

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Jimmie Lee Griffith
Richmond, CA,

Respondent.

DECISION

Complaint No. C01040025

Dated: December 29, 2006

Respondent effected two unauthorized trades in a customer account. Held, findings affirmed and sanctions modified.

Appearances

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

For the Respondent: Tania Rose, Esq.

Decision

Pursuant to NASD Procedural Rule 9311(a), Jimmie Lee Griffith (“Griffith”) appeals from a September 7, 2005 Hearing Panel decision. The Hearing Panel found that Griffith effected two unauthorized trades in his customer’s account, in violation of NASD Conduct Rule 2110. For these violations, the Hearing Panel suspended Griffith for three months and fined him \$10,000. After a complete review of the record, we affirm the Hearing Panel’s findings, but we modify the sanctions. We affirm the Hearing Panel’s three-month suspension, but we increase the fine to \$13,200 to include the financial benefit that Griffith received from his violations.

I. Background

Griffith entered the securities industry in January 1993. From March 1, 1993, until June 16, 2003, Griffith was registered with McLaughlin, Piven, Vogel Securities, Inc. (“MPV Securities” or “the Firm”). Griffith was registered with MPV Securities as a general securities representative and an investment company products/variable contracts limited representative. Griffith has not been registered or associated with any member firms since June 16, 2003.

II. Facts

A. JS, Widow JS, and the Trust Account

In 1995, JS and his wife (“Widow JS”), as trustees for a joint trust (“the Trust”), opened an account with MPV Securities. At that time, JS was 71 years old and retired from his position as a researcher at the University of California-Davis. Widow JS was 69 years old and a retired librarian. JS, an investor who did not like to pay fees or sales charges, handled all decisions for this account.

In February 1997, after the MPV Securities registered representative who serviced the Trust account left the Firm, the Firm reassigned the account to Griffith. Griffith never met JS or Widow JS in person, but Griffith spoke with JS approximately 50 times or more between 1997 and 2000. Griffith did not have discretionary authority to trade the Trust account.

B. JS’s Declining Health in 2000

In 1981, JS was diagnosed with Parkinson’s disease and, in 2000, his health began to decline seriously. Between June 14 and November 1, 2000, JS suffered a minor stroke, had surgery to enable him to take his medications, and spent significant periods of time in the hospital and a nursing home. JS grew somewhat delusional, stopped reading, had difficulty concentrating, and lost his sense of time. By September 1, 2000, JS required constant care and artificial feeding. By October 16, 2000, he was suffering from dementia. JS died on November 3, 2000. Widow JS did not inform Griffith or anyone at the Firm that JS suffered from Parkinson’s disease, or from any of his other medical issues, until after JS’s death.

C. The October 16, 2000 Phone Conversation

On May 19, 2000, JS and Widow JS—then 76 and 74 years old, respectively—executed an updated account application form reflecting a change in the Trust’s investment objectives. Griffith testified that the update was needed because JS wanted the Trust’s investment mix to include more equity securities, based on advice JS had seen on a television program. In response to JS’s wishes, Griffith recommended that JS “gradually move into equities,” beginning with purchasing a small amount of mutual funds. Griffith testified that, after JS “began to add more and more equities,” Griffith informed JS that the Trust’s account form had to be updated “to adequately reflect your investment goals and objectives.”

There was no activity in the Trust account from May 30, 2000, through October 16, 2000, a period that corresponded with the serious decline in JS’s health. On October 16, 2000, approximately three weeks before JS died, Griffith telephoned the JS residence, returning a call that JS placed earlier that day.¹ JS answered the telephone but, too weak to hold the phone,

¹ Widow JS testified that, because JS could not have dialed the telephone himself, a caretaker who assisted JS probably dialed Griffith’s number, which was listed on the telephone.

motioned to Widow JS to hold the telephone for him while he talked. Griffith and Widow JS provided two conflicting versions concerning the substance of that phone call, and exactly what was said is the key dispute in this case.

1. Widow JS's Version

According to Widow JS, during the October 16, 2000 phone call, JS did not authorize Griffith to effect any transactions for the Trust account. Widow JS admitted that she could hear only JS's side of the phone conversation. Widow JS testified that, during that phone call, JS was "ranting" repeatedly ("about four or five times") about a \$60 fee that had been charged several years before in their grandson's account in connection with stock that JS and Widow JS had purchased for their grandson. Widow JS testified that that fee had been "cleared" up more than one year earlier. Widow JS did not hear JS discussing anything with Griffith except the fee. Widow JS claimed that her husband's behavior "should have alerted Mr. Griffith to the fact my husband wasn't coherent."

Widow JS further testified that, at some point, she took the phone from JS, told Griffith that JS was "having a bad day," and apologized for JS's "incoherency." According to Widow JS, Griffith began to discuss with her certain transactions for the Trust account and was "anxious that we sell a lot and buy something." Widow JS testified that this was the first time she had ever discussed any of the trades in this account and that she told Griffith she did not understand what he was talking about. Widow JS claimed that, after about five minutes, she handed the phone back to JS, who ended the approximately 20-minute phone call without further discussion. In sum, Widow JS's testimony was that, based on her hearing JS's statements to Griffith, JS did not authorize any transactions and that Griffith must have been aware of that.

2. Griffith's Version

Griffith gave a markedly different description of the October 16, 2000 phone call. Griffith agreed that he and JS discussed the "safekeeping" fee in JS's grandson's account. In contrast to Widow JS's assertions, however, Griffith testified that JS's grandson's account, in fact, had been erroneously charged a \$69.50 fee and that Griffith credited back the fee as a result of his October 16, 2000 phone call with JS.

Griffith further testified that he and JS then had an "end-of-the-year" portfolio review. According to Griffith, he discovered that the Trust account had made approximately \$83,000 in short-term capital gains during 2000. Griffith testified that, to eliminate any tax liability resulting from the short-term capital gains, he recommended that JS sell certain securities at a loss. Griffith testified that JS agreed to these recommended transactions.²

² On October 16 and 17, 2000, the Trust sold and purchased shares in several trusts, which Griffith described as MPV Securities "proprietary products." The complaint made no allegations concerning these trades.

Griffith claimed that he also realized that the Trust had a position in Putnam New Century Growth Fund (“Putnam Fund”) Class B shares that had sustained an unrealized loss of \$12,000 since January 31, 2000, when the Trust invested \$105,600 in that fund. Griffith testified that, during the October 16 phone call, he recommended that JS sell the investment in the Putnam Fund before losses exceeded \$25,000. Griffith claimed that he made this recommendation despite the fact that the Trust would incur a contingent deferred sales charge because “the [Putnam Fund] was losing money like water going through a sieve.” According to Griffith, JS authorized him to “keep an eye on” the Putnam Fund “over the next couple of months” and to sell it if it looked like the unrealized losses might exceed \$25,000.

Griffith testified that he and JS next discussed what to do with the proceeds from any such sale of the Putnam Fund shares. Griffith claimed that JS agreed with his additional recommendation to take the proceeds and purchase \$100,000 of shares in the World Wide Utility Federated Fund (“Federated Fund”), using money in the Trust’s money market account at MPV Securities to make up the difference. Griffith testified that this purchase would enable JS to take income from this utility fund at a later date.

According to Griffith, JS sounded no different from how he normally sounded and that he seemed “very sharp.” Griffith testified that he reviewed all of the decisions again with JS and then asked JS to hand the phone to Widow JS. According to Griffith, when Widow JS picked up the phone, Griffith told her to “give [JS] a big hug and a kiss, because he just made you guys . . . \$83,000 in tax-free income.” Griffith claimed that he also explained to Widow JS the plan to sell certain securities at a loss to avoid any tax liability from gains earned that year. Griffith denied that Widow JS apologized for her husband’s condition.

D. The November 9, 2000 Transactions

Griffith testified that, on November 9, 2000, he noticed that the Trust’s unrealized losses in the Putnam Fund had climbed to \$18,000. Griffith claimed that, even though the Trust’s losses were short of the \$25,000 limit that JS purportedly had mentioned, November 9, 2000, was a Thursday and he did not want to risk that bad news over the weekend might cause those losses to grow by the following Monday. Griffith testified that, for these reasons, on November 9, 2000, Griffith: (1) sold 4,165 Putnam Fund Class B shares from the Trust account, generating net proceeds of \$83,461.48;³ and (2) purchased 6,261 Federated Fund Class B shares for \$100,000.⁴ Nelia Virtusio (“Virtusio”), an NASD senior compliance examiner, testified that Griffith’s purchase of the Federated Fund Class B shares earned him a \$3,200 commission.⁵

³ The \$83,461.48 proceeds were net of a \$4,392.71 contingent deferred sales charge.

⁴ Although the confirmations for those trades reflect a trade date of November 9, 2000, November 8, 2000, is handwritten on the order tickets as the trade date.

⁵ Considering both Virtusio’s un rebutted testimony and the printed account history that is in the record, we reverse the Hearing Panel’s finding that there is not adequate evidence concerning Griffith’s financial benefit.

After the trades settled on November 14, 2000, Griffith called the JS residence to inform JS about the transactions. JS's daughter answered and informed Griffith that JS had died on November 3, 2000. Griffith offered his condolences and briefly reviewed with JS's daughter the two transactions that he had effected on November 9, 2000.

Widow JS met with Griffith for the first time on February 1, 2001. According to Widow JS, she questioned Griffith about the two November 9, 2000 trades, and Griffith explained those trades by stating that, in the event he cannot reach a customer, he will sell an investment if he believes that it would benefit the customer. Griffith denied that he made such statements to Widow JS.⁶

III. Procedural History

The Department of Enforcement ("Enforcement") began an investigation of Griffith's conduct after MPV Securities reported to NASD that an arbitration award in the amount of \$440,000 had been awarded against the Firm "due to [Griffith's] unauthorized trading." On November 1, 2004, Enforcement filed a one-cause complaint alleging that, on November 9, 2000, Griffith effected two transactions in the Trust account without the knowledge or consent of the customers, in violation of NASD Conduct Rule 2110. Griffith filed an answer admitting that he effected the transactions but asserting that the customers consented to the trades at issue. The Hearing Panel held a one-day hearing.

On September 7, 2005, the Hearing Panel issued a decision. Finding that Widow JS credibly testified that JS had not authorized any transactions during the October 16, 2000 phone call, the Hearing Panel concluded that Griffith effected two unauthorized trades in the Trust account. For this misconduct, the Hearing Panel suspended Griffith for three months and fined him \$10,000. Griffith appealed the Hearing Panel's decision.

IV. Discussion

A. Unauthorized Trading

Unauthorized trading in a customer's account is a violation of the requirement under Conduct Rule 2110 that members observe just and equitable principles of trade. *Robert Lester Gardner*, 52 S.E.C. 343, 344 & n.1 (1995), *aff'd*, 89 F.3d 845 (9th Cir. 1996) (table); *Keith L.*

⁶ In May 2001, after NASD contacted Widow JS in connection with an audit of the Firm, Widow JS filed complaints with NASD and MPV Securities. On December 20, 2001, Widow JS filed an arbitration claim against MPV Securities making numerous claims concerning the handling of the Trust account, including that Griffith had made unauthorized trades. In May 2003, an NASD arbitration panel awarded Widow JS, as trustee of the Trust, \$440,000 in compensatory damages. The arbitration claim concerned a much broader range of events than is at issue here.

DeSanto, 52 S.E.C. 316, 316-17 & n.1 (1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996) (table); *see also Dep't of Enforcement v. Puma*, Complaint No. C10000122, 2003 NASD Discip. LEXIS 22, at *12 n.6 (NAC Aug. 11, 2003). The Hearing Panel found that, on November 9, 2000, Griffith effected two unauthorized trades in the Trust account in violation of Conduct Rule 2110.⁷ After a thorough review of the record, we affirm the Hearing Panel's findings.

There are no disputes about many of the relevant facts. It is undisputed that: (1) Griffith did not have discretionary authority to trade the Trust account; (2) on October 16, 2000, Griffith had a telephone conversation with JS and, briefly, with Widow JS; and (3) on November 9, 2000—six days after JS died and more than three weeks after the October 2000 phone conversation—Griffith effected two transactions for the Trust account. In addition, Widow JS provided unrebutted testimony that JS's health had deteriorated significantly during the months prior to the October 16, 2000 phone conversation and that he had dementia. It is also not disputed that, prior to JS's death, Widow JS did not specifically inform Griffith that JS suffered from Parkinson's disease.

The only material dispute is whether, during their October 16, 2000 phone conversation, JS authorized Griffith to effect the two transactions at issue. On the one hand, Griffith essentially testified that JS had asked him to "keep an eye on" the Trust's investment in Putnam Fund Class B shares "over the next couple months" and to sell it before the Trust's losses in that fund exceeded \$25,000. Griffith claimed that JS also agreed with Griffith's recommendation to take the proceeds from any such sale and purchase \$100,000 of Federated Fund Class B shares, using money in the Trust's cash reserves at MPV Securities to make up the difference. On the other hand, Widow JS testified that JS, during his October 16, 2000 phone conversation with Griffith, did not authorize Griffith to effect any transactions in the Trust account. Widow JS's testimony was based on her assertions that JS, who was very ill at the time, spoke incoherently with Griffith and did nothing more than repeatedly question a fee.

The Hearing Panel, which heard the testimony of both Widow JS and Griffith, found that Widow JS's testimony was credible and that Griffith's testimony was not credible. Griffith attacks these credibility determinations. As explained below, we affirm the Hearing Panel's credibility determinations.

1. The Hearing Panel's Determination That Widow JS's Testimony Was Credible

As the SEC has "often pointed out, the credibility determinations made by the initial decision maker are entitled to considerable weight and deference." *DeSanto*, 52 S.E.C. at 319. A credibility determination "can be overcome only where the record contains substantial evidence for doing so." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS

⁷ Conduct Rule 2110 is applicable to Griffith under NASD Rule 115(a), which provides that NASD rules apply to all members and persons associated with a member.

153, at *21-22 (Jan. 22, 2003).⁸ The record does not contain substantial evidence to overturn the Hearing Panel's determination that Widow JS provided credible testimony.

The Hearing Panel stated that "Widow JS's testimony was consistent, and her manner was forthright and direct." Nothing in the record contradicts this assessment. In addition, the Hearing Panel correctly noted that Widow JS was not obligated to testify and did not stand to gain from her testimony because she had already received a sizeable arbitration award from the Firm. *Cf. Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *20 (NAC May 23, 2001) (affirming determination that customers were credible, in part because customers had already settled claims and "did not stand to gain any financial benefit from testifying"). Accordingly, Widow JS had no motive to provide false testimony.

Although Griffith argues that there are numerous reasons why Widow JS's testimony should be "viewed with caution," he has not demonstrated that there is substantial evidence for overturning the Hearing Panel's credibility determination. First, Griffith questions Widow JS's ability to testify accurately about the October 16, 2000 conversation. Specifically, Griffith notes that the telephone conversation occurred approximately four and one-half years before Widow JS's testimony. Similarly, Griffith contends that Widow JS "demonstrated lack of accurate recall," noting that she incorrectly testified that she had never spoken with Virtusio, who testified that she had spoken with Widow JS approximately three times in 2002. The amount of time that elapsed between the October 16, 2000 conversation and Widow JS's testimony about that conversation does not cause us to question Widow JS's memory, especially since her testimony was consistent with statements she made in a declaration written in May 2001, less than seven months after the conversation. *Cf. Michael A. Niebuhr*, 52 S.E.C. 546, 552 (1995) (rejecting argument that customer witness declaration pertained to events three years earlier and, for that and other reasons, was not credible). Moreover, that Widow JS did not recall her discussions with Virtusio is not the kind of key fact that we would expect Widow JS to remember, especially since she had spoken with several NASD staff members over the course of several years. *See United States v. Jensen*, 169 F.3d 1044, 1047 (7th Cir. 1999) ("Witnesses are not incredible as a matter of law simply because they have been impeached on trivial, irrelevant matters."); 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6096

⁸ Griffith erroneously contends that we should review the Hearing Panel's determination of Widow JS's credibility with "far less deference" because she testified by telephone. We review a Hearing Panel's credibility determinations with the same high level of deference regardless of whether a witness testifies in person or by telephone. *DeSanto*, 52 S.E.C. at 319 & nn.4-5; *Dist. Bus. Conduct Comm. v. Euripides*, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *8 (NBCC July 28, 1997) (giving "considerable weight" to the initial fact finder's credibility determination concerning customer witness who testified telephonically); *see also Daniel Joseph Alderman*, 52 S.E.C. 366, 368 (1995) (giving "considerable weight" to initial fact finder's determination that witness's telephonic testimony was credible and stating that "forthrightness of manner may be gauged by listening solely to a person's voice"), *aff'd*, 104 F.3d 285 (9th Cir. 1997).

(1990) (“[I]f the facts are not material, undermining the witnesses’ version of those facts is, of itself, inconsequential.”).

Next, Griffith notes that Widow JS heard only JS’s side of the October 16, 2000 conversation, implying that she was not competent to testify about it. It is not implausible, however, that Widow JS knew, just from hearing JS’s incoherent statements and his singular focus on a fee charged to their grandson’s account, that JS did not authorize any transactions and that Griffith could not have understood JS to have authorized any transactions. Nor is it implausible that JS’s manner prompted Widow JS to apologize to Griffith for JS’s incoherent behavior.

Griffith also contends that Widow JS’s testimony suffers from a couple of internal inconsistencies. Griffith maintains that it is “impossible to believe” Widow JS’s testimony that, during the October 16, 2000 telephone conversation, Griffith “did all of the talking almost a full 20 minutes without any response from [JS] other than his questioning his fees.” Considering JS’s serious health condition, however, we find nothing inherently suspect about Widow JS’s testimony concerning JS’s behavior during the October 16, 2000 phone call. Griffith also argues that Widow JS’s testimony about JS’s diminished abilities was undermined by the fact that Widow JS allowed JS to discuss with Griffith their account, which held more than \$1 million, for over 20 minutes. Widow JS testified, however, that she heard JS talking only about a fee charged in their grandson’s account, not the Trust account. Moreover, Widow JS provided substantial, unrebutted testimony that JS’s health condition as of October 16, 2000, had seriously deteriorated, and JS died only three weeks after his conversation with Griffith. Furthermore, considering Widow JS’s preoccupation with the care of JS, and the lack of any previous interaction between her and Griffith, the fact that Widow JS allowed JS to speak with Griffith for 20 minutes is not inconsistent with her testimony about JS’s health, let alone substantial evidence for overturning the Hearing Panel’s credibility determination.⁹

Finally, we also have considered whether the cumulative effect of Griffith’s challenges to the Hearing Panel’s determination that Widow JS was credible amounts to substantial evidence for overturning that determination. We find that it does not. Accordingly, we affirm the Hearing Panel’s determination that Widow JS provided credible testimony.

2. The Hearing Panel’s Determination That Griffith’s Testimony Was Not Credible

Turning to Griffith, we see nothing in the record to cause us to question the Hearing Panel’s determination that Griffith was not credible. We agree with the Hearing Panel that

⁹ Widow JS’s testimony that JS repeatedly complained to Griffith about a fee that had already been “cleared” up conflicted somewhat with Griffith’s assertion that JS claimed that such a fee in fact appeared on an “October” account statement. Considering JS’s deteriorated health condition, however, any statement he purportedly made about the fee was not reliable and, for that reason, does not call into question Widow JS’s credibility.

several admissions undermine Griffith's claim that, on October 16, 2000, JS gave him time and price discretion to effect any transactions. Griffith admitted that, ordinarily, JS wanted Griffith to monitor his investments and notify JS immediately if an investment was not performing well so that JS could make a decision on whether to hold it or sell it. Therefore, Griffith's testimony that JS had authorized him on October 16, 2000, to monitor a specific investment and effect transactions without further notification would have been, as the Hearing Panel found, "a complete departure from past practice" for JS. Moreover, Griffith admitted that, prior to October 16, 2000, he had never spoken with Widow JS about the account. Although Griffith contends that this fact has "no bearing" on the issue, we agree with the Hearing Panel that it casts doubt on Griffith's claim that JS gave him time and price discretion to effect transactions. Considering that Griffith had never previously asked to speak with Widow JS, it is unlikely that Griffith would have done so in this instance had he thought that JS authorized the transactions.

Other aspects of Griffith's testimony further demonstrate why we should sustain the Hearing Panel's determination that Griffith was not credible. Griffith claimed that JS gave him time and price discretion to sell the Trust's investment in the Putnam Fund if it looked like the Trust's unrealized losses on its initial \$105,600 investment in that fund might exceed \$25,000. Inconsistent with that story, however, Griffith sold the Putnam Fund shares when the losses were only \$18,000, which was well short of \$25,000.¹⁰ To explain this inconsistency, Griffith claimed that he was worried that bad news over the weekend might cause those losses to grow by the following week. Griffith sold the Putnam Fund shares, however, on a Thursday, not a Friday, further undermining his story.¹¹

Griffith's testimony about his share of the gross commissions also damaged his credibility. Griffith testified that "the house took most" of the gross commissions and that his share was "probably like 32 – 30-something percent." Yet on his purchase of the Federated Fund shares for the Trust, Griffith's share of a \$5,500 gross commission was \$3,200—a 58 percent share and well above the amount he claimed he received. For all of these reasons, we affirm the Hearing Panel's determination that Griffith was not credible.

Given our affirmance of the Hearing Panel's credibility determinations, we reject Griffith's argument that "[t]here is no evidence to suggest that [JS] did not give Griffith [time and price discretion] for the first time in their October 16, 2000 conversation." Widow JS credibly testified that, based on her hearing JS's statements to Griffith, JS did not authorize any

¹⁰ Griffith did not assert that the \$25,000 limit included any contingent deferred sales charges. Even if it did, however, the sale of the Putnam Fund led to total realized losses—including the \$4,392.71 contingent deferred sales charge—of only \$22,139, which was still significantly short of \$25,000.

¹¹ Moreover, the handwritten order tickets for these transactions were dated November 8, 2000—a Wednesday—adding even further doubt as to the veracity of Griffith's claim that the prospect of bad news over the upcoming weekend was what prompted his decision to sell the Putnam Fund shares.

transactions. Accordingly, we find that the two trades that Griffith effected on November 9, 2000, for the Trust account were unauthorized and violated Conduct Rule 2110.¹²

V. Sanctions

For Griffith's unauthorized trades, the Hearing Panel fined Griffith \$10,000 and suspended him for three months. As explained below, we modify these sanctions.

For unauthorized transactions by an individual respondent, the NASD Sanction Guidelines ("Guidelines") recommend that we consider imposing a fine of \$5,000 to \$75,000 and a suspension in any or all capacities for a period of 10 business days to one year.¹³ In determining the appropriate sanctions, we consider the Principal Considerations In Determining Sanctions set forth in the Guidelines.

We agree with the Hearing Panel that Griffith's unauthorized trading was a serious violation of NASD's rules. "Unauthorized trading is a fundamental betrayal of the duty owed by a salesman to his customers." *DeSanto*, 52 S.E.C. at 323. Moreover, Griffith's purchase of the Federated Fund shares earned him a \$3,200 commission. Misconduct that results in the potential for monetary gain is an aggravating factor under the Guidelines.¹⁴ In addition, there is no evidence that Griffith effected the two transactions based on a misunderstanding of his authority.¹⁵

While Griffith's conduct was serious, we concur with the Hearing Panel that Griffith's conduct was not egregious.¹⁶ Griffith's conduct involved only two unauthorized trades and was,

¹² Because we find that Griffith did not have time and price discretion, it is unnecessary to determine whether Griffith would have been authorized to effect transactions more than three weeks after receiving any such time and price discretion. Although not governing in this case, we note that, effective January 31, 2005, NASD Conduct Rule 2510(d) was amended to provide that "the authority to exercise time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer." *NASD Notice to Members 04-71* (Oct. 2004).

¹³ *NASD Sanction Guidelines* 105 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*]. In egregious cases, the Guidelines recommend that we consider imposing on an individual respondent a longer suspension of up to two years or a bar. *Id.*

¹⁴ *Id.* at 7 (Principal Considerations In Determining Sanctions, No. 17).

¹⁵ *Id.* at 105 (Principal Considerations In Determining Sanctions, No. 1).

¹⁶ *See id.* at 105 n.2 (describing the three categories of "egregious unauthorized trading" and citing *Dep't of Enforcement v. Hellen*, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999)).

therefore, not quantitatively egregious. There is no evidence of the kinds of accompanying aggravating misconduct that can qualify unauthorized trading as egregious, nor is there evidence of bad faith that can lead to a finding that unauthorized trading was qualitatively egregious.

We therefore agree that an appropriate sanction is one that, in order to protect the public from the obvious harms that can result from unauthorized trading, is strong enough to deter Griffith and other securities professionals who may be tempted to engage in similar misconduct, but that reflects our conclusion that Griffith's conduct, while serious, was not egregious. In general, we believe that the Hearing Panel's sanctions were appropriately strong. Nevertheless, the fine imposed by the Hearing Panel reflected its erroneous conclusion that there was inadequate evidence of Griffith's financial benefit. Because we have found that Griffith earned \$3,200 as a result of his unauthorized trading, we increase the fine by that amount, consistent with the Guidelines' instruction that "adjudicators should increase the recommended fine amount by adding the amount of a respondent's financial benefit or require respondent to offer rescission to the injured customers."¹⁷

Griffith argues that a fine is "unnecessary" because Widow JS has already recovered a large sum through an arbitration she brought against MPV Securities and because MPV Securities is suing him for reimbursement. Griffith's argument misconstrues the purpose of sanctions in NASD disciplinary proceedings. Our "[d]isciplinary sanctions are remedial in nature" and the "overall purposes . . . are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public."¹⁸ That other parties have taken steps to obtain compensation for the losses caused by a respondent's actions, or to seek contribution for damages, does not render our separate and distinct efforts to protect investors and the public unnecessary. *See David A. Gingras*, 50 S.E.C. 1286, 1290 n.9 (1992) ("A brokerage house's civil settlement with a client does not absolve the salesman in question from disciplinary action for violating the NASD's rules."); *Dist. Bus. Conduct Comm. v. Hayashi*, Complaint No. C3A950047, 1996 NASD Discip. LEXIS 54, at *12-13 (NBCC Oct. 15, 1996) (same).

Likewise, the fact that Widow JS has received compensatory damages from arbitration does not mitigate Griffith's conduct. A respondent's voluntary and reasonable attempt, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct is mitigating evidence for sanctions purposes.¹⁹ Griffith, however, did not contribute to the restitution that Widow JS received and may ultimately end up doing so only as the result of a lawsuit. *Cf. Patel*, 2001 NASD Discip. LEXIS 42, at *27 (holding that a respondent's "capitulation" in returning funds after an arbitration action was filed against him "hardly evidences [a] desire to rectify his original misconduct").

¹⁷ *Guidelines* at 105 n.3.

¹⁸ *Id.* at 2 (General Principles Applicable To All Sanction Determinations, No. 1).

¹⁹ *Id.* at 6 (Principal Considerations In Determining Sanctions, No. 4).

In his appellate brief, Griffith claims for the first time that he “has been on disability for over a year now and has no income.” Griffith, however, did not raise the issue of his alleged inability to pay before the Hearing Panel. Moreover, Griffith’s assertions do not suggest that his alleged inability to pay is a result of a subsequent change in circumstances, given that the hearing took place less than 10 months before he filed his appellate brief and that he was terminated from MPV Securities in June 2003, 22 months before the hearing. Griffith, therefore, has waived the issue of inability to pay.²⁰

Accordingly, for Griffith’s unauthorized trading in the Trust account, we fine Griffith \$13,200 and suspend him in all capacities for three months.

²⁰ *Guidelines* at 5 (General Principles Applicable to All Sanction Determinations, No. 8). At the July 13, 2006 appeal hearing, Griffith’s counsel requested permission to submit evidence concerning Griffith’s alleged inability to pay. The date on which the appeal hearing was held was already more than seven months after Griffith’s original deadline to file a motion for leave to introduce additional evidence. *See* Procedural Rule 9346(b). Nevertheless, the Subcommittee of the NAC empanelled to consider this appeal authorized Griffith to file a motion for leave to introduce additional evidence concerning his alleged inability to pay by July 27, 2006. Griffith, however, did not file any such motion until August 24, 2006. At that time, Griffith did not request a further extension of time and, in any event, did not demonstrate good cause for further extending the deadline. The Subcommittee rejected Griffith’s submission as late. We adopt the Subcommittee’s disposition of the motion as our own.

VI. Conclusion

We affirm the Hearing Panel's findings that Griffith effected two unauthorized trades in the Trust account, in violation of NASD Conduct Rule 2110. Accordingly, we suspend Griffith for three months and fine him \$13,200. We affirm the Hearing Panel's imposition of \$2,345.75 in costs against Griffith, and we assess him costs on appeal of \$1,464.50.²¹

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

²¹ We have considered and reject without discussion all other arguments advanced by respondent.

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