BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Harry Friedman Woodmere, NY, Respondent.	DECISION Complaint No. 2005000835801 Dated:

Respondent engaged in private securities transactions without giving his firm prior written notice. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Hugh Patton, Esq., Jeff Kern, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Brian H. Reis, Esq.

Decision

Pursuant to NASD Rule 9311, Harry Friedman ("Friedman") appeals a May 8, 2009 Hearing Panel decision.[1] The Department of Enforcement ("Enforcement") cross appeals the

[1] Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

Hearing Panel's decision with respect to sanctions against Friedman. The Hearing Panel found that Friedman violated NASD Rules 3040 and 2110 by participating in private securities transactions without providing prior written notice to his firm. The Hearing Panel fined Friedman $77,500 and suspended him in all capacities for 45 days. We affirm the Hearing Panel's findings of violation and modify, in part, the sanctions imposed.

I. Background

Friedman first became associated with a FINRA member firm in October 1994. From October 2002 until July 2004, he was registered as a general securities principal and general securities representative with First Montauk Securities Corp. ("First Montauk" or the "Firm"), a former member firm that was headquartered in Red Bank, New Jersey.[2] The Firm had operated approximately 100 branches consisting of small franchise offices of one or two registered representatives per office. During his association with First Montauk, Friedman operated a First Montauk Office of Supervisory Jurisdiction ("OSJ") in New York City with Joseph Schnaier ("Schnaier"), a general securities representative and his co-respondent in the proceedings below, through their co-ownership of Global International Services, LLC ("Global International").

Friedman and Schnaier formed Global International on the advice of Friedman's accountant to pay the expenses of the OSJ. Friedman and Schnaier operated under a joint representative number and deposited revenues from the OSJ into Global International's bank account, from which they paid all of the OSJ's expenses and drew their salaries. Friedman was responsible for managing the OSJ's retail operations, while Schnaier focused on developing investment-banking opportunities. Friedman is currently registered with another member firm as a general securities representative and principal.

In March 2004, Friedman and Schnaier formed Friedman, Schnaier & Associates LLC ("Friedman, Schnaier & Associates"), a company they planned to operate as a new broker-dealer. In July 2004, they submitted a new membership application on behalf of Friedman, Schnaier & Associates to FINRA's Membership Application Program ("MAP") office. The MAP office staff advised Friedman and Schnaier that staff had concerns about a possible NASD Rule 3040 violation involving Global International's purchases and sales of securities while Friedman and Schnaier were associated with First Montauk. The consultant hired to assist Friedman and Schnaier with the MAP application process sent a letter to the MAP office staff, dated December 17, 2004, stating that Friedman and Schnaier did not understand that they had an obligation under NASD Rule 3040 to inform First Montauk in writing about the securities transactions because "Global [International] was engaged in a passive investment" in which the owners of Global International "had no active role." In a letter dated January 14, 2005, the consultant represented that "it was as Friedman had stated their belief that because of the nature of the investment it was

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[2] The Firm filed a Uniform Request for Broker-Dealer Withdrawal ("Form BDW") on January 15, 2009, indicating that it was the subject of or had been named in an investment-related investigation, consumer-initiated complaint, and private litigation. The Firm's termination as a member of FINRA became effective on February 20, 2009.

not necessary for them to report or ask approval of the purchase and sale." The consultant further represented that "Mr. Friedman admits that it might have possibly been a mistake in hindsight." The MAP staff advised Friedman in a January 5, 2005 conference call that it was unlikely that the application for Friedman, Schnaier & Associates would be approved because of staff's concerns about a possible violation of NASD Rule 3040 by Friedman and Schnaier involving the purchases and sales of securities through Global International, and that the matter would be referred to Enforcement for investigation. Friedman, Schnaier & Associates withdrew its application in February 2005.

II. Procedural History

On November 14, 2007, Enforcement filed a complaint, alleging that Friedman and Schnaier violated NASD Rules 3040 and 2010 by engaging in private securities transactions through Global International, without first providing written notice to, or receiving written approval from, First Montauk. The Hearing Panel found that Friedman and Schnaier engaged in purchases and sales of securities without first providing written notice of the transactions to First Montauk. The Hearing Panel fined Friedman and Schnaier $77,500 each. In addition, the Hearing Panel suspended Friedman for 45 days and suspended Schnaier for 90 days. Friedman appealed the Hearing Panel's findings of violation and sanctions. Enforcement filed a cross-appeal as to the sanctions imposed against Friedman.[3]

III. Facts

A. Friedman's and Schnaier's Purchase and Sales of Securities Through Global International

In January 2003, Schnaier became interested in a company called Majesco Sales, Inc. ("Majesco") as a potential investment banking client for First Montauk. Majesco, a developer of video games and digital entertainment products, was considering raising additional capital. Schnaier was interested in Majesco because he considered the video game industry to be "hot." He and Friedman met with Majesco's management and viewed a demonstration of some of the company's video games.

Schnaier subsequently attempted to convince First Montauk's management to enter into an investment banking relationship with Majesco, but was unsuccessful. He first approached First Montauk's director of corporate finance, Ernest Pellegrino ("Pellegrino"), whom Schnaier described as "standoffish" about the possibility of engaging Majesco as an investment banking

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[3] Schnaier did not appeal the Hearing Panel's findings or sanctions. Enforcement appealed the Hearing Panel's sanctions as to Schnaier but subsequently withdrew its appeal after Schnaier agreed to a bar in a separate disciplinary action.

client.[4] Schnaier and Pellegrino also did not agree on the amount of commissions the OSJ should receive for bringing in any investment banking business.

Schnaier then enlisted Ken Norensberg ("Norensberg"), First Montauk's vice president of business development, to assist him in his effort to convince Herb Kurinsky ("Kurinsky"), the Firm's president, to permit First Montauk to enter into an investment banking agreement with Majesco. Schnaier, Friedman, Norensberg, Kurinsky, and Bill Kurinsky (Herb Kurinsky's brother and a Firm vice president) had a meeting at First Montauk's headquarters in Red Bank, New Jersey ("Red Bank Meeting") in approximately late 2002 or early 2003, to discuss investment banking issues and Majesco. According to Schnaier and Norensberg, Schnaier advised the assembled group of his desire to take Majesco public, and to buy and sell Majesco shares. Norensberg testified that Kurinsky, the Firm's president, gave Schnaier "carte blanche to do whatever" he wanted to do with respect to Majesco, including buying shares.

The Hearing Panel found Norensberg's testimony not credible because of his close friendship with Friedman and concluded that it was specifically not credible that Kurinsky would have given Schnaier such "blanket approval." In addition, the Hearing Panel found that Kurinsky, who testified that he did not remember any discussions with Friedman and Schnaier about Majesco, "was not a reliable witness concerning his contacts with Respondents," because he had memory problems and was unable to remember specific events and people. "[C]redibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overturned only where the record contains substantial evidence for doing so." *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We find no reason to reject the Hearing Panel's credibility determinations.

After the Red Bank Meeting, Schnaier continued his efforts to assist Majesco with its objective to raise capital. In the fall of 2003, four members of the family that owned Majesco offered to sell 2.5 million shares of the company to Schnaier for a penny per share. On November 27, 2003, Friedman and Schnaier purchased 2.5 million shares of Majesco through Global International for a total purchase price of $25,000.[5] Schnaier admitted knowing prior to purchasing the shares that Majesco was planning on creating publicly traded shares through a reverse merger. He could not recall, however, whether he knew about a press release issued on October 15, 2003, announcing that Majesco would merge with a company called ConnectiveCorp, a publicly traded company with no active operations. Majesco entered into a reverse merger with ConnectiveCorp and changed its name to Majesco Holdings, Inc. on December 5, 2003, eight

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[4] At the hearing below, Pellegrino did not recall having any conversations with Friedman and Schnaier about Majesco, but he did not deny that there could have been such conversations.

[5] Majesco had nearly $50 million in sales in 2002 and 2003. It was not profitable in those years, however, sustaining losses of $751,000 in 2002, and $10,841,000 in 2003.

days after Global International purchased Majesco shares.[6] The stock of Majesco started trading at $1.01 per share on the day of the merger.[7]

Friedman and Schnaier eventually sold a portion of Global International's Majesco shares to three purchasers in April and May 2004, after TC, Majesco's largest shareholder, approached them with an offer to purchase all 2.5 million shares of Majesco. Friedman and Schnaier determined that it was a good sign that TC was interested in obtaining more shares of Majesco. As a result, they agreed to sell one million shares of Majesco to TC at a negotiated price of $1.25 per share. They also negotiated to sell 100,000 shares to JG (an investment banker at another firm) at the same price at which they sold the shares to TC ($1.25 per share), in an effort to build a good relationship with him. JG was already familiar with Majesco because his firm had researched the company previously as a potential investment-banking client. In addition, Friedman and Schnaier decided to sell 75,000 shares to RG, at $1.40 per share. RG was Friedman's customer at First Montauk and a family friend.

The parties stipulated that the Majesco share prices at which Friedman and Schnaier sold the shares were lower than the $3.00 to $3.50 per share prevailing market price, in part, because they were subject to a lockup agreement.[8] The sale to JG occurred first, on April 15, 2004, followed by the sale to RG five days later, on April 20, 2004. The sale to TC transpired approximately one month later, on May 24, 2004.[9] The proceeds from those sales, totaling $1,480,000, were deposited into Global International's bank account in the following amounts: $125,000 (from the sale to JG of 100,000 shares at $1.25 per share); $105,000 (from the sale to RG of 75,000 shares at $1.40 per share); and $1,250,000 (from the sale to TC of one million shares at $1.25 per share). The net profit from the sales was $1,468,250.[10] The parties stipulated that after the profits were deposited into Global International's bank account, "[s]ome of the

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[6] We refer to the company pre- and post-merger as "Majesco."

[7] The record does not describe the terms of the exchange of the old and new Majesco shares.

[8] The federal securities laws do not govern the terms of lockup agreements, which can prevent "company insiders – including employees, their friends and family, and venture capitalists" from selling their shares for a set period of time or limit the number of shares that can be sold over a designated period. *See Initial Public Offerings, Lockup Agreements, available at* http://www.sec.gov/answers/lockup.htm. The record does not include any information about the specific provisions of the lockup agreement affecting the Majesco shares at issue.

[9] There is nothing in the record to explain why, given that the sale of Majesco shares to TC was negotiated first, the actual sale was not effected until approximately one month after the sales to JG and RG.

[10] The parties stipulated that the net profit was $1,468,250, and that it was calculated by subtracting $11,750, the amount that Friedman and Schnaier paid for the 1,175,000 shares of Majesco they sold, from the $1,480,000 in proceeds they received for the sales of those shares.

proceeds [were] distributed equally to Friedman and Schnaier," and the "rest . . . used to pay expenses associated with [the] operation of . . . [the] First Montauk [OSJ]."[11]

B. Friedman's On-The-Record Interview

On April 18, 2007, and April 23, 2007, Schnaier and Friedman provided on-the-record testimony, respectively, in connection with Enforcement's investigation of the Majesco transactions. Friedman testified in his on-the-record interview that he believed the Majesco transactions constituted a "passive" investment through Global International that did not require prior written notice to First Montauk. Friedman did not discuss with Schnaier, at the time of the Majesco transactions, whether they needed to disclose them to the Firm because he "never thought it was an issue that needed to be raised." Friedman testified that he also did not consult with Schnaier during the preparation of the December 17, 2004 response to the MAP office examiners because Schnaier was not involved in that part of the process.[12] When asked whether, during the preparation of the December 17, 2004 letter to the MAP office staff, he "wonder[ed] if Mr. Schnaier [had] disclosed the Majesco [transactions]" Friedman stated, "[a]gain, it was my belief that no disclosure was necessary because of the type of transaction, so I didn't think to look into it."[13]

Friedman claimed that he "started to go over the details" of the Majesco transactions with Schnaier for the first time after they received their NASD Rule 8210 requests to appear for on-the-record interviews. It was only then that Schnaier advised him that he had disclosed the Majesco transactions to Kurinsky and that he had obtained "written and verbal approval [from Kurinsky] to do the transactions," which Friedman stated put him "at ease." In response to a question about where the alleged documents might be located, Friedman testified that Schnaier

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[11] Schnaier and Friedman retained 1,325,000 Majesco shares following their sales to JG, RG, and TC.

[12] The December 17, 2004 letter advised the MAP office staff that "the owners of Global International" understood that there was no need to advise First Montauk of the Majesco transactions.

[13] Schnaier testified that he was aware of the NASD Rule 3040 requirements, and that he had provided one document to Kurinsky that requested prior permission to engage in the purchases and sales of Majesco stock, and that the document also included Kurinsky's written approval of those transactions. When advised that his testimony contradicted the prior response that was provided to the MAP office indicating that Friedman and Schnaier were not aware of any obligation to provide notice to the Firm of the Majesco transactions, Schnaier explained that he "really had nothing to do" with the MAP application and had "never seen" the response until a day or two before his on-the-record interview when his attorney showed it to him. He stated that he dealt with the "corporate finance side of business" and Friedman handled the retail business and the MAP application process.

was "not the best of record keepers" and that office moves and office "floods" might be responsible for any inability to produce the notices and approvals.

C. Hearing Testimony and Hearing Panel Credibility Findings

At the hearing, Friedman reiterated the testimony he provided at his on-the-record interview, maintaining that he did not discuss the NASD Rule 3040 notice issue with Schnaier at the time of the Majesco transactions because he believed the transactions constituted a passive investment through Global International that did not require them to provide prior written notice to First Montauk. Friedman stated that he did not consider the purchase transactions as constituting "buying a position away from the firm," though he admittedly did not "know what process [he] would need [to follow] to disclose something like that." With respect to the Majesco sales transactions, Friedman conceded that he followed "no process or procedure." Friedman also acknowledged that he was the person responsible for approving the transactions, and that he was the one who also determined that there was no requirement to provide prior written notice of the Majesco transactions to First Montauk. He testified that, in "hindsight," however, his conclusion not to disclose the Majesco transactions to First Montauk was wrong.

Schnaier testified that he provided Kurinsky with a written notice, requesting approval to purchase Majesco shares and a separate written notice, requesting approval to sell the shares. This testimony differed from his on-the-record testimony in which he claimed that he provided one document to Kurinsky that requested permission to purchase and sell the Majesco shares. Schnaier also testified that he advised Friedman that he had provided written notice to, and received written approval from, Kurinsky for the Majesco transactions, but stated that he could not remember when that discussion occurred, except that it did not take place prior to the consultant's December 17, 2004 letter to the MAP office. Friedman testified that he did not learn from Schnaier until they received their NASD Rule 8210 requests to appear for on-the-record interviews that, according to Schnaier, he had complied with NASD Rule 3040 with respect to the Majesco transactions by providing written notice of the transactions to Kurinsky. Schnaier claimed that he also discussed the Majesco transactions with Kurinsky by telephone. Schnaier could not recall the details of the purported conversations, however, other than that he informed Kurinsky of his opportunity "to buy shares in a private company very cheap" and that he later advised Kurinsky of his opportunity to sell some of the Majesco shares. Kurinsky testified that he did not remember whether he ever discussed Majesco with Schnaier or Friedman.[14]

James Port ("Port"), one of several national supervisors with First Montauk responsible for the supervision of all registered representatives associated with the Firm, testified that Kurinsky would not generally personally approve private securities transactions and, that in his six years at First Montauk, he knew of no occasion when Kurinsky gave written approval for any transactions. He stated that the Firm probably would not have objected, however, to a registered representative's request to make a private securities investment and to sell those securities, as

[14] As noted, the Hearing Panel found that Kurinsky was not a reliable witness because of his memory problems.

long as the sales were not to a Firm customer. The Firm's Compliance and Procedure Manual did not include a specific procedure to that effect, but it did require registered representatives to obtain approval in writing from the Firm "for any financial products or securities which he wishes to sell, other than those which have been previously approved by [the Firm]."[15]

The Hearing Panel concluded that Schnaier's testimony concerning his professed conversations with Kurinsky was not credible and that they "did not find Schnaier to be a credible witness overall," observing that he "was frequently combative and evasive on cross-examination, often seeming to prefer showing his disdain for the Enforcement attorneys rather than answering questions directly." We give deference to the Hearing Panel's credibility determination, which was based on hearing Schnaier's testimony and observing his demeanor. *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"). There is nothing in the record to cause us to depart from the Hearing Panel's credibility findings.[16]

IV. Discussion

NASD Rule 3040 prohibits associated persons from participating in any manner in a private securities transaction without prior written notification to the member.[17] "Private securities transaction" means "*any securities transaction* outside the regular course or scope of an

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[15] Friedman's independent contractor agreement and registered representative agreement with First Montauk also required approval in writing from the Firm to sell any security that was not offered through the Firm.

[16] The Hearing Panel concluded that there was no evidence to support Friedman's and Schneider's claims that a flood was responsible for the absence of the alleged documents relating to the Majesco transactions. Moreover, the Firm's paralegal and an attorney for the Firm's parent company, who also served as First Montauk's chief administrative officer, appeared at the hearing and testified that a thorough search of First Montauk's records had been conducted and that no documents regarding the Majesco transactions were located.

[17] If an associated person has received or may eventually receive selling compensation, the member firm must advise the associated person in writing whether it approves or disapproves the person's participation in the transaction. *See* NASD Rule 3040(c). "Selling compensation" means "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security . . . ." NASD Rule 3040(e)(2). Because the Hearing Panel found that Friedman and Schnaier failed to provide any written notice to the Firm of the Majesco transactions, it determined that it was unnecessary to reach the issue of whether they received selling compensation. Accordingly, the Hearing Panel did not reach the allegation in the complaint that Friedman and Schnaier failed to obtain prior written approval from the Firm for the Majesco transactions, which is predicated on whether the associated person received "selling compensation." We too decline to reach the issue.

associated person's employment with a member . . . ." NASD Rule 3040(e)(1) (emphasis added). NASD Rule 3040 applies to both purchases and sales of securities. *See Jay Frederick Keeton*, 50 S.E.C. 1128, 1129 (1992) (finding that "Keeton's sales activities . . . as well as his own purchases of partnership interests" violated FINRA's rules prohibiting private securities transactions).[18] "[NASD] Rule 3040 serves not only to protect investors, but also to permit securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions." *Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *9 (Feb. 13, 2004). The member must therefore "be apprised of any associated person's outside involvement in securities transactions." *Keeton*, 50 S.E.C. at 1130. There is no dispute that the Majesco transactions constituted private securities transactions subject to the provisions of NASD Rule 3040. There also is no dispute that Friedman participated in the purchase and sale of Majesco securities through Global International while he was associated with First Montauk.

The record demonstrates that, through his ownership of Global International with Schnaier, Friedman purchased Majesco shares and subsequently sold a portion of those shares to purchasers JG, RG, and TC, without first providing First Montauk with written notice of those private securities transactions, as required under NASD Rule 3040. Friedman admittedly determined incorrectly that there was no requirement to provide written notice of the Majesco transactions to First Montauk because of his mistaken belief that they were passive investments that did not fall under the requirements of NASD Rule 3040.

Friedman attempts to blame Schnaier for his own violation of NASD Rule 3040 by contending that he "had no experience in investment banking, and that . . . the approval for the purchase and sale of the [Majesco] shares, [was] handled by and delegated to Mr. Schnaier." These arguments are unconvincing. First, Friedman's claim that Schnaier approved the Majesco transactions at issue contradicts his own admissions at the hearing that he was the person who determined that no prior written notice to the Firm was necessary, and that he was the one who "approved" these transactions. Second, Friedman's assertion that he had no experience in the area of investment banking is misplaced because this case does not concern allegations of an investment banking violation. Moreover, Friedman's lack of knowledge with respect to his obligations under NASD Rule 3040 does not excuse his misconduct because a registered person is expected to have read and have knowledge of FINRA's rules.[19] In addition, as the Commission

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[18] NASD Rule 3040 includes private sales of securities when there is no commission involved. *See Jim Newcomb*, 55 S.E.C. 406, 417 (2001) (finding that Newcomb's sale of promissory notes by a company owned by respondent violated NASD Rule 3040); *Keeton*, 50 S.E.C. at 1131-32 (finding that Keeton's sales of interests in a partnership in which he was an investor without providing prior written notice to his firm violated NASD Rule 3040).

[19] *See Carter v. SEC*, 726 F.2d 472, 474 (9th Cir. 1983) (stating that a registered person is "assumed as a matter of law to have read and have knowledge of [NASD's] rules and requirements"); *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *22 (Nov. 8, 2006) (rejecting respondent's claimed ignorance of his obligations given his securities industry experience and emphasizing that the prohibition on private securities transactions is

[Footnote continued on next page]

has stated, "[a] broker has responsibility for his or her own actions and cannot blame others for her own failings." *Justine Susan Fischer*, 53 S.E.C. 734, 741 n.4 (1998). We therefore reject Friedman's suggestion that he had no individual responsibility to comply with NASD Rule 3040 as applicable to the Majesco transactions.

We affirm the Hearing Panel's finding that Friedman failed to provide the Firm with prior written notice of his Majesco stock purchases and sales, in violation of NASD Rules 3040 and 2110.[20]

V. Sanctions

The Hearing Panel fined Friedman $77,500, which included a fine and an additional amount for Friedman's financial benefit.[21] We affirm the Hearing Panel's monetary sanction. The Hearing Panel also imposed a 45-day suspension against Friedman in all capacities. Because we consider the relevant factors to indicate a very serious violation, we increase the length of the suspension to nine months for the reasons set forth below.[22]

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fundamental to an associated person's duty to his customers and his firm); *Dep't of Enforcement v. Ryerson*, Complaint No. C9B040033, 2006 NASD Discip. LEXIS 17, at *39-40 (NASD NAC Aug. 3, 2006) (finding that a registered representative is not excused for "his lack of knowledge or appreciation" of FINRA rule requirements), *aff'd*, Exchange Act Rel. No. 57839, 2008 SEC LEXIS 1153 (May 20, 2008).

[20] A violation of NASD Rule 3040 is also a violation of Rule NASD Rule 2110. *See Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006), *aff'd*, 209 Fed App'x 6 (2d Cir. 2006). In addition, NASD Rule 0115(a) imposes upon associated persons all duties and obligations of members.

[21] The FINRA Sanction Guidelines ("Guidelines") for private securities transactions recommend increasing the fine amount by adding the amount of a respondent's financial benefit. *See* FINRA Sanction Guidelines 15-16 (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. For purposes of determining Friedman's financial benefit, the Hearing Panel decided to disregard the nominal price Friedman paid for the Majesco shares. We agree with that approach. The sale to RG resulted in proceeds of $105,000, which the Hearing Panel split equally between Friedman and Schnaier for purposes of assessing sanctions.

[22] In his appeal, Friedman requests that the fine imposed by the Hearing Panel be decreased. He also argues that a suspension is not warranted under the facts of this case. In its cross-appeal, Enforcement argues that Friedman's misconduct is a serious matter that warrants an increase in the length of Friedman's suspension from 45 days to nine months.

The Guidelines for private securities transactions provide that an adjudicator's first step in determining sanctions is to assess the quantitative extent of the transactions, including the dollar amount of sales involved, the number of customers, and the length of time over which the selling away occurred.[23] The Guidelines also direct adjudicators to consider 10 qualitative factors. We discuss the relevant quantitative and qualitative considerations below. We also consider the Guidelines' General Principles and Principal Considerations in Determining Sanctions applicable to all violations.

We begin our analysis by considering the quantitative factors listed in the Guidelines for private securities transactions. Although we agree somewhat with the Hearing Panel's discounting of the amount of the sales at issue ($1,480,000), we begin by giving full consideration to the Guidelines' recommendation that sales amounts over one million dollars should result in a suspension of twelve months to a bar. We acknowledge, however, that Friedman was not seeking to earn commissions from the transactions, and that the transactions were limited to the purchase of Majesco shares at the end of November 2004, and the sales to only three purchasers in April and May 2005 of a portion of those shares. We view these facts as favorable to Friedman.

Turning to the qualitative factors that we consider under the Guidelines, we find evidence of aggravating circumstances. We view as aggravating that Friedman had been a principal for six years at the time of the misconduct and was the one who admittedly determined that no prior written notice of the transactions was required and who approved the transactions. He made that determination without consulting the FINRA rules or obtaining guidance from the Firm's compliance personnel. Moreover, the Firm's procedures and Friedman's written agreements with the Firm put him on notice of his obligation to obtain written approval for any sales of securities away from the Firm and thus his obligation to notify the Firm of the transactions at issue. We also consider aggravating that one of the purchasers was a Firm customer (RG)[24] and that Friedman's misconduct resulted in his potential for monetary or other gain.[25] Indeed, the sales of Majesco shares resulted in large net profits that were deposited into Global International's bank account for Friedman's and Schnaier's use.

We disagree with the Hearing Panel's view that certain qualitative factors cited in its decision should be considered for purposes of assessing appropriate sanctions. The Hearing Panel found that the sale of the Majesco securities did not violate state or federal securities laws, or

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[23] *Guidelines*, at 15-16. The Guideline for private securities transactions provides for the following range in sanctions based on the amount of sales: (1) a suspension of 10 business days to 3 months for up to $100,000 in sales; (2) a suspension of three to six months for sales from $100,000 to $500,000; (3) a suspension of six to 12 months for sales from $500,000 to $1 million; and (4) a suspension of 12 months to a bar for sales over $1,000,000. *Id.*

[24] *See Guidelines*, at 16.

[25] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

FINRA rules.[26] Had there been evidence of such violation, it could be viewed as aggravating, but the lack thereof does not lessen the severity of Friedman's misconduct.

The Hearing Panel also determined that Friedman did not represent to the sellers of the Majesco shares or the three purchasers that the transactions were sanctioned by First Montauk.[27] We note, however, that one of the purchasers, RG, was a Firm customer and thus would have reason to believe that the Firm sanctioned the transaction. Moreover, while steps taken by respondents to lead sellers or purchasers to believe a member firm sanctioned private securities transactions could be considered as aggravating, we do not consider the absence of such evidence for purposes of assessing appropriate sanctions.

The Hearing Panel found that there was no harm to the three purchasers or other public customers resulting from Friedman's actions.[28] Although we generally consider any harm to purchasers and the investing public to be aggravating, we give little weight to the fact that there was no measurable harm here to the purchasers of the Majesco shares or the wider investing public.

The Hearing Panel also found that there was no evidence that Friedman misled or concealed the transactions from First Montauk.[29] Friedman's failure to provide the required written notice of the transactions to the Firm had the effect of concealing the activity from the appropriate Firm personnel, which is the gravamen of the violation. The effect of his misconduct on First Montauk was that the transactions could not be supervised by the Firm. We do not give any weight to the fact that Friedman did not engage in additional acts to mislead or conceal the transactions from the Firm.

Contrary to the Hearing Panel, we do not view Friedman's assertion that he did not intend to violate NASD Rule 3040 as a factor that mitigates his misconduct. The Hearing Panel reasoned that Friedman's violation resulted from his failure to understand the requirements of

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[26] As directed by the Guidelines for private securities transactions, we consider whether the product sold away involved "a violation of federal or state securities laws or federal, state or [self regulatory organization] rules." *Guidelines*, at 15.

[27] The Guidelines for private securities transactions instructs adjudicators to consider whether the respondent attempted to create the impression that his employer sanctioned the selling away activity. *Id.*

[28] Under the Guidelines for private securities transactions, we consider whether the private securities transactions resulted in injury to the investing public and, if so, the nature and extent of the injury. *Guidelines*, at 16.

[29] The Guidelines also direct us to consider whether the respondent misled his employer about the existence of the selling away activity or otherwise concealed it from the firm. *Id.*

NASD Rule 3040, and that Friedman apparently confused the provisions of NASD Rules 3030[30] and 3040. It is well established, however, that a registered representative is not excused, for "his lack of knowledge or appreciation" of FINRA rule requirements. *See Ryerson*, 2006 NASD Discip. LEXIS 17, at *39-40. And such ignorance of FINRA rules is not mitigating for purposes of sanctions. *See Thomas C. Kocherhans*, 52 S.E.C. 528, 531-532, 534 (1995) (determining that ignorance of FINRA rules does not compel a reduction of sanction). Moreover, Friedman's claim that he was not aware of his obligation under NASD Rule 3040 is counterbalanced by the fact that he was an experienced securities industry professional, having been a registered representative for nine years at the time of the misconduct, six of which he served as a general securities principal. *See Keyes*, 2006 SEC LEXIS 2631, at *22 ("Keyes's claimed ignorance of his obligations is only aggravated in light of his fifteen years experience in the securities industry").[31]

Friedman argues in support of a reduction in sanctions that the sanctions imposed in another FINRA disciplinary case should determine the sanctions in this matter. The Commission has held, however, that sanctions depend on the "particular facts and circumstances of each case, and cannot be determined by comparison with the action taken in other cases." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *50 (Jan. 22, 2003).

Finally, Friedman argues that the sanctions will have an adverse effect on his career because it would prevent him from acquiring an additional interest in his current firm. In determining appropriately remedial sanctions, however, we do not consider as evidence of mitigation the possible impact a disciplinary action might have on a respondent's career. *See Dep't of Enforcement v. Winters*, Complaint No. E102004083704, 2009 FINRA Discip. LEXIS 5, at *18 (FINRA NAC July 30, 2009) ("The economic hardship that results from a longer suspension and the impact that this matter may have upon Winters's business do not mitigate his misconduct"). We therefore reject Friedman's arguments in support of his request that the sanctions be reduced.

In light of the foregoing considerations, we affirm the Hearing Panel's imposition of a $77,500 fine against Friedman and increase Friedman's suspension to nine months in all capacities. We conclude that an increase in the Hearing Panel's suspension is necessary to

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[30] NASD Rule 3030 requires associated persons to provide written notice of outside business activities, other than a passive investment, to the associated person's firm.

[31] We note that Friedman has failed to take responsibility for his misconduct. On appeal, Friedman attempts to blame Schnaier for the violations at issue, claiming that Schnaier was the individual responsible for the transactions under review. The facts, however, belie this claim. Friedman, who was the only principal at the First Montauk OSJ location, admitted at the hearing that he was the individual who determined that no prior written notice of the transactions was required and who approved the transactions. Further, as stated above, a registered representative is responsible for his own actions and cannot blame others for his own misconduct. *See Fischer*, 53 S.E.C. at 741 n.4. Friedman is responsible for his own misconduct and cannot mitigate his sanctions by asserting that Schnaier was responsible for the violations.

remediate Friedman's misconduct given the aggravating factors and lack of mitigating circumstances, and to deter others from taking a similarly lackadaisical approach to regulatory requirements concerning private securities transactions.

VI. Conclusion

We affirm the Hearing Panel's findings that Friedman engaged in private securities transactions with respect to the Majesco securities without prior written notice to his Firm, in violation of NASD Rules 3040 and 2110. For those violations, Friedman is fined $77,500 and suspended for nine months from associating with any member firm in all capacities. We also affirm the Hearing Panel's order that Friedman pay hearing costs in the amount of $8,666.63, jointly and severally with Schnaier. In addition, Friedman is assessed $1,699.30 in appeal costs, consisting of the appeal cost of $1,000 and the appeal hearing transcript cost of $699.30.[32]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

[32] We also have considered and reject without discussion all other arguments advanced by the parties. Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.