BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Carl Martin Trevisan Alexandria, VA, Respondent.	DECISION Complaint No. E9B2003026301 Dated: April 30, 2008

Respondent caused member firm's books and records to contain inaccurate information about certain customers selling Class B mutual funds by obtaining sales charge waivers for those customers by erroneously representing that they were disabled. Held, findings and sanctions modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Lynn M. Kaseta, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Bruce M. Bettigole, Esq., Akrivi Mazarakis, Esq.

Decision

I. Introduction

There is no dispute that Carl M. Trevisan ("Trevisan") entered disability waivers of contingent deferred sales charges ("CDSCs")[1] on behalf of 14 customers who were, in fact, not

[1] A CDSC is a sales charge that mutual fund companies impose on investors who sell/redeem their Class B or Class C mutual fund shares within a certain period after purchase. The purpose of the CDSC is to reimburse a fund's distributor for commissions paid to dealers at the time the investor purchases the fund shares. The amount of the CDSC varies based on the holding period and the terms offered by the specific mutual fund company.

disabled, in 31 Class B mutual fund redemption transactions from late September 2001 through June 2002. The issue before us is whether Trevisan entered these waivers accidentally or deliberately. Our answer to this question—that the record does not establish by a preponderance of the evidence[2] that Trevisan's actions were deliberate—governs how we characterize Trevisan's misconduct and how we sanction him for it.

On March 20, 2007, the Hearing Panel issued a decision finding that Trevisan violated NASD Rules 2110 and 3110 by obtaining CDSCs for the customers in question by deliberately and falsely claiming that those customers were disabled. The Hearing Panel barred Trevisan, stating that he had aggravated his deliberate misconduct by refusing to admit his wrongdoing and instead maintaining that he had inadvertently entered the inaccurate information.

Trevisan appealed the Hearing Panel's decision to the National Adjudicatory Council pursuant to NASD Rule 9311. After a complete review of the record, we affirm the Hearing Panel's conclusion that Trevisan violated NASD Rules 2110 and 3110. Nonetheless, we find inadequate support in the record for the Hearing Panel's finding that Trevisan deliberately entered false disability information for the customers in question then lied about it under oath. In accordance with this finding, we modify the Hearing Panel's sanctions to eliminate the bar and impose a $5,000 fine.[3]

II. Background

Trevisan first registered with a FINRA member firm as a general securities representative in 1980. He registered with Citigroup Global Markets, Inc. ("Citigroup" or the "Firm") in 1993 as a general securities representative and became a certified investment management analyst in 1998 and a certified financial planner in 1999 or 2000. Citigroup issued a Letter of Caution ("Citigroup LOC") to Trevisan on November 12, 2003, citing his "failure to adhere to the Firm's policies regarding the waiver of [CDSCs] in connection with the redemption of mutual fund shares." The LOC required Trevisan to pay a $5,000 fine and to reread the Firm's mutual fund sales practice compliance manual. Citigroup subsequently terminated Trevisan on April 11, 2007, following the issuance of the Hearing Panel's March 20, 2007 decision. Trevisan associated with another FINRA member firm on June 15, 2007.

At the time of the conduct at issue—late September 2001 through June 2002 ("the relevant period")—Trevisan and his "team" of three other brokers at Citigroup were servicing

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[2] *See Kirk A. Knapp*, 51 S.E.C. 115, 130 n.65 (1992) (stating that correct standard in FINRA proceedings is preponderance of the evidence); *see also Gerald James Stoiber*, 53 S.E.C. 448, 450 (1998) (stating that "the burden of persuasion, i.e., the requirement that the case be proved by a preponderance of the evidence, not merely the burden of going forward to produce evidence" remains with FINRA).

[3] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating as the Financial Industry Regulatory Authority ("FINRA"). References to FINRA shall include, by reference and where appropriate, references to NASD.

approximately 1,300 accounts for 400 households and managing $300 million in customer funds. Trevisan had 400 active retail accounts, and his gross commissions exceeded $1 million per year.

III. Facts

During the relevant period, Citigroup employed an electronic order entry system for mutual fund transactions known as "FCI."[4] This system required representatives to engage in a multi-step process on their computers to fill various information fields. Each representative had to hit the "tab" key on his or her computer keyboard to proceed through the various fields, including one that was entitled "CDSC waiver." The default for the CDSC waiver field was blank. Accordingly, if a representative did not seek a waiver, he or she would leave the field blank and tab to the next field. Conversely, if a representative did seek a waiver, he or she would have to enter the number "1" for a waiver on grounds of the customer's death, the number "2" for a waiver based on a customer's disability, or the number "3" for a waiver due to a qualified distribution.

Michael Ward ("Ward"), Vice President of Citigroup's mutual fund department, testified about the specific functions of Citigroup's FCI mutual fund order entry system during the relevant period. He testified that a representative's electronic FCI order to redeem Class B mutual fund shares was not complete until after a verification screen appeared. He stated that the verification screen set forth the details of the transaction and required the representative to enter his or her unique password to proceed. After the representative entered the password, a confirmation screen appeared, and any waivers entered were listed as a separate line item. The representative had to continue to hit the tab key to confirm the items and proceed to the completion of the transaction.

In addition to Citigroup's electronic mutual fund redemption requirements, the record included numerous prospectuses from mutual fund companies, which referenced various forms, proof of disability, notarized statements, or other evidence required to demonstrate that a customer seeking a CDSC disability waiver was disabled as defined by the Internal Revenue

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[4] Citigroup had another electronic mutual fund order entry system known as "NEXGEN", but Trevisan testified that he did not use that system. Trevisan also testified that he did not use the paper ticket order entry system for mutual fund redemptions that was also available at Citigroup during the relevant time period. At the time in question, Citigroup's procedures did not require a supervisor to review the electronic order entries, whereas the paper ticket system required a representative to obtain review by a branch manager, who would initial the ticket. On August 10, 2006, Citigroup entered into a Letter of Acceptance, Waiver, and Consent ("Citigroup AWC") with FINRA for violations by more than 100 registered representatives that had improperly sought disability waivers for mutual fund customers. The AWC required Citigroup to pay a $400,000 fine, make restitution of $715,000 to affected mutual fund entities, and revise its supervisory policies. The Firm subsequently represented to FINRA that it had enhanced its mutual fund online surveillance system to require a supervisor to review and approve or reject each CDSC waiver proposed by registered representatives.

Code. Further, Citigroup issued a Compliance Alert in 1999 to its managers and directors advising that representatives must comply with mutual fund prospectus requirements when requesting CDSC waivers.

Trevisan testified that because the stock market had declined substantially during 2001 and 2002, he tried to keep even more closely in touch with his customers than had been his practice in the past. Certain of his customers with equity funds continued to hold their investments; others made free exchanges to different funds within the same fund family. Other customers wished to remain invested in equities, in hopes that the stock market would stabilize, but they were uncomfortable with the entire mutual fund family in which they were invested. In those cases, the customers sold the funds and invested in other funds. Trevisan recommended that these customers invest in C shares issued by a fund family that he described as being "well-established, conservative, and low-expense." He stated that customers who wished to remain invested for at least one year were good candidates for C shares because they would not have to pay a front-end load or a back-end charge if they held the C shares for at least one year.

Trevisan testified that during 2001 and 2002, he used the FCI system to process 35 mutual fund sales for certain of his customers and that he entered CDSC disability waivers for those customers because he believed in good faith at that time that they were disabled within the mutual funds' requirements. The disability waivers for those 35 transactions were not included in FINRA's complaint against Trevisan and are not at issue here. Trevisan also testified that he used the FCI system at that time to enter waivers for certain customers based on death (by entering a number "1" in the waiver field) and qualified distribution (by entering a number "3" in the waiver field). Again, none of those transactions is at issue here.

Trevisan does not dispute that from late September 2001 through June 2002, he used Citigroup's FCI system to enter 31 Class B mutual fund redemption orders for 14 of his customers[5] (including his former sister-in-law) and that those orders resulted in CDSC disability waivers for customers who he knew were not disabled. The transactions involved total funds of $373,855.93 and $8,089.26 in inappropriately waived CDSCs. In both his investigative testimony and before the Hearing Panel, Trevisan denied that he deliberately entered disability waivers for these customers, and he denied that he directed anyone else to do so. Trevisan testified instead that the 31 transactions with incorrect disability waivers constituted "inadvertent mistakes." The Hearing Panel did not find Trevisan credible, stating that it was "inconceivable" that Trevisan could have entered the CDSC disability waivers accidentally.

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[5] Trevisan testified that he worked with a team of three other brokers and three assistants and that the customers belonged to him or his team. He also stated that he usually spoke to his own customers about mutual fund redemptions and that he usually entered such orders himself, although he did not specifically recall entering the orders in question here. Trevisan did, however, accept full responsibility for entering the transactions at issue and acknowledged that the transactions had been entered with his unique password.

Trevisan stated that he immediately advised Citigroup that these transactions were inaccurate after Citigroup personnel approached him in October 2002 with a list of customers for whom Trevisan had entered disability waivers. He also testified that he and his team sometimes entered more than 100 mutual fund transactions per day and that he often processed such orders very quickly, by typing information on his computer keyboard without looking up at the screen. Trevisan testified that he did not remember seeing a verification screen for any of the orders in question that reflected disability waivers for customers who did not qualify for them. Trevisan stated that often he did not look at the screen and simply continued hitting the tab key to move the on-line order through the FCI system.

Trevisan also noted that the disability waivers in question were entered for only 14 of his more than 400 active retail customers, and that he earned gross commissions of at most $323.57[6] out of his $1 million in annual gross commissions when he reinvested the proceeds from the Class B redemptions for those 14 customers.

Moreover, Trevisan presented specific evidence regarding inconsistencies within the accounts of the 14 customers who were included in the 31 transactions at issue, and he asserted that such inconsistencies provide support for his argument that he mistakenly hit the number "2" key on his keyboard to enter the disability waivers for those customers:

- Customer TC sold shares of PIMCO Innovation on April 12, 2002, May 1, 2002, and May 7, 2002. He received disability waivers of CDSCs due on the first and last sales ($105 and $778.31, respectively), but he paid the CDSC of $92.78 on the middle sale;

- Customer CD received two disability waivers on sales of Alger funds on May 14, 2002 ($69.37 and $6.16); but one year earlier, on March 30, 2001, and April 9, 2001, she paid CDSCs of $418.93 and $40.00 on other sales of the same funds;

- Customer JD received a disability waiver on a sale of Putnam Vista fund on May 22, 2002 ($790.33), but paid a CDSC of $341.58 on a sale of an Evergreen fund on July 26, 2001;

- Trevisan's former sister-in-law, customer ST, received disability waivers on three sales of Alger funds on May 29, 2002, and June 5, 2002 ($581.64, $28.68, and $93.68), but she paid a CDSC charge of $.12 on May 15, 2002. ST also paid CDSCs of $333 and $429.87 on two other sales of Alger funds in June and July 2001;

- CDSC disability waivers were entered in transactions for another two of Trevisan's customers, WL and LA, on March 22, 2002, and May 20, 2002, respectively, even though the funds that were sold no longer had any applicable sales charge.

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[6] Trevisan's net commissions totaled at most $113.25.

Trevisan admitted that he had been "sloppy" and "careless" when he entered the incorrect information on Citigroup's FCI system for the transactions at issue. Trevisan also stated that after Citigroup notified him in October 2002 of the incorrect CDSC disability waivers, he and his team took special care to double check all computer entries on transactions and that this problem never occurred again.

IV. Procedural History

In 2002, FINRA's Department of Enforcement ("Enforcement") received an anonymous telephone call stating that representatives at the New Brunswick, New Jersey branch office of Citigroup[7] were entering false CDSC disability waivers on mutual fund redemptions for customers. FINRA's subsequent investigation of Citigroup's activities in all of its offices with regard to disability waivers in mutual fund redemptions led to the issuance, on February 14, 2006, of the instant complaint against Trevisan and three other representatives—David Cottam ("Cottam"), Timothy Behany ("Behany"), and Edward VanGrouw ("Van Grouw").

Each respondent filed an answer to the complaint and requested a hearing. On September 21, 2006, Cottam settled the complaint against him. On September 22, 2006, Van Grouw orally agreed to terms of settlement with Enforcement and, accordingly, the hearing as to him was stayed. On September 26, 2006, the Hearing Panel held a hearing on the allegations against Behany and Trevisan. Because Van Grouw did not finalize a written settlement with Enforcement, the same Hearing Panel held a second hearing on the allegations against him on January 8, 2007. The Hearing Panel issued its decision regarding Behany, Van Grouw, and Trevisan on March 20, 2007. Trevisan's appeal is the only one pending before us.

V. Discussion

After carefully reviewing the record in this matter, we affirm the Hearing Panel's finding that Trevisan violated NASD Rules 2110 and 3110. Nonetheless, we find inadequate support in the record for the Hearing Panel's finding that Trevisan deliberately entered false disability information for the customers in question then lied about it under oath. Although Enforcement was not required to show intentional misconduct to establish a violation of NASD Rules 2110 and 3110, we find that, absent a showing of intent or at least recklessness, the sanctions imposed by the Hearing Panel were excessive. Accordingly, we eliminate the bar and impose a $5,000 fine.

A. Appellate Standards

Our role as an appellate body is to conduct a de novo review of cases appealed from Hearing Panel decisions to determine whether, in each instance, Enforcement has proven its case by a preponderance of the evidence and whether the sanctions imposed are appropriate. *Dep't of*

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[7] At the time, Citigroup was known as Salomon Smith Barney. For consistency, all references in this decision will be to Citigroup.

Enforcement v. Sathianathan, Complaint No. C9B030076, 2006 NASD Discip. LEXIS 3, at *51 (NASD NAC Feb. 21, 2006), *aff'd*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572 (Nov. 8, 2006), *appeal pending*, No. 07-1002 (D.C. Cir. Jan. 3, 2007). If we find that the "totality of the evidence suggests an equally or more compelling inference than [Enforcement's] allegation," we can reverse or modify a Hearing Panel's findings. *Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17, at **54 (NASD NAC June 25, 2001) (*citing SEC v. Moran*, 922 F. Supp. 867, 892 (S.D.N.Y. 1996)); s*ee also Dep't of Enforcement v. Skelly*, Complaint No. CAF000013, 2003 NASD Discip. LEXIS 40, at *20 (NASD NAC Nov. 14, 2003) (reversing hearing panel's finding that respondent fraudulently charged excessive markdowns).

When conducting our de novo review, we normally give deference to the Hearing Panel as the fact finder on the matter of witness credibility, based on its having had the opportunity to observe witnesses' demeanor. *Eliezer Gurfel*, 54 S.E.C. 56, (1999), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000); *Dep't of Enforcement v. Frankfort*, Complaint No. C02040032, 2007 NASD Discip. LEXIS 16, at *24-25 (NASD NAC May 24, 2007); *Dep't of Enforcement v. DaCruz*, Complaint No. C3A040001, 2007 NASD Discip. LEXIS 1, at *23-24 (NASD NAC Jan. 3, 2007).

We may, however, set aside a Hearing Panel's credibility determination if we find that the record contains substantial evidence to the contrary. *Dep't of Enforcement v. Lu*, Complaint No. C9A020052, 2004 NASD Discip. LEXIS 8, at *24 (NASD NAC May 13, 2004); *Dep't of Enforcement v. Puma*, Complaint No. C10000122, 2003 NASD Discip. LEXIS 22, at *17 (NASD NAC Aug. 11, 2003). In particular, if we find that the Hearing Panel's decision "includes only general credibility findings and does not discuss the substantial amount of record evidence that appears to contradict those findings," then we have the power to set aside the Hearing Panel's credibility determination. *Warren G. Schreiber*, 53 S.E.C. 912, 916 (1998).

The standards for setting aside the Hearing Panel's credibility finding are met here. The Hearing Panel found it "inconceivable" that Trevisan had inadvertently entered the disability waivers, but failed to discuss the substantial circumstantial evidence proffered by Trevisan suggesting that he had mistakenly entered the incorrect CDSC disability waivers for the 14 customers in question. Because the Hearing Panel failed to discuss this substantial evidence, the Hearing Panel's credibility determination is not entitled to deference by the NAC. In the absence of that determination, we find the record inadequate to support a finding that Trevisan engaged in the deliberate falsification of customer records.

B. The Record Contains Substantial Evidence Contrary to the Hearing Panel's Finding that Trevisan Acted Deliberately

The Hearing Panel stated that it was "inconceivable" that Trevisan could have entered the CDSC disability waivers accidentally. Yet the decision indicates that this conclusion was based on little more than the Hearing Panel's assessment of the number of incorrect disability waivers entered by Trevisan (31 transactions for 14 customers) and the physical manner in which those waivers had to be entered into Citigroup's FCI system. The Hearing Panel merely summarized Citigroup's FCI process of tabbing to the CDSC waiver field and entering the numbers "1," "2," or "3" to indicate the basis for the waiver. The Hearing Panel concluded that "[g]iven the

physical layout of a computer keyboard, it is inconceivable to the Hearing Panel that the number '2' key could have been hit inadvertently 31 times (on five days more than once) over an eight and one-half month period." Thus, the Hearing Panel summarily dismissed Trevisan's consistent direct and investigative testimony by noting that "Trevisan was unable to explain how disability waivers could have been entered by accident or mistake," and concluding that it could not "credit Trevisan's assertion that the requests for disability waivers were accidental."[8]

To the contrary, we find that "given the physical layout of a computer keyboard" and the exculpatory direct and circumstantial evidence proffered by Trevisan, the record in this case is insufficient to prove by a preponderance of the evidence that Trevisan acted deliberately in entering CDSC disability waivers.

1) The "Physical Layout of a Computer Keyboard"

As to the Hearing Panel's keyboard comment, we take official notice[9] of the close proximity between the tab key on a standard computer keyboard and the number keys for "1," "2," and "3." Trevisan testified that during the relevant time period he sometimes entered hundreds of mutual fund orders per day, that he typed quickly on his keyboard, and that he did not always look up to the computer screen to ensure that he had entered information correctly. Trevisan readily admitted that he made 31 entry errors in 14 customer accounts during a nine-month period from 2001 to 2002. He consistently maintained that because these errors were accidental, he did not know how he made them. He did, however, concede that his actions were "sloppy." By extrapolating from Trevisan's testimony, if he had entered only 345 trades per month during this period, his error rate would have been approximately 1%. Although we do not condone Trevisan's failure to review the verification screen before confirming an order, we find

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[8] Trevisan argued that the Hearing Panel's decision was also flawed because it found Trevisan's version of events to be inconceivable, but did not comment specifically on the Hearing Panel's assessment of Trevisan's candor or demeanor as a witness. *See Puma*, 2003 NASD Discip. LEXIS 22, at *6 n.3 & *17 (referring to earlier remand decision of NAC instructing hearing panel to elaborate in several areas, including "its general impression of [respondent's] demeanor and candor"). The *Puma* remand, however, was based on several grounds, including the hearing panel's failure to discuss the bases on which it had alternately credited and not credited the respondent's testimony and the reliability of certain customers' hearsay written statements. *Puma* does not stand for the proposition that the NAC should remand or set aside a hearing panel's credibility determination simply because the hearing panel does not make an express finding regarding the demeanor of a witness.

[9] Pursuant to NASD Rule 9145(b), we may take official notice of such matters as might be judicially noticed by a court. *Am. Inv. Serv., Inc.*, 54 S.E.C. 1265, 1266 n.1 (2001). A fact is appropriate for judicial notice if it is not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

that an error rate of roughly 1% is not so high as to preclude a finding of inadvertent mistake. Trevisan could have inadvertently misplaced his fingers on the keyboard and struck the number "2" key instead of the tab key in the number of instances at issue.

The Hearing Panel attempted to bolster its conclusion that Trevisan could not have accidentally hit the number "2" key on 31 occasions by stating that Trevisan "never hit the number '1' [death] or number '3' [qualified distribution] key, either intentionally or accidentally for these 14 customers, nor does he recall ever hitting those two keys to request a waiver on the basis of death or a qualified distribution." The Hearing Panel's statement is overly broad, however, as Trevisan did testify at the hearing that "to the best of his recollection" he had processed B share redemptions during the relevant period by entering waivers for death ("1") or qualified distribution ("3") in instances where such waivers were appropriate. Instead, the Hearing Panel cited to Trevisan's investigative testimony for its inference that Trevisan knew that he had not accidentally entered inaccurate CDSC waivers for death ("1") or a qualified distribution ("3") during the relevant time period. Yet Trevisan's investigative testimony merely indicates that he did "not recall" whether he had "ever mistakenly enter[ed] a one or three for death or qualified distribution" and that Citigroup had never informed him that he had made such wrongful entries.

Indeed, the record is silent on precisely that issue—whether Trevisan made other mistakes in FCI mutual fund order entries at that time. There is no evidence to indicate whether Trevisan, Enforcement, or Citigroup ever examined Trevisan's customer transactions from the relevant time period to see whether he or his team had made an entry mistake by hitting a number "1" or "3" key for a customer not entitled to a CDSC waiver due to death or a qualified distribution. Enforcement's examiner testified at the hearing that FINRA's investigation began with an anonymous tip regarding improper disability waivers and that she only examined the disability waivers (number "2" keys) identified by Citigroup. The documentation of Enforcement's correspondence with Citigroup that was introduced in evidence confirms that FINRA's investigation was focused solely on disability waivers and not on other forms of waivers. Moreover, Trevisan's hearing testimony further confirms that in October 2002, Citigroup only questioned him about a list of his customers with disability waivers and not any other types of waivers. Accordingly, there is insufficient evidence to allow us to accept the Hearing Panel's reasoning that Trevisan must have deliberately entered the number "2" disability waivers at issue because he never wrongly entered the numbers "1" or "3" during the relevant time period.

2) Trevisan's Handwritten Customer Note

We are also not convinced by the only other corroborative evidence cited by the Hearing Panel for its conclusion that Trevisan acted deliberately—a handwritten note from Trevisan's customer files. Enforcement introduced a series of such customer notes into evidence purportedly to show that although Trevisan was a very "meticulous" person, he did not make any notes concerning legitimate disabilities for the customers at issue. The Hearing Panel cited one such note for customer KS, indicating that Trevisan sold the customer's fund "for no charge."

Trevisan testified that he made this note after he was informed by his team member that there was no remaining CDSC payable with respect to that fund.[10] The Hearing Panel did not accept this explanation, reasoning that evidence showing that customer KS had received a CDSC disability waiver on the sale of that fund undermined Trevisan's testimony that he thought no CDSC would be incurred. The Hearing Panel stated that Trevisan could not explain how the disability waiver could have been entered for KS when Trevisan thought there would be no such charge. But the Hearing Panel failed to note that this same situation had occurred on two other occasions with customers WL and LA: erroneous disability waivers were entered even though no sales charge was due. In both instances, Trevisan testified that the entries were accidental. In addition, it seems highly unlikely that Trevisan would have created a notation of having intentionally entered an improper disability waiver for customer KS when the record shows that there were no such entries for the other 13 customers at issue. Thus we find the fact that Trevisan entered a CDSC disability waiver for customer KS, a customer from whom Trevisan thought no sales charge even due, to be further evidence that Trevisan's actions were accidental and not deliberate.

3) Trevisan's Proffered Circumstantial Evidence

Finally, the Hearing Panel did not address the strong circumstantial evidence proffered by Trevisan to show that his actions were accidental and not deliberate. For example, the Hearing Panel failed to mention that:

1) certain of Trevisan's customers received erroneous waivers on certain transactions but not on others (for example, Customer TC received a waiver on April 12 and May 7, 2002, but not on May 1, 2002; customer CD received two waivers on May 14, 2002, totaling $75.53, but paid six times more, $458.93, in 2001; customer JD received a waiver on May 22, 2002, but paid a CDSC in 2001; customer ST received waivers on three transactions but paid CDSCs on three other occasions);

2) there appeared to be no pattern to the amounts waived or paid—customer CD received a waiver for only $6.16; customer ST paid CDSCs ranging from $.12 to $429.87; and

3) customers LA and WL received disability waivers on transactions for which there were no remaining CDSCs.

Without discussing Trevisan's evidence, the Hearing Panel merely concluded that "[t]he motivation for this successful veteran of the securities industry to seek these waivers remains a

[10] Trevisan testified that because the customer originally purchased the mutual fund through a different broker he was not very familiar with the terms of the fund and therefore asked a team member to check on it for him.

mystery."[11] Yet the Hearing Panel did not attempt to unravel this "mystery" by analyzing the inconsistencies in the above instances proffered by Trevisan to show that his actions were accidental and not deliberate. Given the Hearing Panel's failure in this regard, we cannot give deference to its general credibility finding against Trevisan to support the conclusion that Trevisan acted deliberately in entering the CDSC disability waivers. *See Schreiber*, 53 S.E.C. at 915-16 (finding that no deference could be given to the initial fact finder's general credibility finding because the decision did not reflect whether the fact finder had considered a substantial amount of record evidence that appeared to contradict that finding); *see also Dep't of Enforcement v. Perles*, Complaint No. CAF980005, 2000 NASD Discip. LEXIS 9, at *35 n.19 (NASD NAC Aug. 16, 2000) ("The rule from *Schreiber* does not apply to this case, because the Hearing Panel discussed and considered all of the evidence in the record, including . . . the substantial circumstantial evidence surrounding the trades.")

Accordingly, we find that there is substantial evidence in the record to set aside the Hearing Panel's credibility finding against Trevisan.

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[11] In his appeal brief, Trevisan conceded that motive is not a necessary element for an NASD Rule 2110 violation, citing *Dist. Bus. Conduct Comm. v. Gerhauser*, Complaint No. C07960014, 1997 NASD Discip. LEXIS 69, at *20 (NASD NBCC Nov. 20, 1997); *see also Robert Tretiak*, Exchange Act Rel. No. 47534, 2003 SEC LEXIS 653, at *21 n.21 (Mar. 19, 2003). It is equally clear that motive is not a necessary element for an NASD Rule 3110 violation. *See Joseph G. Chiulli*, 54 S.E.C. 515, 522 (2000) (holding that scienter is not required to prove a Rule 3110 violation). Nonetheless, Trevisan argued on appeal that because Enforcement failed to prove that he had any motive to deliberately enter the inaccurate CDSC waivers, this lack of motive should be viewed as exculpatory when judging whether his conduct was intentional or accidental. To advance this argument, Trevisan filed a motion pursuant to NASD Rule 9346(b) to adduce additional evidence on appeal consisting of written declarations from the customers who received the disability waivers at issue. Trevisan argued that these declarations would show that he did not discuss the waivers with the customers, and therefore he had no motive to execute the disability waivers in an effort to gain favor with his customers and retain their business. The subcommittee of the NAC empanelled to hear the oral argument in this case ("Subcommittee") denied this motion, and we adopt this ruling as our own. Trevisan failed to satisfy the standards of NASD Rule 9346 on the admission of new evidence on appeal, which is reserved for "extraordinary circumstances," and which requires the moving party to show (1) "good cause for failing to introduce [the new evidence] below," and (2) that such evidence "is material to the proceeding." Trevisan argued that he had good cause for failing to present the customers' declarations or testimony to the Hearing Panel because his previous counsel had a conflict of interest and was therefore ineffective. The Subcommittee found these arguments to be unavailing and we affirm this ruling. Additionally, the proposed evidence was not material to this proceeding for liability purposes—NASD Rules 2110 and 3110 do not require evidence of improper motive. Nor was it material for sanction purposes, as it would not have been necessary for Trevisan to disclose his misconduct to his customers in order for him to have been acting deliberately.

C. Trevisan's Entries of Inapplicable Disability Waivers for Customers Violated NASD Rules 2110 and 3110

Given that we accord no deference to the Hearing Panel's credibility determination against Trevisan, we find that the record is insufficient to show by a preponderance of the evidence that Trevisan intentionally entered the CDSC disability waivers in question.

NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade." *Dep't of Enforcement v. Ortiz*, Complaint No. E0220030425-01, 2007 NASD Discip. LEXIS 28, at *15 n.14 (FINRA NAC Oct. 10, 2007), *appeal pending*, No. 3-12899 (SEC Nov. 14, 2007). NASD Rule 3110(a) requires member firms "to keep and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations, and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by Securities Exchange Act of 1934 ["Exchange Act"] Rule 17a-3." In turn, Exchange Act Rule 17a-3 requires member firms to make and keep, inter alia, "[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities." 17 C.F.R. § 240.17a-3(a)(6)(i). NASD Rule 0115 makes all NASD rules, including NASD Rules 2110 and 3110, applicable to both FINRA members and all persons associated with FINRA members.

Entering inaccurate information in a member firm's books or records violates NASD Rule 3110 and also violates NASD Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005) (finding that incorrect information in documents constitutes a violation of NASD Rules 3110 and 2110). Moreover, it is a "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110." *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999); s*ee also Reynolds*, 2001 NASD Discip. LEXIS 17, at *50 (*quoting Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6 at *12-13 (NASD NAC June 2, 2000) ("[V]iolations of federal securities laws and NASD Conduct Rules are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable rules and regulations.")).

Trevisan admitted that he entered 31 inaccurate disability waivers for 14 customers into the records of Citigroup from late September 2001 through June 2002. He testified that during the relevant time period, he sometimes processed hundreds of mutual fund redemptions daily through Citigroup's FCI process without looking up from his computer keyboard to verify the information presented on the computer screen. Trevisan referred to his own actions as "sloppy." Trevisan's admissions are sufficient to sustain the Hearing Panel's finding that he violated

NASD Rules 2110 and 3110. Although the record supports a finding that Trevisan's conduct was negligent,[12] it is insufficient to prove intentional misconduct.

VI. Sanctions

The Hearing Panel imposed a bar on Trevisan because it found that he deliberately entered false disability waivers and then aggravated his misconduct by testifying under oath that he had made inadvertent mistakes in his order entries. Because we have found that Enforcement failed to prove either that Trevisan's actions were deliberate or that he lied during his testimony given under oath, we modify the Hearing Panel's sanctions for the reasons set forth below.

In deciding upon an appropriate sanction, we have considered the FINRA Sanction Guidelines' ("Guidelines") principal considerations and the considerations that are specific to recordkeeping violations. The Guidelines for recordkeeping violations recommend a fine of $1,000 to $10,000 and a suspension for up to 30 business days.[13] In egregious cases, the Guidelines suggest a fine of $10,000 to $100,000, and a lengthier suspension (of up to two years) or a bar.[14]

We first conclude that Trevisan's misconduct was negligent but not egregious for purposes of the recordkeeping Guidelines.[15] Trevisan admitted that he acted sloppily and carelessly in entering 31 improper disability waivers for 14 customers during the relevant period. Trevisan testified that he often did not look up from his computer keyboard to verify the information that appeared on the screen. By repeatedly failing to ensure the accuracy of the

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[12] The evidence in this case does not support a finding that Trevisan's actions were reckless, which would require us to find that his misconduct was "highly unreasonable," "involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care." *Gebhart v. SEC*, 2007 U.S. App. LEXIS 27183, at *2 n.2 (9th Cir. Nov. 21, 2007) (*quoting Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)). Trevisan's admitted carelessness, resulting in a 1% error rate, does not reach this level.

[13] *FINRA Sanction Guidelines* 30 (2006) (Recordkeeping Violations) http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

[14] The Hearing Panel consulted the Guidelines for "Forgery and/or Falsification of Records" in this matter due to its finding that Trevisan acted deliberately. *Id*. at 39. Those Guidelines provide for a fine of $5,000 to $100,000 and a suspension for up to two years in cases where mitigating factors exist, and a bar in egregious cases. Because we find that the record supports only a finding that Trevisan's actions were negligent, and not intentional, we conclude that it is more appropriate to apply the Guidelines for recordkeeping violations.

[15] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13 ("[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence")).

customer information he entered, Trevisan deprived the mutual fund distributors of fees to which they were entitled and caused Citigroup's books and records to contain false information about customers' disability status.[16]

Our conclusion that Trevisan's actions were negligent thus places him at the low end of the sanction range in the recordkeeping Guideline—a fine of $1,000 to $10,000 and a suspension of up to 30 business days. In view of the following mitigating factors in this case, we determine that a sanction within the lower end of the negligent range—a $5,000 fine—is sufficiently remedial.

Trevisan's misconduct had the potential for only minimal monetary gain to him and, in fact, his inaccurate entry of disability waivers for 14 customers resulted in at most $323.17 in gross commissions, compared to his annual gross commissions of more than $1 million.[17] Moreover, Trevisan's conduct did not harm any customers. The injury to the mutual fund distributors, collectively $8,089.26, was nominal and reimbursed by Citigroup as part of the $715,000 in restitution ordered by the 2006 AWC with FINRA.[18] Because Citigroup has made restitution to the mutual fund distributors, we do not impose a restitution requirement on Trevisan.

Trevisan fully cooperated with FINRA and Citigroup's investigations.[19] When Citigroup asked Trevisan in October 2002 about disability waivers entered for certain of his customers, he readily identified the customers who were not disabled. He provided on-the-record testimony to FINRA investigators in February 2004. In November 2003, Citigroup issued an LOC to Trevisan that fined him $5,000 and required him to reread the Firm's compliance manual and compliance memos concerning mutual funds and CDSCs. Because Trevisan's monetary enrichment from reinvesting the proceeds of the redeemed mutual funds was so minimal (at most $323.57 in gross commissions and $113.25 in net commissions), and because he has already paid a $5,000 fine to Citigroup for his misconduct, we eliminate the bar imposed by the Hearing

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[16] We do not accept as a mitigating factor Trevisan's lack of disciplinary history. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("Lack of a disciplinary history is not a mitigating factor.").

[17] *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions No. 17 ("[w]hether the respondent's misconduct resulted in the potential for respondent's monetary or other gain")).

[18] *Id*. at 6 (Principal Considerations in Determining Sanctions No. 11 ("(a) whether the respondent's misconduct resulted directly or indirectly in injury to [other parties], and (b) the nature and extent of the injury")).

[19] *Id*. at 7 (Principal Considerations in Determining Sanctions Nos. 10 (whether the respondent attempted to conceal his or her misconduct or lull a regulator or a firm into inactivity) and 12 (whether the respondent provided assistance to FINRA in its investigation)).

Panel. Instead, we impose a $5,000 fine for Trevisan's violation of FINRA's recordkeeping rules.[20]

Compliance with recordkeeping rules is essential to the proper functioning of the regulatory process. Indeed, the Commission has stressed the importance of the records that broker-dealers are required to maintain pursuant to the Exchange Act, describing them as the "keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies." *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979).

We find that Trevisan's careless conduct in entering inaccurate disability waivers for 14 customers, in 31 transactions from late September 2001 through June 2002, evidences disregard of these rules and his obligations thereunder and warrants our imposition of a $5,000 fine.

VII. Conclusion

We affirm the Hearing Panel's conclusion that Trevisan violated NASD Rules 2110 and 3110. Nonetheless, we find inadequate support in the record for the Hearing Panel's finding that Trevisan deliberately entered false disability information for the customers in question then lied about it under oath. In accordance with this finding, we modify the Hearing Panel's sanction to eliminate the bar and impose on Trevisan a $5,000 fine.[21]

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[20] Following the issuance of the Hearing Panel's decision in March 2007, Citigroup terminated Trevisan. "As a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case. We consider the disciplinary sanctions we impose to be independent of a firm's decisions to terminate or retain an employee." *Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *8-11 (NASD NAC Dec. 18, 2000) (giving respondent credit for firm-imposed suspension, but not termination).

[21] We also have considered and reject without discussion all other arguments of the parties.

Pursuant to NASD Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for nonpayment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for nonpayment.