BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Philippe N. Keyes Valencia, CA, Respondent.	DECISION Complaint No. C02040016 Dated: December 28, 2005

Respondent participated in private securities transactions without prior written notice to, and written approval from, his member firm and used misleading sales literature that failed to disclose material facts related to an offered investment. Held, Hearing Panel's findings and sanctions affirmed.

APPEARANCES

For the Complainant: Jacqueline D. Whelan, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: Richard A. Ruben, Esq.

DECISION

Philippe N. Keyes ("Keyes") appeals this matter pursuant to NASD Procedural Rule 9311. The Hearing Panel found that Keyes: (1) violated Conduct Rules 3040 and 2110 by participating in the offer and sale of promissory notes for compensation to 35 customers without prior written notice to, and prior written approval from, his employer; and (2) violated Conduct Rules 2210 and 2110 by using misleading sales literature. The Hearing Panel barred Keyes in all capacities for the selling away violation. In light of the bar, the Hearing Panel declined to impose a sanction for the communications with the public violation. After a complete review of the record, we affirm the Hearing Panel's findings of violations and the imposed sanction.

I. Background

A. Keyes's Employment History

Keyes first associated with a member firm in 1989. Keyes began working for Investors Capital Corp. ("ICC") in April 2000 as an investment company products and variable contracts limited representative. ICC terminated Keyes in November 2001 for his failure to comply with the firm's policies and procedures. Keyes was last associated with a member firm in April 2002.

B. Procedural History

The Department of Enforcement ("Enforcement") filed a two-cause complaint against Keyes on April 5, 2004.[1] Cause one of the complaint alleged that Keyes participated in the offer and sale of promissory notes that were securities to customers for compensation without providing prior written notice to, and receiving prior written approval from, his employing member firm. Cause two of the complaint alleged that Keyes used misleading and unbalanced sales literature in connection with the promissory note transactions. Keyes generally denied these allegations. In his answer, Keyes argued that mitigating circumstances applied to each of the alleged violations.

On November 29, 2004, a Hearing Panel found Keyes liable for the two causes alleged in the complaint. This appeal followed.[2]

II. Facts

The facts of this case are largely undisputed. Keyes stipulated to the material facts required to support the allegations in the complaint with the exception of whether the investment

---

1 The complaint also named Ronald Wightman ("Wightman") as a respondent in this matter. NASD alleged that Wightman failed to supervise Keyes at ICC in violation of Conduct Rules 3010 and 2110. Wightman settled this matter with NASD in August 2004.

2 Pursuant to Procedural Rule 9346(b), Keyes made a motion before the National Adjudicatory Council ("NAC") subcommittee ("Subcommittee") empanelled to consider this appeal. In this motion, Keyes requested leave to introduce additional evidence of the "disciplinary findings, discipline imposed, and the terms and conditions imposed" in the settlement between NASD and Wightman. The Subcommittee determined that the proposed new evidence was not relevant or material and therefore denied Keyes's motion. *See, e.g., Dep't of Mkt. Regulation v. Geraci*, Complaint No. CMS020143, 2004 NASD Discip. LEXIS 19, at *50-51 (NAC Dec. 9, 2004) (rejecting respondent's argument that sanction received in related settled matter was relevant or material to current disciplinary proceeding). We adopt the Subcommittee's finding as our own.

offered was a security, which is a question of law. *See Stoiber v. SEC*, 161 F.3d 745, 749 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1069 (1999). We review the facts in detail because we have considered them in determining whether the sanctions imposed below are appropriate.

A. Keyes's Involvement with the Wynn Company

Larry Lee ("Lee"), a life insurance broker in Salt Lake City, Utah, first referred Keyes to ICC through Wightman. Wightman recruited Keyes to join ICC in April 2000. Wightman was a registered principal for ICC and worked out of ICC's office of supervisory jurisdiction in Salt Lake City.[3] Keyes was hired to work out of his own office in California.

In June or July 2000, Lee invited Keyes to meet Wightman in Salt Lake City and attend a sales presentation given by Dennis Wynn, the founder and president of the Wynn Company ("Wynn"). The purpose of the meeting was to introduce Keyes to the Wynn secured commercial note program ("Wynn notes"). Dennis Wynn described Wynn's business and the Wynn notes during his presentation. Wynn was a Utah corporation engaged in the sale of used automobiles through high interest loans to customers with impaired credit ratings. The automobile loans carried an interest rate of 28-30% and an average term of 24 months.

Wynn used the funds raised through selling the Wynn notes to finance its operations. According to Wynn promotional materials, an investor received from Wynn a promissory note and an Assignment of Payments Agreement, which were purportedly held in escrow by an escrow agent. The Assignment of Payments Agreement secured the Wynn notes. Keyes testified before the Hearing Panel, however, that he believed that the automobiles secured the Wynn notes and that Wynn held the automobiles' titles. The Wynn notes bore a 12-month maturity date and provided an interest rate of 10 to 12 percent. At maturity, the investor could liquidate the note, repurchase it, or invest an additional amount.

During that same trip to Salt Lake City, Keyes toured Wynn's headquarters and met with Wightman to establish a plan for his ICC business. Keyes believed, based on his observations, that Wynn was a viable operation. He testified that he saw a physical structure and staff conducting business. He stated that he saw automobiles for sale, a repair shop with mechanics working on the vehicles, and payment checks received from automobile purchasers. Keyes, however, did not review Wynn's financial statements or the purported escrow agreement, or independently verify the existence of an escrow relationship.

After touring Wynn, Keyes met with Wightman. According to Keyes, Wightman discussed his vision for expanding his sales team's annuity business. Keyes further contends that Wightman discussed his plan to convert existing fixed annuity contracts into variable products.

---

3 ICC's home office was located in Massachusetts.

Keyes testified that part of Wightman's plan included rolling the interest their customers earned from the Wynn notes into variable annuities.

Keyes began selling the Wynn notes in January 2001. From January 2001 through November 2001, Keyes referred 35 customers to Wynn. These customers purchased Wynn notes having a total value of $1,900,634.70. Wynn paid Keyes $63,412 for those referrals. Wynn filed for bankruptcy in July 2002.[4]

B. Marketing the Wynn Notes

In connection with the Wynn note transactions, Keyes stipulated that he provided customers with three pieces of sales literature describing various aspects of the Wynn note program. The three pieces of sales literature consisted of a tri-fold brochure, an informational flyer, and an "investment triangle." Keyes stipulated that Wynn provided him with the tri-fold brochure and the informational flyer and that he prepared the investment triangle.

The tri-fold brochure described the Wynn notes as secured by a "portfolio of automobile contracts with titles held by an escrow agent." It further assured a potential investor of the notes' low risk. The brochure stated "the collateral backing [each] note is carefully managed for safety and security. . . . Note holders have enjoyed solid growth, reliable income, and peace of mind." The brochure also highlighted the Wynn note program as "[s]uitable for IRA's, SEP's and other retirement plans."

The informational flyer included information about Wynn and its business. It also described the Wynn note program and contained a "frequently asked questions" section. The informational flyer listed the salient features of the Wynn notes, including an interest rate of "10% APR" with a 12-month maturity, monthly interest paid to the note holders or compounded within the notes, and collateralization of the notes equal to 150% of the notes' value. The flyer described the collateral securing the notes as consisting of two parts: the loan contracts between the consumer and Wynn and the actual titles to the automobiles. In addition, the flyer stated that an independent escrow agent "monitors" the notes to ensure that the collateral is maintained at 150% of the notes' value.

The investment triangle compared the rate of return and risk of the Wynn notes with other types of investments. At its apex, the triangle listed investment in stocks. The second through fourth tiers of the triangle listed investment in mutual funds, the Wynn notes (listing a rate of return of 10.5%), and annuities, respectively. At its base, the triangle listed bank investments (with a 1.5% rate of return), money market funds (with a 1.85% rate of return), and certificates of deposit (with a 3.75% rate of return).

---

4 The Wynn bankruptcy was originally filed as a Chapter 11 petition and was later converted to a Chapter 7 petition.

III. Discussion

A. Private Securities Transactions

Conduct Rule 3040 prohibits an associated person from participating in private securities transactions for compensation without first providing written notice to, and receiving written permission from, his employer firm. Conduct Rule 3040 applies to a securities transaction "outside the regular course or scope of an associated person's employment with a member." Conduct Rule 3040(e)(1). In order to determine whether Keyes violated Conduct Rule 3040, we must first ascertain whether the Wynn notes were securities.

1. The Wynn Notes Were Securities

Keyes argued before the Hearing Panel that Conduct Rule 3040 did not prohibit his activity because the Wynn notes that he sold were not securities. Keyes, however, has abandoned that argument before us and agrees with the Hearing Panel's finding that the Wynn notes were securities. For the reasons set forth in detail below, we agree with the Hearing Panel's finding that the Wynn notes were securities.

The Supreme Court devised the "family resemblance" test in *Reves v. Ernst & Young*, 494 U.S. 56, 63-67(1990), for determining whether a particular note is in need of regulation and should therefore be deemed a "security" for purposes of federal securities laws and regulations. Under the family resemblance test, all promissory notes are presumed to be securities, and this presumption is rebutted only by a showing that the investments bear a strong resemblance to a list of financial instruments specifically excluded as securities by the Supreme Court in *Reves*, or by proving, under a four-factor test, that the note is of a type that should be added to the list of excluded financial instruments. *Id.* at 66-67; *see also Stoiber v. SEC*, 161 F.3d at 749, n.7 (articulating that the "mere introduction of some evidence suggesting that [the] note[s]" are not securities is not enough to overcome this presumption).

The Wynn notes do not resemble the list of financial instruments that the Court specifically exempted nor do the four factors considered in *Reves* suggest that the Wynn notes should be added to the list of excluded financial instruments.[5] Wynn sold the notes to raise

---

[5] The four factors considered in *Reves* for whether a note should be added to the list of statutorily exempt notes are: (1) the motivations that would prompt a reasonable borrower and lender to enter into the transaction; (2) the plan of distributing the notes; (3) the reasonable expectations of the investing public regarding whether the instruments were securities; and (4) the presence of any alternative scheme of regulation or other factor that significantly reduces the risk of the instrument so as to make regulation under the securities laws unnecessary. *Reves,* 494 U.S. at 66-67.

money to conduct its purported regular business, which was the purchase and resale of automobile installment loan contracts. *See Reves*, 494 U.S. at 66 (explaining that an instrument is likely a security when the seller's purpose is to raise operational capital). In addition, the Wynn notes were distributed broadly. Keyes testified below that he sold the notes to approximately 35 investors. *See Stoiber*, 161 F.3d at 750; *Robin Bruce McNabb*, 54 S.E.C. 917, 919, 923 (2000) (*citing Trust Co. v. N.N.P., Inc.*, 104 F.3d 1478, 1489 (5th Cir. 1997) ("A debt instrument may be distributed to but one investor, yet still be a security.")), *aff'd*, *McNabb v. S.E.C.*, 298 F.3d 1126 (9th Cir. 2002). The public's reasonable perceptions of the Wynn notes also suggest that we categorize the notes as securities. *Stoiber*, 161 F.3d at 751 (*citing Reves*, 494 U.S. at 68-69). A reasonable investor giving funds to receive a guaranteed rate of return ranging from 10 to 12 percent would consider that the notes were an investment. Finally, we conclude that there is no regulatory scheme providing an adequate substitute for the protection of the federal securities laws applicable to these instruments. *See Reves*, 494 U.S. at 71-72. Indeed, the record makes clear that the Wynn note holders needed the protection of the federal securities laws because they became unsecured creditors when Wynn filed for bankruptcy in 2002.

In sum, we find that the Wynn notes were securities.[6]

2. No Written Notice and Approval

Conduct Rule 3040 requires an associated person to provide his employer with written notice of private securities transactions before the transactions take place. *See* Conduct Rule 3040(b). The Commission has held that the written notice must describe in detail the proposed transactions and the associated person's proposed role in the transactions and state whether the associated person has received or may receive selling compensation in connection with the transactions. *Anthony H. Barkate*, Exchange Act Rel. No. 49542, 2004 SEC LEXIS 806, at *2 (Apr. 8, 2004). If the associated person is compensated for the transactions, he must receive the firm's written permission before he engages in these transactions. *See* NASD Conduct Rule 3040(c).

Keyes stipulated that he received $63,412 in finder's fees from Wynn for selling the Wynn notes. Keyes concedes that he provided no written notice to, and received no written approval from, any officer, principal, or any other duly authorized person that could act on behalf of ICC in granting an approval for such a request. Furthermore, in a response to an NASD information request, ICC stated that the Wynn notes were unapproved products and that ICC

---

[6] The Commission previously found that a promissory note program remarkably similar to the Wynn notes program involved the sale of securities. *See Chris Dinh Hartley*, Exchange Act Rel. No. 50031, 2004 SEC LEXIS 1507, at *7-8 (July 16, 2004) (finding promissory notes were securities when notes paid 10% interest and were offered to the public for the purpose of financing the purchase of automobile installment loan contracts).

prohibited the sale of all promissory notes. Keyes's sale of the Wynn notes therefore constituted private securities transactions.

We affirm the Hearing Panel's findings that Keyes violated Conduct Rules 3040 and 2110.[7]

B. Sales Literature

Conduct Rule 2210(a) defines sales literature that does not constitute an advertisement as "any written or electronic communication . . . distributed or made generally available to customers or the public."[8] Keyes stipulated that he presented the three pieces of sales literature to customers in connection with the Wynn note transactions. The disseminated materials therefore fall within the definition of sales literature.

Conduct Rule 2210(d)(1) prohibits a member from making any false, exaggerated, unwarranted, or misleading statements in its communications with the public.[9] All public communications must be based upon the principles of fair dealing and good faith, provide a sound basis for evaluating the facts discussed, and not omit material facts or qualifications that would cause the communication to be misleading in light of this context. Conduct Rule 2210(d)(1).

NASD rules require that sales literature must "disclose in a balanced way the risks and rewards of the touted investments." *Jay Michael Fertman*, 51 S.E.C. 943, 950 (1994). Sales literature that fails to present a balanced statement of an investment's benefits and risks is misleading. *See Excel Fin., Inc.*, 53 S.E.C. 303, 311-12 (1997) (holding that sales literature distributed to customers that failed to explain investment's speculative nature, including tax

---

[7] Our finding that Keyes violated Conduct Rule 2110 "is in accord with [the] long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation, including Conduct Rule 3040, constitutes a violation of Conduct Rule 2110." *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

[8] NASD amended Conduct Rule 2210 effective on November 3, 2003. This decision references the subsections, language, and requirements of Rule 2210 as they existed prior to the November 2003 amendments.

Conduct Rule 2210(a)(1) defines an advertisement as material "published, or designed for use in, a newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, telephone directories, . . . electronic or other public media."

[9] NASD Rule 115 extends NASD rule requirements to persons associated with a member.

consequences, the lack of liquidity, and the potential fluctuations of value was misleading and violated NASD's advertising rules); *Dep't of Enforcement v. Pacific On-Line Trading & Sec., Inc.*, Complaint No. C01000037, 2002 NASD Discip. LEXIS 19, at *19 (NAC Nov. 27, 2002) (requiring that the content of communications "must be accurate and must provide sufficient information to evaluate the facts with respect to the securities products or services discussed"), *aff'd*, *Pacific On-Line Trading & Sec., Inc.*, Exchange Act Rel. No. 48473, 2003 SEC LEXIS 2164 (Sept. 10, 2003).

We find that the sales literature was misleading and provided no sound basis for evaluating an investment in the Wynn notes. The tri-fold brochure was misleading because it promoted the "solid growth" and "reliable income" of the Wynn notes without disclosing the risk that Wynn could default on the notes and the purchaser could lose his entire investment. The tri-fold brochure and informational flyer contained false statements because they claimed that the notes were collateralized to 150% of the face value. Keyes testified before the Hearing Panel that he now realizes that the Wynn notes that his customers purchased were not collateralized as represented. In addition, the investment triangle was misleading because it compared the Wynn notes to stocks, mutual funds, and money market funds without disclosing that the Wynn notes were illiquid and carried a high risk of default. The investment triangle also failed to explain the basis for the rates of return associated with the listed investments.

Keyes admits that the disseminated sales literature was not in compliance with NASD rules. We thus affirm the Hearing Panel's findings that Keyes violated Conduct Rules 2210 and 2110.[10]

---

10 A violation of NASD's advertising rules is also a violation of Conduct Rule 2110. *Pacific On-Line Trading & Sec., Inc.*, 2003 SEC LEXIS 2164, at *13.

IV. Procedural Arguments

Keyes raises three procedural arguments. First, Keyes suggests that NASD has not provided him with a fair process during the course of these proceedings. We have reviewed the record in this proceeding and reject Keyes's charge. Keyes specifically alleges that Enforcement delayed progression of this case, causing his NASD registrations to expire.[11] We find that Enforcement's investigation and initiation of disciplinary proceedings did not preclude Keyes from associating with another member firm, which would have allowed his registrations to remain current during the pendency of these proceedings. *See* NASD Membership and Registration Rule 1031(c). Indeed, the record shows that Keyes obtained employment with another member firm subsequent to his termination, but voluntarily ended his employment with that member firm in April 2002. In addition, the record establishes that Keyes received a fair process in accordance with NASD's Code of Procedure and Section 15A(h)(1) of the Securities Exchange Act. *See, e.g., Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of Section 15A(h)(1) met when NASD brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and NASD kept a record of the proceedings).

Second, Keyes contends that the Hearing Panel did not consider the facts and circumstances of this case and that its decision reflects a "boilerplate" analysis. Pursuant to NASD Procedural Rule 9268(b), the Hearing Panel's decision must describe the investigation, the specific rule provisions allegedly violated, the findings of fact, the conclusions of the panel as to whether the respondent violated the provisions alleged in the complaint, the disposition of the principal issues raised in the proceeding, the sanctions imposed, the reasons for the sanctions imposed, and the effective date of the sanctions. The Hearing Panel's decision squarely comports with the requirements of Procedural Rule 9268(b). We therefore reject Keyes's argument as meritless.

Third, Keyes asserts, for the first time in his reply brief, that the NASD investigator in this case was "biased" against Keyes and failed to follow NASD procedures. Keyes points to two examples to support his assertion. He states that the investigator "didn't even bring her file to the Disciplinary Hearing when she was to be questioned." A full reading of the hearing transcript, however, reflects that the investigator had access to her investigative file at the hearing location. The file was merely located in another room. Keyes also states that the investigator could not recall specific details of the investigation when questioned on cross-examination. The hearing transcript indicates, however, that the investigator could not recall specific details related to *Wightman's* investigative testimony. Notably, the transcript of this testimony was in the record before the Hearing Panel. Keyes, moreover, could have called

---

[11] Keyes engaged in the misconduct at issue between January and November 2001. Enforcement learned of Keyes's termination for cause from ICC and initiated its investigation in January 2002. Enforcement filed its complaint in the matter in April 2004.

Wightman as a witness, but did not. We conclude that Keyes has not shown that the investigator was biased against him or that she failed to follow NASD procedures. *See Sundra Escott-Russell*, 54 S.E.C. at 873-74; *Maximo Justo Guevara*, 54 S.E.C. 655, 665 (2000).

Accordingly, we find no irregularities in these proceedings.

V. Sanctions

The Hearing Panel barred Keyes from associating with any member for engaging in private securities transactions. The Hearing Panel also concluded that a six-month suspension in all capacities and a $15,000 fine would be appropriate for the sales literature violation. In light of the bar, however, the Hearing Panel declined to impose the additional sanctions. We affirm the Hearing Panel's imposition of the bar and concur in the recommended sanctions for the sales literature violation. We too decline to impose the suspension and fine as a result of the bar.

A. Private Securities Transactions

The NASD Sanction Guidelines ("Guidelines") for private securities transactions provide that an adjudicator's first step in determining sanctions is to assess the quantitative extent of the transactions.[12] The Guidelines provide for a fine between $5,000 and $50,000 and the imposition of a suspension of one year to a bar when the dollar amount of the sales exceeds $1 million.[13] Keyes sold more than $1.9 million in Wynn notes to 35 customers over an 11-month period. In our view, the quantitative factors alone support the imposition of a bar in this case.

The Guidelines also state that "[t]he presence of one or more mitigating or aggravating factors may either raise or lower the sanctions."[14] Thus, the Guidelines direct that we consider 10 additional principal considerations and the general considerations applicable to all violations in determining the appropriate sanction.[15] We find among these considerations numerous aggravating factors.

Keyes marketed the Wynn notes to customers as part of an investment plan in which customers would roll the interest earned from the Wynn note and fixed annuities into variable annuities. Keyes, therefore, created the impression that ICC sanctioned his conduct.[16]

---

12 *See NASD Notice to Members 03-65* (NASD Revises NASD Sanction Guidelines).

13 *Id.*

14 *Id.*

15 *Id.*

16 *See id.*

Moreover, ICC prohibited the sale of all promissory notes. Keyes's misconduct also exposed Keyes's customers to substantial harm. Any customers that had not cashed out before Wynn filed for bankruptcy are now unsecured creditors in the bankruptcy proceedings.[17]

We are further troubled by Keyes's misconduct because he was on notice that Wynn was experiencing financial difficulties yet continued to refer customers to the Wynn note program. One of Keyes's customers notified him in approximately August 2001 that his interest check from Wynn had bounced. Keyes testified that he contacted Wynn and was told that the company had forgotten to transfer money into the account that issued the interest checks. Wynn subsequently issued a new check with sufficient funds to the customer. Keyes, however, should have viewed this episode as a red flag and diligently inquired into Wynn's financial condition. He did not.

The sale of the Wynn notes also resulted in Keyes's monetary gain.[18] He stipulated that he received over $63,000 in selling compensation from Wynn. Further aggravating is the fact that Keyes recruited another registered individual to sell the Wynn notes.[19]

We also consider whether Keyes provided oral notice of the details of the proposed Wynn note transactions to his firm, and, if so, ICC's oral or written response.[20] Keyes contends that Wightman knew of his participation in the program and approved of his conduct; therefore Keyes did not mislead ICC. Keyes admits that he did not discuss his sales of the Wynn notes with any ICC principal other than Wightman. Even if we were to accept Keyes's contention that he gave oral notice to Wightman, we would not find that fact to be mitigating in light of the significant aggravating factors present in this case. It is undisputed that ICC did not provide Keyes with written or oral permission. In addition, Keyes may not shift all responsibility to a supervisor, and he is not excused for his lack of knowledge or appreciation of Conduct Rule 3040's requirements. *See Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) (dismissing as meritless respondent's assertion that he was never warned by his manager that his conduct was inappropriate and therefore he had no way to know that his conduct was wrong); *see also Patricia H. Smith*, 52 S.E.C. 346, 348 n.8 (1995) (rejecting respondent's attempt to blame her misconduct on training received from member firm).

---

17 Two of Keyes's customers who purchased Wynn notes are included among Wynn's 20 largest unsecured claims.

18 *See id.*

19 *See id.*

20 *See id.*

Keyes further contends that he did not conceal the Wynn note activity. The evidence undercuts Keyes's contention. Keyes failed to update his Uniform Application for Securities Industry Registration or Transfer Form ("Form U4") or any ICC compliance materials to reflect his involvement with Wynn. The Form U4 requires that a representative disclose in detail involvement in another business. Keyes, however, disclosed nothing with respect to Wynn. Moreover, ICC required its representatives to disclose outside business activity and income earned from that activity. Keyes disclosed only his employment as an accident and disability insurance salesperson and continuing education instructor.

Keyes argues that the sanctions imposed in this case are too severe when compared with those imposed in other NASD disciplinary proceedings involving other associated persons. For support, Keyes cites to *Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318 (Feb. 13, 2004); *Dep't of Enforcement v. Hartley*, Complaint No. C01010009, 2003 NASD Discip. LEXIS 49 (NAC Dec. 3, 2003), *aff'd*, *Chris Dinh Hartley*, 2004 SEC LEXIS 1507; *Dep't of Enforcement v. Hanson*, Complaint No. C9A000027, 2001 NASD Discip. LEXIS 41 (NAC Dec. 13, 2001); and *Dep't of Enforcement v. Gebhart*, Complaint No. C02020057, 2004 NASD Discip. LEXIS 4 (OHO Feb. 9, 2004). We reject Keyes's argument. The Commission has firmly established "that the appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases." *Pacific On-Line Trading & Sec., Inc.*, 2003 SEC LEXIS 2164, at *20 (Sept. 10, 2003); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."). These cases upon which Keyes relies are inapposite to the misconduct at issue here.

Keyes further contends that he was unaware of NASD's rules governing private securities transactions. The Hearing Panel found that Keyes was not credible on this point. We will not disturb the Hearing Panel's credibility finding. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) (stressing that deference is given to initial decision maker's credibility determination based on "hearing the witnesses' testimony and observing their demeanor"). Keyes has been an NASD registered person for 15 years. Thus, his claim of ignorance regarding Conduct Rule 3040's requirements is implausible.[21] In any event, as a registered person, Keyes is "assumed as a matter of law to have read and have knowledge of [NASD's] rules and requirements." *See Carter v. SEC*, 726 F.2d 472, 474 (9th Cir. 1983).

Keyes argues in favor of mitigation that he "enthusiastically" cooperated with NASD's investigation, made no attempt to deceive regulators, and testified truthfully. The Guidelines recognize as generally mitigating a respondent's substantial assistance to NASD in its

---

[21] In addition, Keyes testified that he taught a preparatory class for the Series 6 examination and "a host of other courses such as financial planning."

investigation of misconduct.[22] We do not find that Keyes provided substantial assistance to NASD but, instead, cooperated with the investigation as he was obligated to do. When Keyes registered with NASD, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate with the NASD." *See Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994).

In addition, Keyes argues that the Hearing Panel erroneously refused to credit his absence of prior disciplinary history when it imposed sanctions. While the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating. *See, e.g., Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *58-59 (NAC May 17, 2001) (holding the absence of disciplinary history is not considered part of "relevant disciplinary history" under the Guidelines for purposes of reducing sanctions); *Dep't of Enforcement v. Balbirer*, Complaint No. C07980011, 1999 NASD Discip. LEXIS 29, at *10-11 (NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry . . . ."). A respondent should not be rewarded because he may have previously acted appropriately as a registered person. Indeed, the Commission has consistently rejected arguments that a lack of a disciplinary record is a factor mitigating the sanction of a bar. *See Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684, at *17-18 & n.15 (Oct. 23, 2002); *Ronald H. V. Justiss*, 52 S.E.C. 746, 750 (1996).

Keyes also asserts that a lesser sanction is in order because he is unable to affiliate with another firm since ICC terminated him. This fact is not mitigating. "NASD, in determining the appropriate sanction, does not give weight to the fact that a firm terminated a respondent." *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *13-14 (NAC May 7, 2003).

Keyes also argues that the Hearing Panel improperly sanctioned him more severely than Wightman. As we noted, Wightman settled the charges against him prior to an NASD hearing. Generally, in settled cases, the parties forgo the cost of litigation and agree to lesser sanctions; this is well recognized as a "settlement discount." *See Dep't of Enforcement v. Belden*, Complaint No. C05010012, 2002 NASD Discip. LEXIS 12, at *27 (NAC Aug. 13, 2002); *see also Howard R. Perles*, Exchange Act Rel. No. 45691, 2002 SEC LEXIS 847, at *34 (Apr. 4, 2002) (noting that "pragmatic considerations justify lesser sanctions in negotiated settlements"). The Overview to the Guidelines also recognizes the principle "that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle."[23] We also note that Keyes and Wightman were charged with violating distinct NASD rules. We find that the sanctions imposed upon Wightman are not relevant to our determination of appropriate sanctions in the matter before us and give them no weight.

---

[22] Guidelines at 10.

[23] Guidelines at 1.

As the Commission has stressed, "selling away is a serious violation, and Rule 3040 is designed not only to protect investors from unmonitored sales, but also to protect securities firms from exposure to loss and litigation in connection with sales made by persons associated with them." *Jim Newcomb*, Exchange Act Rel. No. 44945, 2001 SEC LEXIS 2172, at *19 (Oct. 18, 2001); *see Mark H. Love*, 2004 SEC LEXIS 318, at *23. Conduct Rule 3040 plays a crucial role in the regulatory scheme, and its abuse calls for significant sanctions. *See Ronald W. Gibbs*, 52 S.E.C. 358, 365 (1995); *Anthony J. Amato*, 45 S.E.C. 282, 285 (1973). Accordingly, we bar Keyes for his violations of Conduct Rules 3040 and 2110.[24]

B. <u>Sales Literature</u>

For failing to comply with rule standards or the inadvertent use of misleading communications, the Guidelines suggest a fine of $1,000 to $20,000.[25] If the use of the misleading communications is intentional or reckless, the Guidelines suggest a fine of $10,000 to $100,000 and a suspension of the responsible individual for up to two years.[26] Here, Keyes's use of the sales literature was not inadvertent, but, at a minimum, reckless.

The record reflects that Keyes took no steps to ensure the sales literature's accuracy or to use only approved sales literature. Instead, Keyes disseminated sales literature that failed to address the risks of the Wynn notes and gave investors the false impression that an investment return was certain.

Keyes argues in mitigation that Wightman knew of his use of the Wynn sales literature and thus approved of its use. Outside of Keyes's self-serving testimony, however, the record does not support Keyes's assertion.[27] Even if true, Keyes's claim does not mitigate the severity of his misconduct. *See Charles E. Kautz*, 52 S.E.C. 730, 733, 736 (1996) (emphasizing that firm approval of violative conduct does not lessen respondent's culpability). Keyes disregarded his obligation to use sales literature that was balanced and not misleading.

---

[24] In its complaint, Enforcement sought an order requiring Keyes to pay restitution to his customers. We determine that an order of restitution would be inappropriate here because the record is unclear regarding the customers' quantifiable loss. *See* Guidelines at 6-7.

[25] Guidelines at 88 (Communications With The Public—Failing To Comply With Rule Standards Or Use Of Misleading Communications).

[26] *Id.* at 89.

[27] Keyes had an opportunity to call Wightman as a witness before the Hearing Panel, but declined to do so.

For these reasons, we suspend Keyes in all capacities for six months and fine him $15,000 for his violation of NASD's advertising rules. We decline, however, to impose these additional sanctions in light of the bar.

VI. Conclusion

We affirm the Hearing Panel's finding that Keyes engaged in private securities transactions without prior written notice to, and prior written approval from, his employer and distributed misleading sales literature to customers. Accordingly, for his private securities transactions, we impose a bar in all capacities. For the sales literature violation, we find that a six-month suspension and $15,000 fine is appropriate. Due to the imposition of the bar, however, we decline to impose the suspension and fine. We affirm the Hearing Panel's imposition of hearing costs against Keyes in the amount of $2,221.69. We impose appeal costs of $1,000 and transcript costs of $289.06. The bar will be effective immediately upon service of this decision.[28]

On Behalf of the National Adjudicatory Council,

____

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

---

28 We also have considered and reject without discussion all other arguments of the parties.