find that Belden recommended Class B shares. Belden therefore had an obligation to determine that the purchase of Class B shares was suitable for J.

We find that Belden's recommendation to J to purchase Class B shares instead of Class A shares was unsuitable. NASD has long held that a registered representative has an obligation to avoid increasing the costs that his or her customers pay. In Harold R. Fenocchio, 46 S.E.C. 279 (1976), the SEC upheld an NASD decision in which the National Business Conduct Committee ("NBCC") found that a registered representative induced customers to trade in mutual funds and real estate securities for the purpose of generating commissions. In addition, the registered representative failed to execute a letter of intent and failed to ensure that customers received rights of accumulation. Id. at 282. As a result, the customers did not receive sales load discounts. Id. The SEC affirmed the NBCC's conclusion that Fenocchio violated just and equitable principles of trade. Id. at 283.

In District Bus. Conduct Comm. v. Den Herder, Complaint No. C3B950031, 1997 NASD Discip. LEXIS 18 (NBCC), aff'd, 53 S.E.C. 329 (1997), the NBCC found that a registered representative violated the suitability rule when he recommended the purchase of mutual fund shares without having reasonable grounds for believing that such transactions were suitable for the customer in light of the customer's ability to purchase funds with similar investment objectives within the mutual fund families without incurring a sales charge. Id. at *8-9. Instead, the respondent recommended mutual funds that caused the customer to incur a sales charge of $2,549.41. Id. at *4. In addition, the respondent recommended the purchase of mutual fund shares without securing the customer breakpoint discounts or other discounts through a letter of intent. Id. The NBCC found that the registered representative violated the suitability rule. Id. at *8-9.

We find that Belden made an unsuitable recommendation to his customer. J's purchase of Class B shares, instead of Class A shares, resulted in significantly higher commission costs, including payment of a CDSC. Belden also could have purchased Class A shares and taken advantage of breakpoint discounts, but he failed to do so. For these reasons, and because Class A shares with similar investment objectives and performance were available in the same mutual fund family, the purchase of Class B shares was unsuitable. See "Suitability Issues for Multi-Class Mutual Funds" *NASD Regulatory and Compliance Alert* (Summer 2000) ("[M]embers should not recommend Class B or C shares to investors who seek to purchase in large amounts and who would incur significantly lower sales charges for Class A share purchases due to the availability of breakpoints, rights of accumulation, or letters of intent."); see also NASD *Notice to Members* 95-80 (Sept. 1995) (reminding members that, in determining whether a fund is suitable for an investor, a member should consider the fund's expense ratio and sales charges as well as its investment objectives).

Belden argues that he did not have the expertise to deal with accounts that were the size of J's account, and that he therefore sought and relied upon the expertise of Kadagian. The Hearing Panel, however, found that Kadagian always recommended the purchase of Class A shares. Kadagian testified that it was his normal practice to recommend Class A shares because, although they generally had initial sales charges, they had lower internal expenses and did not charge a CDSC when the shares were sold. Kadagian testified that he only agreed to manage Class B shares for this account because it was Belden's preference to use Class B shares. We thus find Belden's claim of reliance on Kadagian unpersuasive.[9]

Belden further argues that the initial sales charge on Class A shares would offset the higher operating costs of the Class B shares. In support of this proposition, Belden submitted a quick calculation of the earnings, which he generated during a break in the Hearing Panel proceeding. This "quick calculation," however, is flawed. His calculation

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[9] Moreover, even if Kadagian had recommended the purchase of Class B shares, it would not absolve Belden of responsibility to comply with the suitability rule. Representatives are responsible for conducting their own reasonable investigations and for their representations as to the safety or soundness of a security. See Hanley v. SEC, 415 F.2d 589, 597 (2d Cir. 1969) ("By [a salesman's] recommendation he implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on that investigation."). The NAC has held that "[i]t is well-established that the suitability rule requires an associated person to make an independent determination whether an investment is suitable for a particular customer, taking into account the customer's investment objectives and financial needs." District Bus. Conduct Comm. v. Cruz, Complaint No. C8A930048, 1997 NASD Discip. LEXIS 62, at *34-35 (NAC Oct. 31, 1997). Belden's purported lack of expertise does not remove his liability because "[i]nexperience does not excuse a registered representative's duty to his clients." SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992).

assumes an inappropriately high growth rate over the entire time of the holding and does not apply the CDSC, apparently assuming it would never be incurred.[10]

In sum, we find that the preponderance of the evidence supports the Hearing Panel's finding that Belden did not have a reasonable basis for recommending that J purchase Class B shares instead of Class A shares. We therefore affirm the Hearing Panel's finding that such conduct constituted a violation of Conduct Rules 2110 and 2310.

B. Procedural Arguments

On appeal, Belden argues that the Hearing Panel did not use the correct burden of proof. In addition, Belden argues that his Fifth Amendment right to due process was violated by the Hearing Panel's consideration of hearsay evidence and by Pilgrim's refusal to answer certain questions during his testimony.

1. Burden of Proof

Belden argues that the Hearing Panel did not use the correct burden of proof. According to Belden, the Hearing Panel should have applied the "clear and convincing" standard of proof to the evidence in this case. Specifically, he states that this standard of proof is used when a government agency seeks to take the "license and livelihood of a person." This argument is without merit. First, NASD is not a governmental agency. See Desiderio v. National Ass'n of Sec. Dealers, 191 F.3d 198, 206 (2d. Cir 1999) ("NASD is a private actor, not a state actor."); Marchiano v. National Ass'n of Sec. Dealers, 134 F. Supp.2d 90, 95 (D.D.C. 2001); William P. Lincoln, 53 S.E.C. 452, 462-63 (1998); Herbert Garrett Frey, 53 S.E.C. 146, 153 n.17 (1997). Second, the United States Supreme Court has held that in SEC disciplinary proceedings, the correct standard of proof is the preponderance of the evidence. See Stedman v. SEC, 450 U.S. 91, 96 (1981). The same standard of proof is used in NASD disciplinary decisions. See Wall Street West, Inc. v. SEC, 718 F.2d 973, 974 (10th Cir. 1983); Seaton v. SEC, 670 F.2d 309, 311 (D.C. Cir. 1982); Ernest A. Cipriani, Jr., 51 S.E.C. 1004, 1006 (1994). Therefore, the Hearing Panel correctly applied the preponderance of the evidence standard of proof.

2. Reliability

Belden argues that the Hearing Panel should have disregarded Pilgrim's testimony because he refused to answer certain questions. Belden contends that NASD therefore

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[10] Belden assumed a growth rate of 23.45 percent per year. According to Belden, this rate was taken from Kadagian's historic performance record for his asset management program. Kadagian, however, only used Class A shares, and the performance record was only for returns within the program over the last four to five years. It is improper to assume that the rate of return on Class A shares and Class B shares would be the same. In addition, the performance record used was only over a short period of time.

violated his right to due process. Constitutional standards, however, only apply to state actors. See Otto v. SEC, 253 F.3d 960, 965 (7th Cir. 2001). As discussed above, the NASD is not a governmental agency or a state actor and constitutional standards therefore do not apply. See Desiderio, 191 F.3d at 206; Marchiano, 134 F. Supp.2d at 95; Datek Sec. Corp. v. National Ass'n of Sec. Dealers, 875 F. Supp. 230, 233 (S.D.N.Y. 1995) ("[T]he NASD is a private corporation not subject to the strictures of the Constitution.").

Belden is nonetheless entitled to certain procedural safeguards. Section 15A(h)(1) of the Securities Exchange Act of 1934 requires that NASD "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." These procedural safeguards were met. The Hearing Panel judged the credibility of Pilgrim's testimony and the "credibility determination of the initial decision maker is entitled to considerable weight and deference, since it is based on hearing the witnesses' testimony and observing their demeanor." Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992). Moreover, the Hearing Panel stated that it did not make any findings of fact based exclusively on Pilgrim's testimony.[11] We therefore see no reason to disturb the Hearing Panel's credibility determination.

3. Hearsay

Belden argues that because J's statements were hearsay, the Hearing Panel's consideration of them denied Belden due process. J was deceased at the time of the hearing.

It is well established that "hearsay evidence is admissible in administrative proceedings if it is relevant and material." SEC v. Otto, 253 F.3d 960, 966 (7th Cir. 2001); Dillon Securities, Inc., 51 S.E.C. 142, 150 (1992). Procedural Rule 9263 codifies this precedent by stating that the "Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." In sum, hearsay evidence is admissible and can be relied upon if it is probative and reliable and the use of the testimony is fair. See Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980). According to the SEC, the following factors must be considered: possible bias of the declarant; the type of hearsay involved; whether the statements are signed and sworn rather than anonymous, oral or unsworn; whether the statements are contradicted by direct testimony; whether the declarant was available to testify; and whether the hearsay is corroborated. See Charles D. Tom, 50 S.E.C. 1142, 1145 (1992).

Belden argues that J was biased because he and Pilgrim were starting a competing business. J's statements in his complaint letter, however, were corroborated by other evidence, including testimony by Pilgrim and Kadagian. In addition, Belden

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11 We recognize the possibility that Pilgrim was motivated by spite. Belden's lawsuit against Pilgrim and J alleges that Pilgrim and J attempted to set up a business to compete with Belden. As a result, Belden argues that Pilgrim was biased.

corroborated key statements made by J in his complaint letter because Belden testified that he probably told J that Southmark only dealt with Class B shares. Based on all the testimony, we find that the hearsay evidence was probative and reliable, as well as relevant and material. In any event, Belden stipulated to the admission of J's complaint letter before the Hearing Panel. We therefore hold Belden to his previous stipulation and find that he has waived this argument.

V. <u>Sanctions</u>

The Hearing Panel imposed a $40,000 fine and a 90-day suspension, ordered restitution of $55,567.03 plus interest, assessed costs and ordered Belden to requalify as a principal by examination.

The Sanction Guideline ("Guideline") for unsuitable recommendations suggests a fine of $2,500 to $75,000.[12] In addition, the Guideline suggests a suspension of 10 business days to one year, and state that where it is appropriate to remedy misconduct, adjudicators should order restitution in the actual amount of loss.

The Hearing Panel found that Belden's conduct was egregious. We agree, based on certain aggravating factors. First, Belden's disciplinary history indicates that, in 1993, he settled a complaint with NASD that alleged that he had disseminated misleading sales literature relating to mutual funds.[13] Belden received a censure and a $25,000 fine. Second, Belden's conduct was intentional. The evidence supports the conclusion that Belden placed J in Class B shares to generate commissions. Belden testified that he needed to "soak the rich [clients] to pay for the poor [clients]." Although Belden argues that this statement was taken out of context, Belden's testimony supports our conclusion. Belden's "soak the rich" comment was not the only time during his testimony that he admitted that he needed to make high commissions on his larger accounts. Belden also indicated that, based on the amount of the person's investment, even if Class A shares were available at net asset value with no front-end load, he advised that Class A shares might not be an appropriate choice for the customer. Belden explained that he "has to pay all the expenses of Southmark . . . [and doesn't] have a client base large enough to survive on fees alone." In short, Belden argued that he could not stay in business if he had to rely on the lower commissions from Class A shares. We find that these aggravating factors make Belden's misconduct egregious and warrant the imposition of severe sanctions.

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12 <u>See</u> NASD Sanction Guidelines (2001 ed.) at 99.

13 Belden stated that the violation was for unapproved sales literature and not misleading sales literature. This distinction is not relevant. Either conduct is serious and would be considered an aggravating factor. A review of Belden's 1993 settlement, however, indicated that the violation was for unapproved sales literature <u>and</u> misleading sales literature.

We also affirm the Hearing Panel's order of restitution. In general, restitution is proper when a person has suffered a quantifiable loss as a result of a respondent's misconduct, particularly where a respondent has benefited from the misconduct.[14] Belden's purchase of Class B Shares required J to pay $55,567.03 in additional commissions that J would not have had to pay if he had purchased Class A shares. This additional commission inured to the benefit of Belden. We therefore order Belden to pay to the estate of J the amount of the higher commissions that J paid.

Hearing Panels and the NAC are allowed to consider the size of a firm when imposing sanctions for rule violations involving negligence.[15] If the violation involves fraudulent, willful or reckless misconduct, however, the Hearing Panel or NAC "should consider whether, given the totality of the circumstances involved, it is appropriate to consider firm size and may determine that, given the egregious nature of the fraudulent activity, firm size will not be considered in connection with sanctions."[16] We disagree with the Hearing Panel's conclusion that because of Belden's central role in operations of the firm, he should not be suspended for more than 90 days. Because Belden intentionally favored his financial interest to the detriment of one customer, we increase Belden's suspension to one year.

Belden argues that the sanctions are excessive in comparison to other cases. In support, Belden cites a 1992 settlement involving the unsuitable sale of Class B shares. This argument, however, is not relevant. First, sanctions stemming from a settlement are typically less than fully litigated cases because the parties forgo the cost of litigation. This is generally referred to as a settlement discount. Second, it is well established that the appropriateness of sanctions is dependent on the facts and circumstances of each particular case and cannot be precisely determined by comparing the facts in any one individual case with the sanctions imposed in another proceeding. See Butz v. Glover Livestock Commission, Co., 411 U.S. 182, 187 (1973); Hiller v. SEC, 429 F.2d 856, 858-859 (2d Cir. 1970).

Accordingly, we order that Belden be fined $40,000 and suspended in all capacities for one year.[17] In addition, we order Belden to pay restitution totaling

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[14] See NASD Sanction Guidelines (2001 ed.) at 6.

[15] See NASD Sanction Guidelines (2001 ed.) at 3, fn. 2.

[16] See NASD Sanction Guidelines (2001 ed.) at 3, fn. 2.

[17] We also have considered and rejected without discussion all other arguments advanced by the respondent.

Pursuant to Procedural Rule 8320, the registration of any person associated with a member who fails to pay any fine, cost, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.

$55,567.03 to the estate of J and to requalify as a principal by examination. Finally, we order Belden to pay appeal transcript fees of $ 339.90 plus appeal costs of $1,000 and the hearing costs for the proceeding below.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary