BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Ram Kapara Brooklyn, NY, Respondent.	DECISION Complaint No. C10030110 Dated: May 25, 2005

Registered representative engaged in private securities transactions without giving his firm prior written notice; falsified a document; misrepresented material facts to two customers; and failed to respond to staff requests for information. Held, Hearing Officer's findings and sanctions affirmed, in part.

Appearances

For the Complainant: Peter Bon Viso, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: William Schneider, Esq.

Opinion

Ram Kapara ("Kapara") appeals a Hearing Officer's April 20, 2004 default decision pursuant to Procedural Rule 9311. After a thorough review of the record in this case, we find that the Hearing Officer's entry of default was proper, and that the respondent has not established good cause for his failure to participate in the proceedings below.

We also affirm, in part, the Hearing Officer's findings of violation. After an independent review of the evidence, we find that Kapara: engaged in private securities transactions without giving his firm prior written notice, in violation of NASD Conduct Rules 3040 and 2110;[1] submitted to NASD staff a falsified document, in violation of Conduct Rule 2110; misrepresented material facts to two customers, in violation of Conduct Rule 2110; and failed to respond to staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. We reverse and dismiss, however, the Hearing Officer's finding that Kapara exercised discretionary authority over a customer's account without the customer's prior written authorization, in violation of NASD Conduct Rules 2510 and 2110.

Finally, we affirm, in part, the sanctions imposed upon Kapara by the Hearing Officer. We find that Kapara's conduct warrants a bar. We also conclude that Kapara should pay restitution to two customers, but we modify the manner in which restitution is to be calculated and paid. In doing so, we reject a claim of inability to pay set forth by Kapara on appeal. We vacate the Hearing Officer's restitution order as it relates to one customer.

I. Background

A. Employment History

Kapara entered the securities industry in 1995. Kapara registered as a general securities representative of Argus Securities, Inc. ("Argus" or "the Firm") in December 2000. On December 4, 2001, the Firm terminated Kapara. He is not presently associated with any member firm.

B. Procedural History

On November 28, 2003, the Department of Enforcement ("Enforcement") filed a five-cause complaint against Kapara. The complaint alleged that Kapara violated Conduct Rules 3040 and 2110 by effecting private securities transactions away from Argus without providing prior written notice to the Firm; violated Conduct Rule 2110 by submitting to NASD staff, during the course of an investigation into Kapara's conduct, a falsified document; violated Conduct Rule 2110 by providing false and misleading information to three customers in connection with the private securities transactions at issue in this case; violated Conduct Rules 2510 and 2110 by exercising discretion over a customer's account without prior written authorization from the customer; and violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to requests from NASD staff to appear for an on-the-record interview and to provide information.

---

[1] Pursuant to NASD Rule 115(a), Conduct Rule 2110 applies to all members and persons associated with a member.

Pursuant to NASD Procedural Rule 9134, Enforcement served the complaint and a notice of complaint by mailing them, using certified and first-class mail, to Kapara's current residential address as reflected in NASD's Central Registration Depository ("CRD"®). The Postal Service returned a receipt with a signature evidencing that Kapara received the certified mailing sent to his CRD address.[2]

On December 30, 2003, the time for filing an answer having passed, Enforcement served another copy of the complaint and a second notice of complaint in accordance with NASD Procedural Rule 9215(f). The second notice of complaint was sent, by certified and first-class mail, to the current CRD and other addresses to which the original and supplemental notices of complaint had been mailed to Kapara. Some of these mailings were returned undelivered, others were not, and Enforcement received several return receipts reflecting delivery.

Kapara did not answer the complaint. As a result, on February 10, 2004, Enforcement filed a motion seeking entry of a default decision pursuant to NASD Procedural Rule 9269. The motion was supported by a declaration of counsel for Enforcement and 14 exhibits.[3] The exhibits set forth Enforcement's efforts to serve notice of the proceedings upon Kapara. Although Enforcement's motion detailed the violations alleged in the complaint, and Enforcement counsel's declaration stated that Enforcement possessed "sufficient evidentiary support" for the allegations, the motion was not otherwise accompanied by any independent evidence of misconduct.

Kapara did not respond to Enforcement's default motion. Thus, on April 20, 2004, the Hearing Officer issued a decision finding that Kapara received valid constructive notice of the proceedings and that he defaulted by failing to answer the complaint. The decision accepted the allegations set forth in the complaint as true and found that Kapara admitted the allegations by virtue of his default. The Hearing Officer's decision imposed a bar upon Kapara for his failure to respond to NASD information requests in violation of Procedural Rule 8210 and Conduct Rule

---

[2] Enforcement also mailed the complaint and a notice of complaint, by certified and first-class mail, to a second address obtained from CRD, as well as several other addresses obtained from Equifax. Each of these additional addresses was a subtle variation of the current CRD address. Although some of these mailings were returned to Enforcement as unclaimed or undeliverable, others were not. On December 2, 2003, Enforcement also served Kapara with the complaint and a supplemental notice of complaint after obtaining an additional address from LEXIS. The supplemental mailing was sent by both certified and first-class mail, but only the certified mailing was returned to Enforcement.

[3] Enforcement served a copy of its default motion and supporting documents, by certified and first-class mail, to each of the addresses that it possessed for Kapara.

2110, and a separate bar for the submission to NASD of a falsified document in violation of Conduct Rule 2110. The Hearing Officer also ordered that Kapara pay $831,000 in restitution to three customers that participated in the private securities transactions that were the subject of the complaint.

This timely appeal followed. On appeal, Kapara asserts that he was not subject to NASD jurisdiction at the time that the complaint in this case was issued. Alternatively, Kapara asserts that good cause exists for his failure to participate in the proceedings below and, in any event, that the record does not contain an independent evidentiary basis for the Hearing Officer's findings. Finally, Kapara argues that the sanctions imposed upon him are inconsistent with NASD Sanction Guidelines.

Enforcement requests that we affirm the Hearing Officer's default decision barring Kapara from the securities industry and ordering him to pay restitution. Pursuant to NASD Procedural Rule 9346(b), Enforcement sought leave to produce evidence supporting the Hearing Officer's findings of violation. The NAC subcommittee ("Subcommittee") empanelled to consider this case granted Enforcement's motion.[4]

II. Discussion

We first consider whether Kapara was subject to NASD jurisdiction at the time that the complaint in this case was filed. We find that he was. We next consider whether Kapara defaulted by failing to answer the complaint. We find that he did. We also consider whether Kapara has demonstrated good cause for his failure to participate in the proceedings below. We find that he has not. Finally, we consider the merits of this appeal. We find that, with one exception, the allegations set forth in the complaint are substantiated.

A. Jurisdiction

Kapara claims that he was not subject to NASD jurisdiction when Enforcement served its complaint on November 28, 2003. Kapara is mistaken.

Article V, Section 4 of NASD's By-Laws generally provides that a person who is terminated and no longer associated with any NASD member continues to be subject to NASD jurisdiction for a period of two years from the effective date of termination of registration, or

---

[4] This is consistent with our past practice, in appeals from default decisions, to order that Enforcement supplement the record below with independent evidence of the violations alleged in the complaint, or remand the matter to the Hearing Officer for the introduction of such evidence. See, e.g., Dep't of Enforcement v. Verdiner, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *4 (NAC Dec. 9, 2003); Dep't of Enforcement v. Respondent, Complaint No. C10010146, 2003 NASD Discip. LEXIS 1, at *12-14 (NAC Jan. 3, 2003).

from the filing of an amendment of a notice of termination that discloses any actionable conduct. Thus, NASD's jurisdiction is determined not by the termination of an individual's employment or association with a firm, but rather by the effective date of termination of the individual's registration. Donald M. Bickerstaff, 52 S.E.C. 232, 234 (1995); Richard Greulich, 50 S.E.C. 216, 218 (1990). In this case, Argus filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") effectively terminating Kapara's registration with the Firm on December 4, 2001. The complaint was therefore timely served by Enforcement.

Furthermore, an additional basis for jurisdiction exists in this case. On February 12, 2002, Argus filed an amended Form U5 concerning possible violations by Kapara of Conduct Rule 3040. This amended filing served to extend NASD's jurisdiction over Kapara to a date well beyond the date upon which the complaint was served.

Therefore, we find that Kapara was subject to NASD jurisdiction for purposes of these proceedings.

B. Hearing Officer's Entry of Default

It is well settled that NASD Procedural Rule 9134 provides for constructive notice by mailing a complaint to the respondent's current CRD address. Dep't of Enforcement v. Hodde, Complaint No. C10010005, 2002 NASD Discip. LEXIS 4, at *10-11 (NAC Mar. 27, 2002). The record establishes, and Kapara does not dispute, that Enforcement's efforts to serve him with notice of the proceedings below complied with this rule. He thus received the requisite notice of the disciplinary proceedings instituted against him. See Dep't of Enforcement v. Verdiner, 2003 NASD Discip. LEXIS 42, at *5-6 & n.1 (finding that respondent, having been mailed the complaint at his CRD address and by failing to file an answer, defaulted).

It is also undisputed that Kapara failed to answer the complaint or otherwise respond within the period specified in Enforcement's second notice of complaint. Where such facts exist, Procedural Rules 9215(f) and 9269(a) permit the Hearing Officer to treat the allegations in the complaint as having been admitted and to enter a default decision against the respondent.

Accordingly, we affirm the Hearing Officer's finding that Kapara defaulted.

C. Kapara's Failure to Show Good Cause

NASD Procedural Rule 9344(a) provides that, when an individual appeals a default decision and establishes good cause for his failure to participate in the proceedings below, the NAC or the Review Subcommittee may either dismiss the appeal and remand the matter for further proceedings, or may order that the appeal proceed. If an individual who defaulted fails to show good cause, however, Rule 9344(a) dictates that the matter be considered on the basis of the record without the opportunity for oral argument. Kapara requests that his failure to participate in the proceedings below be excused for good cause. We decline Kapara's request.

Kapara's claim of good cause is based solely upon an assertion that, due to a domestic dispute that forced him from his CRD residence, Kapara did not receive actual notice of Enforcement's disciplinary action. The record, however, contradicts this assertion. Enforcement received a signed postal receipt indicating that Kapara received the complaint and notice of complaint when these documents were sent by certified mail to Kapara's CRD address. Kapara also admits that he received Enforcement's default motion, and therefore notice of the proceedings below, prior to the Hearing Officer's entry of default.[5]

Furthermore, even were we to accept as true Kapara's assertion that he did not possess actual notice, this fact does not permit Kapara to reopen an NASD disciplinary proceeding at a time unilaterally chosen by him. Kapara had a duty to keep a current address on file with NASD.[6] Nazmi C. Hassanieh, 52 S.E.C. 87, 90 (1994). Kapara did not abide by this duty. Kapara's argument that he failed to receive the complaint, because he left his CRD address, does not constitute good cause for his failure to answer the complaint. See Hodde, 2002 NASD Discip. LEXIS 4, at *9 (finding that respondent failed to establish good cause for his failure to answer the complaint where the respondent did not provide CRD with an updated address).

We find that Kapara has failed to demonstrate good cause for his failure to participate in the proceedings before the Hearing Officer. Consequently, we have considered this appeal based upon the written record, including the briefs submitted by the parties on appeal and the supplemental evidence provided by Enforcement in support of the allegations set forth in the complaint, without oral argument from the parties.[7]

D. Evidentiary Bases for the Findings of Violation

The Hearing Officer properly deemed the allegations of the complaint against Kapara admitted and incorporated them into the default decision as findings of fact. Although we can

---

[5] Kapara was required to respond to Enforcement's February 10, 2004 motion for default within 14 days. Kapara states that he only became aware of Enforcement's motion in March 2004. At that time, although Kapara's counsel informally requested that Enforcement withdraw its motion, Kapara did not otherwise request an enlargement of the period of time within which to respond to the default motion or otherwise seek leave to file an untimely answer.

[6] This obligation is ongoing, even after an NASD member firm has terminated an individual. Warren B. Minton, Exchange Act Rel. No. 46709, 2002 SEC LEXIS 2712, at *13 & n.16 (Oct. 23, 2002).

[7] Kapara submitted a declaration in support of his appeal. Although he did not seek leave to supplement the record with this declaration, we nevertheless have considered the declaration for purposes of evaluating the record and reaching the findings set forth in this decision.

deem the allegations in the complaint admitted, we are not doing so in this case. We have conducted an independent review of the evidence and find, with one exception, that there is sufficient evidence in the record to support the findings set forth in the default decision.[8]

1. Private Securities Transactions

NASD Conduct Rule 3040(a) provides that "[n]o person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." An associated person who intends to participate in a securities transaction outside the regular course or scope of employment must give prior written notice to his or her employer describing the proposed transaction in detail. NASD Conduct Rule 3040(b).[9]

The record establishes that Kapara, while associated with Argus in October 2001, solicited three Firm customers, GW, WL, and RE, to buy stock in a venture called Soup Club, Inc. ("Soup Club").[10] Kapara was involved in the choice of Soup Club as an investment for each of these customers, made specific recommendations concerning Soup Club to each of these customers, and facilitated the mechanics of each customer's investment, including the transfer of funds or the sale of stock in each customer's Argus account to pay Soup Club directly for the stock. Such participation fits within the broad range of behavior covered by Conduct Rule 3040.[11] See, e.g., Mark H. Love, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *9-10

---

[8] The Commission has indicated that, when a default decision is appealed, the record should contain independent evidence supporting the findings of violation so that the Commission can discharge its review function under Section 19 of the Securities Exchange Act of 1934 ("Exchange Act"). See James M. Russen, Jr., 51 S.E.C. 675, 678 n.12 (1993) (noting approvingly in default case that NASD, rather than simply basing its conclusions upon the complaint's allegations, had reviewed the record evidence and determined that it supported a finding of violation); Troy A. Wetter, 51 S.E.C. 763, 767-68 (1993) (ruling in the context of an NASD default decision that the Commission could "conclude on this record, that [the firm] effected only 5, rather than 30, securities transactions").

[9] Although it appears in this case that Kapara did not receive any selling compensation, Conduct Rule 3040 further provides that, if selling compensation is to be received, an associated person may not engage in a private securities transaction unless the associated person's employer gives its prior approval in writing. NASD Conduct Rule 3040(c).

[10] We find, and Kapara does not dispute, that the interests in Soup Club were securities as defined in Section 3(a)(10) of the Exchange Act.

[11] The fact that Kapara apparently did not benefit from or otherwise receive compensation for the Soup Club transactions does not, as he now argues, undermine a finding that Kapara

[Footnote continued on next page]

(Feb. 13, 2004) (finding a violation of NASD Conduct Rule 3040 where the respondent recommended the investment to customers and facilitated the transfer of customers' funds from their brokerage accounts to the recommended investment vehicle).

The record further establishes that Argus had no knowledge of these transactions. Kapara participated in the transactions outside the scope of his employment at Argus and without providing written notice of his activities to the Firm. Kapara admitted this much in a letter to NASD staff prior to the institution of disciplinary proceedings.

We therefore affirm the Hearing Officer's finding that Kapara violated NASD Conduct Rules 3040 and 2110 as alleged in the first cause of the complaint.

2. Submission of a Fraudulent Document to NASD

Falsifying documents is a practice that is inconsistent with just and equitable principles of trade. Ramiro Jose Sugranes, 52 S.E.C. 156, 157 (1995); Jeffrey Michael Miller, 51 S.E.C. 1027, 1029 (1994). During the course of NASD's investigation into his activities, Kapara provided NASD staff with a letter by which he purported to resign from Argus on September 27, 2001. Kapara provided this letter as explanation for his failure to provide Argus with written notice of the Soup Club transactions. The independent evidence establishes, however, that Kapara continued to be associated with Argus through October 2001, at which time customers GW, WL, and RE invested in Soup Club, did not resign from Argus until November 7, 2001, and voluntarily left Argus on or about November 9, 2001. The evidence thus fully supports an inference that Kapara falsified his September 27, 2001 resignation letter.[12] Accordingly, we affirm the Hearing Officer's finding that Kapara's conduct violated NASD Conduct Rule 2110 as alleged in the second cause of the complaint.

3. False and Misleading Statements

The complaint alleged that Kapara misrepresented Soup Club to customers GW and WL. The independent evidence establishes that Kapara told both customers that Soup Club was a real estate venture that would be buying and selling real estate in New York, through which the customers could make a substantial, quick profit. Kapara also told these two customers that Soup Club was involved with a certain New York Stock Exchange ("NYSE") listed company

---

[cont'd]

violated Rule 3040. Receipt of a benefit or compensation is not a required element of a Conduct Rule 3040 violation. Keith L. Mohn, 54 S.E.C. 457, 464 (1999).

[12] Proof of a securities law violation can be made through an inference from circumstantial evidence and not solely upon direct testimonial confession. SEC v. Moran, 922 F. Supp. 867, 890 (S.D.N.Y. 1996).

with plans to take Soup Club public. Neither of these claims was true. A Soup Club offering memorandum obtained by NASD staff shows that Soup Club was planning to operate upscale cafes. Furthermore, Soup Club was not affiliated with a NYSE listed company that had plans to assist Soup Club with going public.

The independent evidence also establishes that Kapara's misrepresentations were material. Whether information is material is dependent upon the significance the reasonable investor would place upon the representation. Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988). To be material, the representation must be viewed by the reasonable investor as having significantly altered the total mix of information available. Id. In this case, the nature of Soup Club's business activities, and its alleged affiliation with an established, listed company that planned to take it public, were significant information, and Kapara's representations concerning this information altered the total mix of information available to his customers. See SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992) ("Material facts include 'not only information disclosing the earnings . . . of a company but also those facts which affect the probable future of a company and which may affect the desire of investors to buy, sell or hold a company's securities.'") (citations omitted). Customers GW and WL both declared that they based their investment decisions upon Kapara's representations that Soup Club was a real estate investment that intended to go public in the near future, and that they would not have purchased Soup Club stock if they had known instead that Soup Club was only in the business of operating cafes.

Although Kapara argues that he cannot be held liable for making misrepresentations because the offering memoranda made clear to the customers the nature of Soup Club's activities, this argument is without merit. First, declarations submitted by customers GW and WL state that they were not provided with any written sales or financial materials concerning their Soup Club investments. Furthermore, Kapara may not rely upon Soup Club's offering documents as a shield for his own misrepresentations. See Dist. Bus. Conduct Comm. v. Klein, Complaint No., C01940014, 1995 NASD Discip. LEXIS 222, at *37 (NBCC June 26, 1995).

Kapara's material misrepresentations are inconsistent with just and equitable principles of trade. Dep't of Enforcement v. Timberlake, Complaint No. C07010099, 2004 NASD Discip. LEXIS 11, at *16 (NAC Aug. 6, 2004) ("It is axiomatic that a broker who makes material misrepresentations and omissions to customers is engaging in unethical conduct."). Accordingly, we affirm the Hearing Officer's finding that Kapara violated NASD Conduct Rule 2110 as alleged in the third cause of the complaint.

4. Discretionary Trading

NASD Conduct Rule 2510(b) requires that a registered representative obtain written authorization from a customer before exercising discretionary authority in the customer's

account.[13] Enforcement alleged in the complaint that Kapara exercised discretion in customer RV's account without RV's prior written authorization.

The only independent evidence within the record in support of this cause of the complaint is the declaration of customer RV. RV's declaration supports a finding that Kapara exercised discretionary authority in RV's account and purchased securities without his knowledge. Further evidence necessary to support a finding of violation, however, is missing. The record does not contain any circumstantial or direct evidence that Kapara failed to obtain written authorization to exercise discretionary control over RV's account.[14] For instance, while RV recalls filling out Argus customer account forms when he opened his account, he does not recall what they were, and the record does not include any account forms that could, by inference, establish the absence of written discretionary authority.

For these reasons, we reverse and dismiss the Hearing Officer's finding that Kapara violated NASD Conduct Rules 2510 and 2110 as alleged in the fourth cause of the complaint.

5. Failure to Respond to NASD Information Requests

The record establishes that NASD staff made numerous requests of Kapara pursuant to NASD Procedural Rule 8210.[15] On October 9, 2002, NASD sent Kapara a written request to appear for an on-the-record interview on October 22, 2002. The day before the scheduled interview, however, Kapara contacted the staff and stated that he would be unable to appear. Consequently, on October 25, 2002, the staff rescheduled the interview and sent Kapara a written request that he appear and provide testimony on November 20, 2002.

---

[13] This rule also requires that a member firm, or a person duly designated by the firm in accordance with Conduct Rule 3010, accept the discretionary account in writing.

[14] The record also does not contain any circumstantial or direct evidence as to whether the Firm accepted the account as discretionary.

[15] Procedural Rule 8210(a) authorizes NASD, in the course of its investigations, to require a member, a person associated with a member, or any person subject to NASD's jurisdiction, to provide information orally, in writing or electronically "with respect to any matter involved in [an] investigation, complaint, examination, or proceeding." The Commission has emphasized that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate. Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997).

Kapara did not appear. Instead, a "mediation specialist" claiming to represent Kapara requested a postponement of the interview scheduled for November 20, 2002.[16] Staff thus directed Kapara, in writing on November 22, 2002, to appear on December 10, 2002 for his interview.

Kapara did not appear for the scheduled on-the-record interview and did not otherwise contact NASD staff. On December 10, 2002, NASD staff therefore made a written request that Kapara appear to provide testimony on December 19, 2002. Despite being informed that this was staff's final request, and that his failure to appear could result in disciplinary action, Kapara once again did not appear for the scheduled interview and did not otherwise contact NASD staff.

In addition to the several requests that Kapara appear for an on-the-record interview, NASD staff also requested that Kapara provide them with documents. The first such request was made, in writing, on November 22, 2002. Staff requested that Kapara provide certain financial information by December 6, 2002. After Kapara failed to provide the requested information, NASD staff sent a second letter, on December 9, 2002, requesting that Kapara provide the documents by December 19, 2002. He failed to do so.

It is uncontested that Kapara did not appear to provide testimony as requested by NASD staff and did not provide them with the information they had requested. In his defense, however, Kapara asserts that he never received the several Rule 8210 requests propounded by NASD staff, due to the same domestic dispute that he claims prevented him from receiving actual notice of the disciplinary proceedings below. We reject Kapara's argument.

The record establishes that Kapara was fully aware of NASD's interest in obtaining testimony from him, as he personally informed NASD staff that he would not be able to appear for the on-the-record interview scheduled for October 22, 2002. Once Kapara knew that NASD was seeking information from him, he had a responsibility to cooperate fully with the staff's requests. See Ashton Noshir Gowadia, 53 S.E.C. 786, 789-790 (1998) (sustaining finding that respondent violated NASD Procedural Rule 8210, where respondent claimed that he had not received NASD's written requests, but admitted that he knew NASD was seeking to obtain information from him).

Furthermore, even if true, Kapara's assertion that he did not receive the staff's numerous requests does not excuse his failure to comply with such requests. Kapara received constructive

---

[16] The "mediation specialist" was not an attorney. Enforcement informed Kapara that only attorneys who are members of a state bar are regarded as representatives who may appear at on-the-record interviews conducted by NASD staff.

notice of the several Rule 8210 requests made by NASD staff.[17] Such constructive notice, when coupled with Kapara's complete lack of cooperation, is sufficient to trigger a violation of NASD Procedural Rule 8210. See Dep't of Enforcement v. Steinhart, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at *7-10 (NAC Aug. 11, 2003) (stating that a finding that respondent received actual notice of an NASD request for information was not necessary to affirm a finding that respondent violated Procedural Rule 8210, where respondent received constructive notice of the requests and failed to comply).

Accordingly, we affirm the Hearing Officer's finding that Kapara violated NASD Procedural Rule 8210 and Conduct Rule 2110 as alleged in the fifth cause of the complaint.

III. Sanctions

The Hearing Officer barred Kapara from associating with any NASD member in any capacity and ordered him to pay restitution to customers GW, WL and RE. In imposing sanctions upon Kapara, we have consulted the NASD Sanction Guidelines ("Guidelines") for guidance. We have also considered the Guidelines' general principles and principal considerations, as well as the considerations that are specific to each violation. Having done so, we find that Kapara's conduct warrants a bar. We also find that restitution is in order, but only with respect to two of the three customers, and further modify the Hearing Officer's order of restitution for the reasons stated below. Finally, we reject Kapara's argument that the order of restitution should be set aside because of a claimed inability to pay.

A. Bar from Associating with Any Member

We turn first to Kapara's violation of Procedural Rule 8210 and Conduct Rule 2110. The Guidelines provide that a bar should be standard if a respondent did not respond, "in any manner," to a request propounded by NASD staff pursuant to Rule 8210.[18] The record establishes that Kapara, instead of cooperating with NASD staff, failed to appear for several scheduled on-the-record interviews, despite efforts to accommodate his schedule, and failed to

---

[17] NASD Procedural Rule 8210(d) states that "[a] notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the [CRD]." The record establishes that Enforcement complied with these service requirements.

[18] See Guidelines (2001 ed.) at 39 (Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD Procedural Rule 8210). Where mitigation exists, or the person did not respond in a timely manner, a suspension in any or all capacities for up to two years should be considered. Id.

respond to two requests to provide information. Kapara simply did not respond in any manner to the requests made of him. Kapara's disregard of his obligation to comply fully with requests made pursuant to Rule 8210 undermined NASD's regulatory responsibilities and its efforts to investigate possible violative activity by Kapara. See Dep't of Enforcement v. Valentino, Complaint No. FPI010004, 2003 NASD Discip. LEXIS 15, at *14 (NAC May 21, 2003), aff'd, Toni Valentino, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004). We find that there are no factors present that warrant mitigation of the standard sanction for failing to respond to NASD staff's requests, and therefore we bar Kapara from associating with any NASD member firm in any capacity for violating Procedural Rule 8210 and Conduct Rule 2110.

We next turn to Kapara's document fabrication in violation of Conduct Rule 2110. Falsifying documents is an extremely serious offense that requires that a bar be imposed absent exceptional circumstances.[19] Dist. Bus. Conduct Comm. v. Kirschbaum, Complaint No. C07960069, 1998 NASD Discip. LEXIS 36, at *10 (NAC Aug. 25, 1998). The independent evidence fully supports an inference that Kapara created a fictitious resignation letter in an attempt to deceive NASD staff into believing that he could not have violated Conduct Rule 3040, because he was no longer associated with a member firm. Deliberately falsifying documents to mislead NASD staff in their investigations is an egregious offense warranting a bar. See, e.g., Dist. Bus. Conduct Comm. v. Pelaez, Complaint No. C07960003, 1997 NASD Discip. LEXIS 34, at *13-14 (NBCC May 22, 1997) (affirming the imposition of a bar where respondent intentionally forged documents intended to hide from NASD the true state of affairs); Rita Delaney, 48 S.E.C. 886, 890 (1987) (affirming bar where applicant deliberately falsified firm records to conceal activities from NASD during its investigation). We find no facts present that warrant mitigation, and bar Kapara for violating Conduct Rule 2110 by falsifying a document.

Although not discussed in the Hearing Officer's default decision, we have also considered whether a bar is warranted for Kapara's additional misconduct. With respect to Kapara's selling away activities, in violation of Conduct Rules 3040 and 2110, we note initially that Kapara's activity resulted in the sale of interests in Soup Club totaling $831,000. Such a large dollar amount of sales warrants a sanction at the high end of those recommended in the Guidelines. Furthermore, after considering the Guideline's principal considerations for selling away activities, we find that there are several aggravating factors present. First, Kapara sold away to three customers of the Firm.[20] Second, Kapara created the impression that Argus sanctioned his

---

[19] The Guidelines for misconduct involving forgery or falsification of records recommend a fine of $5,000 to $100,000 and, in cases in which mitigating factors exist, a suspension in any and all capacities for up to two years. See Guidelines (2001 ed.) at 43 (Forgery and/or Falsification of Documents). In egregious cases, the Guidelines recommend considering a bar. Id.

[20] See Notice to Members 03-65 (NASD Revises Sanction Guidelines) (Selling Away (Private Securities Transactions)) (Principal Considerations in Determining Sanctions, No. 8).

activity by using the Firm's premises for the selling away activity and assisted the customers with wiring funds or selling securities in their Argus accounts to purchase their Soup Club shares.[21] We find that the existence of these aggravating factors, when coupled with the high dollar volume of Kapara's sales away from the firm, warrants that Kapara be barred for violating Conduct Rules 3040 and 2110.

Finally, the Guidelines for intentional or reckless misrepresentations of fact recommend a fine of $10,000 to $100,000, and a suspension in any or all capacities for 10 business days to two years.[22] A bar is warranted in egregious cases.[23]

We find Kapara's conduct egregious. Clearly, any investor would want to know the true nature of the activities of the business entity in which the investment is being made. The offering memorandum for Soup Club made clear the nature of the company's business activities and made no mention of an affiliation with an NYSE listed company. Kapara's flagrant misconduct was calculated to mislead customers GW and WL, and induce their investments, with complete disregard for the truth. Given Kapara's numerous acts of misconduct, his efforts to mislead and delay regulatory authorities, and his failure to this day to acknowledge his misconduct,[24] we find that a bar is warranted for Kapara's materially misleading statements in violation of Conduct Rule 2110.

We conclude that the extent of Kapara's violations evince a complete lack of understanding of his duties as a registered person. Accordingly, based upon all of the foregoing facts and circumstances, and the lack of any mitigating circumstances,[25] we find that Kapara's misconduct warrants that he be barred from associating with any member in any capacity.

---

21 See id. (No. 6).

22 See Guidelines (2001 ed.) at 96 (Misrepresentations or Material Omissions of Fact).

23 Id.

24 See Guidelines (2001 ed.) at 9-10 (Principal Considerations in Determining Sanctions).

25 We do not accept as a mitigating factor Kapara's lack of disciplinary history. See 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 as a registered person. We therefore do not find that the absence of a disciplinary history should mitigate the seriousness of the misconduct or the severity of the sanctions imposed."). We also do not accept the proposition that Kapara's sanction should be lessened due to alleged failures in supervision. See Thomas C. Kocherhans, 52 S.E.C. 528, 531-532, 534 (1995) (concluding that ignorance of NASD rules and absence of supervisory structure do not compel a reduction of sanction).

B. Restitution

Restitution is an equitable remedy that seeks either to prevent a respondent from being unjustly enriched, or requires that the respondent return his victim to the status quo ante.[26] Charles E. French, 52 S.E.C. 858, 864 (1996). An order of restitution thus seeks to restore a respondent's victim to the position he was in prior to the transaction by returning to the victim the amount by which the victim was deprived. Toney L. Reed, 51 S.E.C. 1009, 1013-1014 (1994).[27] In this case, the Hearing Officer ordered that Kapara pay a total of $831,000 in restitution to customers GW, WL, and RE.[28] We affirm the Hearing Officer's restitution order, in part, and modify the manner in which restitution is calculated and paid.

Where a respondent has engaged in private securities transactions, but no other violations are proven establishing causation for the customer's harm, restitution is an inappropriate sanction. Dep't of Enforcement v. Hanson, Complaint No. C8A000059, 2002 NASD Discip. LEXIS 5, at *4 (NAC Mar. 28, 2002). The complaint in this case did not allege that Kapara misled customer RE, and we therefore are not in a position to consider the issue. Dist. Bus. Conduct Comm. v. A.S. Goldmen & Co., Complaint No. C10960208, 1999 NASD Discip. LEXIS 18, at *12 n.8 (NAC May 14, 1999) (declining to address the issue of a rule violation not alleged in the complaint). Absent a finding that Kapara misled customer RE in connection with his Soup Club investment, ordering that Kapara pay him restitution is inappropriate because the record does not establish that Kapara could not have sold Soup Club to RE if Kapara had disclosed the transaction to the Firm. We therefore reverse and dismiss that aspect of the Hearing Officer's restitution order requiring that Kapara pay restitution to customer RE.

On the other hand, we find that Kapara misled customers GW and WL into investing in Soup Club stock. Such deception makes restitution an appropriate sanction for Kapara's selling away to these customers. See, e.g., French, 52 S.E.C. at 864; cf. Timberlake, 2004 NASD Discip. LEXIS 11, at *27-28 (affirming an order of restitution to customers that were misled in violation of NASD Rule 2110). Kapara's representations to these customers were material, and

---

[26] The Guidelines recommend that we consider ordering restitution where appropriate to remediate misconduct. See Guidelines (2001 ed.) at 6 (General Principles Applicable to All Sanction Determinations, No. 5).

[27] Unlike an order of disgorgement, restitution does not require that the respondent have profited or benefited from his actions, but demands, as a matter of equity, that the respondent, rather than the victim, bear the customer's loss. Reed, 51 S.E.C. at 1013-1014.

[28] The Hearing Officer ordered $222,000 in restitution to GW, $558,000 to WL, and $51,000 to RE.

were relied upon by both customers to make their investment decisions. Nonetheless, in order to conform the order of restitution to the Guidelines' requirement that restitution be made to an identifiable person for a quantifiable loss, we find that the following modification of the manner in which restitution is calculated and paid is necessary.[29]

As a condition of restitution, the person entitled to restitution must return or offer to return that which he received as part of the transaction, or its value, unless such thing has, among other factors, been continuously worthless or consists of money that can be credited if restitution is granted. Restatement of Restitution § 65 (1937). This requirement seeks to prevent a windfall to the victim. David Joseph Dambro, 51 S.E.C. 513, 519 & n.25 (1993).

In this case, the record establishes that customers GW and WL received stock and warrants from Soup Club for their investments. The evidence also establishes that these customers received promissory notes and repurchase commitments from Soup Club, whereby Soup Club agreed to repurchase their stock if the company did not go public by June 2003, with interest to be paid from the date of the agreement until the date of payment to the customer.[30]

The record is silent as to whether customers GW and WL still own their Soup Club securities or whether there is a market for these securities. The record is also silent as to the status of the repurchase agreements, and their existence presents the possibility that customers GW and WL already have recouped part, or all, of their investments.

Accordingly, we modify the order of restitution as to customers GW and WL in the following manner. If their securities have been sold, or repurchased by Soup Club, the amount of restitution to be paid by Kapara to each customer should be decreased by the amount for which these securities were sold or repurchased. Id. at 519. If the securities have not been sold or repurchased, Kapara should make full restitution, provided that these customers surrender their securities and transfer their Soup Club repurchase agreements to Kapara.[31] Id.

We further modify the order of restitution as follows. Customer GW only personally invested $24,000 in Soup Club with the remaining portion of his $222,000 investment coming

---

[29] See Guidelines (2001 ed.) at 6 (General Principles Applicable to All Sanction Determinations, No. 5).

[30] Soup Club provided these promissory notes and repurchase commitments to customers GW and WL in June 2002.

[31] If the customers' investments and repurchase agreements are worthless, no offset of the restitution amount is necessary and the customers need not surrender their Soup Club instruments. Restatement of Restitution § 65 (1937).

from a corporate account for a business entity for which he was the general manager. Therefore, we order that Kapara pay restitution, prior to accounting for the potential offsets discussed above, in the amount of $24,000 to GW and $198,000 to GW's business entity.[32] Similarly, the record indicates that $522,000 of WL's $558,000 investment was made as trustee of an account for his grandfather.[33] Therefore, we order Kapara to pay restitution, prior to accounting for the potential offsets discussed above, in the amount of $36,000 to WL and $522,000 to WL as trustee for the account of his grandfather.[34]

C. Inability to Pay

Kapara argues that he is unable to pay restitution because of his financial condition. The Guidelines require that, when raised by a respondent, we consider such claims when determining an appropriate level of monetary sanctions.[35] Kapara, "like any respondent raising the issue of his or her personal financial circumstances as they affect ability to pay a restitution order, has the burden of producing evidence in support of the claim and proving bona fide insolvency." Toney L. Reed, 52 S.E.C. 944, 947 n.12 (1996). Proof of bona fide insolvency requires that the accuracy of all financial information be verified "through the submission of signed and notarized documents evidencing financial hardship." Dep't of Enforcement v. Levitov, Complaint No. CAF970011, 2000 NASD Discip. LEXIS 12, at *33-34 (NAC June 28, 2000).

We hold that the information submitted by Kapara during the course of his appeal is insufficient to support his claimed inability to pay.[36] Although Kapara provided a signed and notarized statement of financial condition, which ostensibly shows that he possesses negligible net worth and gross income, he provided few of the documents called for in the instructions to the statement of financial condition provided to him. For instance, Kapara did not provide pay

---

[32] Customer RE is GW's business partner and, presumably, will share in some manner in any restitution to the company.

[33] The record indicates that WL personally only invested $36,000 in Soup Club.

[34] We also order the payment of interest on the restitution ordered to customers GW and WL at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), calculated from the date of investment.

[35] See Guidelines (2001 ed.) at 8 (General Principles Applicable to All Sanction Determinations, No. 8).

[36] Kapara first claimed an inability to pay restitution on appeal to the NAC. The Subcommittee empanelled to consider this case thus directed Kapara to document his financial status through the use of a standard statement of financial condition discussed in the Guidelines. See Guidelines (2001 ed.) at 8 (General Principles Applicable to All Sanction Determinations, No. 8).

stubs showing his current salary or wages or copies of any bank statements supporting his claimed limited cash balances.

Moreover, in those instances in which Kapara provided documentation, it generally was incomplete and served only to raise additional, unanswered questions concerning his financial condition. For example, the instructions to the standard statement of financial condition require that a respondent provide federal and state income tax returns for the past two years. Kapara provided fragments of 2002 and 2003 federal income tax returns for "Ram Kapora." These returns contained redacted Social Security numbers and were not accompanied by any signature pages, schedules, forms 1099, W-2 statements, or any other documentation that would bear on the reliability of his submission. The returns also identified capital gains or losses, business income, and income from rental real estate, royalties, partnerships, trusts, etc., which suggests Kapara possesses assets in addition to those he identified in his statement of financial condition.

Similarly, Kapara provided only what appear to be the most recent monthly statements for three credit cards, despite the instruction that he provide copies of all such statements for the last 12 months. One such statement indicates that Kapara made a payment of more than $2000 towards the account's balance in the month prior to his completing his financial statement. This payment does not comport with Kapara's claimed financial condition, and Kapara provided no explanation of this disbursement as the instructions to the statement of financial condition direct.

Finally, even if Kapara's financial documentation were reliable, which we do not find it is, the documentation is not sufficient to prove Kapara's bona fide insolvency. "The fact that [the respondent] may have limited funds in a particular bank account does not indicate that [the respondent] is 'insolvent' and does not prove that [the respondent] is without funds or assets from other sources." Dist. Bus. Conduct Comm. v. McNeil, Complaint No. C3B960026, 1999 NASD Discip. LEXIS 3, at *26 (NAC Jan. 21, 1999).

As the Commission has stated, "a [respondent's] ability to pay is peculiarly within his knowledge, and it is appropriate that he bear the burden of demonstrating his inability." B.R. Stickle & Co., 51 S.E.C. 1022, 1026 (1994). We hold, based upon the record before us, that Kapara has not shown that he is unable to pay the ordered restitution.

IV. Conclusion

We find that Kapara: engaged in private securities transactions without giving his Firm prior written notice, in violation of NASD Conduct Rules 3040 and 2110; submitted to NASD staff a falsified document, in violation of Conduct Rule 2110; misrepresented material facts to two customers, in violation of Conduct Rule 2110; and failed to respond to staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. For each of these violations, we bar Kapara from associating with any NASD member firm in any capacity.

The bar will become effective as of the date of this decision. We also order restitution to customers GW and WL in the total amount of $780,000, plus interest from the date of investment.[37]

On Behalf of the National Adjudicatory Council,

_____

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

[37] The restitution is to be paid in the amounts set forth herein. In the event that these customers cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of the customer's last known address. Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to staff of NASD's Department of Enforcement, District 10, no later than 90 days after the date when this decision becomes final.

We also have considered and reject without discussion all other arguments advanced by the parties.