BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. John Brigandi Greenvale, NY, Respondent.	DECISION Complaint No. C10040025 Dated: January 17, 2007

Respondent made unsuitable recommendations to a customer. Held, findings affirmed and sanctions affirmed.

Appearances

For the Complainant: Adam Lipnick, Esq., Department of Enforcement, NASD

For the Respondent: Steven M. Kaplan, Esq.

Decision

Pursuant to NASD Procedural Rule 9311, John Brigandi ("Brigandi") appeals a January 14, 2005 Hearing Panel decision finding that Brigandi violated NASD Conduct Rules 2310[1] and 2110.[2] After a thorough review of the record, we affirm the findings and sanctions imposed by the Hearing Panel.

I. Background

According to information contained in NASD's Central Registration Depository ("CRD®"), Brigandi entered the securities industry as a general securities representative in October 1988. At the time of the events at issue in this case, Brigandi was employed as a registered representative for Roan-Meyers Associates, LP ("Roan-Meyers" or "the Firm").

II. Procedural History

On April 1, 2004, Enforcement filed a one-cause complaint against Brigandi. The complaint alleged that Brigandi had recommended quantitatively unsuitable transactions in the account of customer FG. In response, Brigandi filed an answer in which he contested the charge and requested a hearing.[3] An NASD Hearing Panel from the Office of Hearing Officers conducted a hearing on October 27, 2004. In a decision dated January 14, 2005, the Hearing Panel found that Brigandi had made unsuitable recommendations in violation of NASD Conduct Rules 2310 and 2110. Brigandi's appeal followed.

III. Facts

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[1] NASD Conduct Rule 2310, commonly referred to as the "suitability" rule, requires that a member or associated person have a reasonable basis for believing that a recommended purchase, sale or exchange of a security is suitable for the customer based on the customer's financial needs and objectives.

[2] NASD Conduct Rule 2110 requires that NASD members shall, in conducting their business, "observe high standards of commercial honor and just and equitable principles of trade." The Commission has previously determined that a violation of NASD Conduct Rule 2310 is also a violation of NASD Conduct Rule 2110. *See James B. Chase*, Exchange Act Rel. No. 47476, 2003 SEC LEXIS 566, at *21 n.28 (Mar. 10, 2003) (*citing Clinton Hugh Holland, Jr.*, 52 S.E.C. 562, 566 n.20 (1995), *aff'd* 105 F.3d 665 (9th Cir. 1997)). In addition, NASD Rule 115 makes all NASD rules, including NASD Conduct Rule 2110, applicable to both NASD members and all persons associated with NASD members.

[3] On June 7, 2004, Brigandi informed NASD's Office of Hearing Officers that he had obtained counsel to represent him in this matter. On June 18, 2004, Brigandi's counsel submitted an amended answer denying the allegations and requesting a hearing.

Brigandi's customer, FG, was born in December 1939. He lived in Italy as a child where he attended school through median school, which is the equivalent of the eighth grade in the United States. FG eventually moved to Brooklyn, New York, where he purchased a home and opened a family-operated dry cleaning business with his wife, RG. In 1989, FG sold his home and business in Brooklyn and moved back to Italy.[4]

In 1998, FG was diagnosed with lung cancer and was not employed.[5] RG suffered from kidney disease and also did not work. During this time, FG's daughter, MG, lived with her parents in Italy. Because her parents were not fluent in English, MG assisted them with many of their affairs. FG and his wife opened their first investment account with their daughter's help in September 1998 at A.G. Edwards. The A.G. Edwards account holdings consisted of various bonds and two mutual funds. This account was opened with approximately $100,000.

In May 1999, MG informed her father that Joseph Ali ("Ali") was working in the securities industry at Royal Hutton Securities ("Royal Hutton"). In Brooklyn, Ali's family had lived next-door to FG and Ali was a long-time friend of FG's family. MG suggested to her parents that Ali should handle their investments. Her parents agreed and moved some of their investments from the A.G. Edwards account to Royal Hutton. In or around December 1999, Ali left Royal Hutton to work for Roan-Meyers. Ali worked for each of these firms in an unregistered capacity.

In December 1999, Brendan T. Malone ("Malone") was a registered representative at Roan-Meyers. Malone opened a Roan-Meyers account in FG's name on December 15, 1999, using a new account form filled out by Ali. Malone completely relied upon Ali for all the information for the form, which contained numerous inaccuracies.[6] At this time, FG authorized his daughter to wire funds from the Royal Hutton account into the new account at Roan-Meyers. Two wire transfers were made, one for $13,377.17 and a second for $15,643.89. In April 2000, at Ali's suggestion, FG authorized MG to liquidate the mutual funds in the A.G. Edwards

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[4] In or about 1992, FG had an interest in a construction company in Italy with two associates. Prior to going out of business in 1997, the company built three residences, one of which FG owns and currently occupies.

[5] Between 1998 and 2001, FG underwent chemotherapy and surgery, which involved an extended hospital stay.

[6] First, FG's name was misspelled. Second, Ali was listed as FG's nephew even though Ali is not related to FG. Third, the form incorrectly stated that FG's annual income was $150,000 even though FG was unemployed and made less than $100,000 per year. Fourth, the form stated that FG, who opened his first investment account less than two years earlier, had more than 10 years of investment experience. Fifth, the form stated that FG currently owned the cleaning business that he had sold in 1989. Finally, the investment objective on the form was stated to be short-term trading. In fact, FG's investment objective was income and growth, with preservation of capital.

account and wire the proceeds to the Roan-Meyers account. Pursuant to this authorization, on April 20, 2000, A.G. Edwards wired $55,387.88 to FG's Roan-Meyers account. This transfer bought the total investment in the Roan-Meyers account to $84,408.94.

In January 2000, Brigandi became the broker of record on FG's Roan-Meyers account. Brigandi testified that he had worked with Ali at other firms off and on for approximately four years and that they had become friends. Brigandi described Ali as his "cold caller," and Ali was responsible for generating leads for Brigandi. Ali was unlicensed and had previously failed the Series 7 examination. Malone never transacted any business or earned any commissions on the account.

Brigandi testified that he executed a short-term speculative trading strategy for FG's account. Brigandi did not contact FG directly to obtain information regarding FG's financial needs before implementing this strategy. Instead, Brigandi relied on Ali for such information. According to Brigandi, Ali told him that FG was a wealthy international businessman who had accounts throughout the United States. Brigandi also relied on FG's new account form from the Roan-Meyers account and FG's final monthly statement from FG's Royal Hutton account to assess FG's financial condition. Based on this information, Brigandi concluded that an aggressive short-term trading strategy was suitable for FG.

Brigandi testified that he did not need to contact FG because Ali claimed to have had a power of attorney for the Royal Hutton account and that Ali was waiting for FG to execute a new power of attorney for the Roan-Meyers account. Contrary to Ali's claim, however, the new account form specifically indicated that there was no power of attorney associated with the account.[7] Brigandi began trading in FG's account approximately four weeks before Ali provided him a power of attorney.[8] Later, it was discovered that Ali had forged the power of attorney.[9]

Brigandi testified that he made all of his investment recommendations regarding FG's account to Ali directly.[10] Brigandi further testified that Ali, speaking only Italian, would discuss

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[7] The form allowed the investor to check off "Yes" and "No" boxes responding to the question, "Does anyone have trading authority?" and to provide a signed power of attorney as an attachment if trading authority was granted.

[8] The power of attorney was dated February 7, 2000. Brigandi began trading on January 4, 2000.

[9] In July 2003, Ali entered into a Letter of Acceptance, Waiver and Consent with NASD pursuant to which he was barred from the securities industry for forging the power of attorney, converting $23,000 from FG's account, and providing false testimony to NASD staff during an on-the-record interview.

[10] Brigandi admitted that he would recommend that Ali "buy 'X' number of shares at 'X' price" for FG's account.

these recommendations with FG by telephone. Brigandi, who does not speak Italian, never discussed his recommendations with FG. Brigandi testified that his recommendations were routinely followed after these discussions.

Between January and August 2000, Brigandi executed 63 purchases and 67 sales in FG's account. Brigandi relied heavily on margin for the transactions in FG's account. The purchases totaled approximately $1,627,342 while the average equity in FG's account was just $24,966.[11] Most of the securities were held for 15 days or less, and the annual turnover rate for the securities was 86.88. By August 2000, the account had a $42.09 deficit. During the same period, Brigandi generated $42,452 in gross commissions[12] and $2,502 in margin interest and other fees. The commissions Brigandi received from FG's account represented approximately 48% of the gross commissions that Brigandi earned during this period. The cost-to-equity ratio was 240%, which meant that the account had to earn 240% to break even.[13]

In July 2001, MG sent NASD a complaint letter that she had drafted for her father. The complaint letter stated that without their consent, FG's account had been subjected to excessive and unreasonably risky trading after it was opened in December 1999. In May 2002, NASD began investigating the trading in FG's account. Enforcement's allegations of unsuitable trading against Brigandi are the result of this investigation.

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[11] The Hearing Panel calculated the average equity in FG's account to be $22,411, but in performing this calculation it subtracted the $23,000 that Ali converted from the account. As a result, the Hearing Panel also calculated the annual turnover rate to be 96.81. The $24,966 number represents the average equity if the $23,000 had remained in the account over the nine-month trading period.

[12] Brigandi testified that he received no less than a 50 percent pay out each month that he was employed at Roan-Meyers. He also testified that he could choose one month for a 100 percent pay out and that he chose February 2000 as the month for this pay out. According to this payment scheme, in February 2000, Brigandi made at least $11,143 in net commissions from FG's account. Excluding the month of February, from January to August 2000, Brigandi earned at least $17, 632 in net commissions from FG's account. Thus, Brigandi earned no less than $28,775 in net commissions for his trading in FG's account. In addition, Brigandi received $4,170 in additional compensation from the Firm for his trading in FG's account. The minimum amount that Brigandi earned from trading in FG's account was therefore $32,945.

[13] The cost-to-equity ratio is the total amount of commissions, margin interest and other fees divided by the average equity. The cost-to-equity ratio for FG's account over nine months was 180% (or $44,956 divided by $24,966). The cost-to-equity ratio on an annualized basis was therefore 240% (or 180% multiplied by 12 and divided by nine). Using $22,411 as the average equity, the Hearing Panel calculated the cost-to-equity ratio to be 276%. *See supra* note 13.

IV. Discussion

After reviewing the record, we affirm the Hearing Panel's finding that Brigandi violated NASD Conduct Rules 2310 and 2110 by recommending transactions in a customer's account without reasonable grounds for believing that the transactions were suitable for the customer. As discussed below, we also affirm the sanctions imposed by the Hearing Panel for Brigandi's violations.

A. Brigandi Violated the Suitability Rule

The Commission has concluded that a broker's excessive trading in a customer's account may violate the suitability rule. *Rafael Pinchas*, 54 S.E.C. 331, 342 (1999); *see also John M. Reynolds*, 50 S.E.C. 805, 806 (1991) (stating that "[e]xcessive trading may be thought of as quantitative unsuitability"). Excessive trading occurs when a broker has control over trading in a customer account and the level of activity in that account is inconsistent with the customer's objectives and financial situation. *Pinchas*, 54 S.E.C. at 337. Enforcement argues that Brigandi violated Rule 2310 because he had de facto control over FG's account, and the frequency of trading in FG's account during this period was inconsistent with FG's objectives and financial situation. We agree.

1. *Brigandi Had Control of FG's Account*

A broker who does not have formal discretionary authority over an account may still exercise de facto control of the account. *Reynolds*, 50 S.E.C. at 807-808. De facto control exists where a customer relies on a broker's advice to such a degree that the customer does not independently evaluate the broker's recommendations and exercise independent judgment. *See Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 3 (1st Cir. 1983); *Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673, 676-77 (9th Cir.1982); *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir. 1980). Such reliance can be established by evidence that the customer is unsophisticated and routinely followed the broker's advice. *Clyde J. Bruff*, 53 S.E.C. 880, 883 (1998); *see Mihara*, 619 F.2d at 821; *see also Cruse v. Equitable Sec. of New York, Inc.*, 678 F. Supp. 1023, 1030-1031, (S.D.N.Y. 1987) ("Although a securities account may be non-discretionary, a broker may still effectively exercise de facto control where a customer places his trust and faith in a broker and routinely follows his broker's advice.") (*citing Mihara*, 619 F.2d at 821)).

The record clearly establishes that FG was not a sophisticated investor who could independently evaluate Brigandi's recommendations. FG was a retired dry cleaner who had no experience investing in speculative stocks or trading on margin. It is also undisputed that: (1) Brigandi was the architect of the aggressive short-term trading strategy implemented in FG's account, and (2) from January through August 2000, Brigandi's recommendations in support of

this strategy were routinely followed.[14] Accordingly we conclude that Brigandi exercised de facto control over FG's account.

We confirm our conclusion by reviewing other factors that courts have considered when determining whether a broker controls a non-discretionary account, including: (1) the discretion given to the broker-dealer; (2) the age, education, intelligence and investment experience of the customer; (3) the relationship between the customer and the broker; and (4) the regularity of discussions between the broker and the customer. *Cruse*, 678 F. Supp. at 1031 (citation omitted); *Rivera v. Clark Melvin Secs. Corp.*, 59 F. Supp.2d 280, 290 (D.P.R. 1999); *Zaretsky v. E. F. Hutton & Co.*, 509 F. Supp. 68, 74 (S.D.N.Y. 1981).

First, we find that Brigandi had significant discretion over FG's account as evidenced by Brigandi's testimony that his recommendations were routinely followed with regard to both: (1) the number of shares of a particular stock to buy, and (2) the price at which to purchase the shares.

Second, FG was an elderly, unsophisticated investor with an eighth grade education and no experience in short-term trading. *See Lieb v. Merrill Lynch, Pierce, Fenner & Smith, Inc*, 461 F. Supp. 951, 954 (E.D. Mich. 1978), *aff'd mem*., 647 F.2d 165 (6th Cir. 1981) (stating that "[w]here the customer is particularly . . . old . . . or naive with regard to financial matters . . . the courts are likely to find that the broker assumed control over the account.") (citations omitted).

Third, although Brigandi and FG did not have a close personal relationship, the record is clear that FG had a relationship of trust with Ali, who worked directly under Brigandi. We find that the combination of FG's trust of Ali and Brigandi's position of influence over Ali supports the conclusion that Brigandi had control over FG's account. *Compare Lieb*, 461 F. Supp. at 954-55 (concluding that courts are more likely to find that a broker exercised de facto control where the business relationship between the broker and the customer is not an arms-length relationship).

Finally, although there was purportedly frequent consultation between Brigandi and FG (through Ali) as to the trading, this does not negate the control that Brigandi exercised over FG's account.[15] *See Shamsi v. Dean Witter Reynolds, Inc.*, 743 F. Supp. 87, 95 (D. Mass. 1989)

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[14] Brigandi argues that despite the significant control that he had over the account, the Hearing Panel's finding of de facto control was erroneous because FG did not follow every single one of his recommendations. We disagree. The idea that FG may not have followed each specific recommendation does not establish that FG exercised independent judgment over the account. The level of activity in the account remained remarkably high in accordance with the aggressive trading strategy that Brigandi desired to implement for the account. *See Bruff*, 53 S.E.C. at 883 (stating that "[c]ontrol may be established when a customer relies upon the broker to such an extent that the broker is in a position to control the volume and frequency of the transactions in the account").

[Footnote continued on next page]

(stating that "where an inexperienced investor routinely follows the advice of his broker, the latter may be liable for [excessive trading] notwithstanding that the client authorizes each transaction") (citing *Tiernan*, 719 F.2d at 3); *see also Nesbit v. McNeil*, 896 F.2d 380, 383 (9th Cir. 1990) (stating that "the mere fact that [a broker] told his client what was being done" did not negate the broker's de facto control over the client's account).

After considering all of the above facts and circumstances, we affirm the Hearing Panel's finding that Brigandi exercised de facto control over FG's account.

2. *Brigandi's Trading in FG's Account Was Excessive*

Where a broker has de facto control of investment decisions in an account, excessive trading may be found based solely on the annual turnover rate in the account. *Pinchas*, 54 S.E.C. at 340 n.17 (*citing David A. Gingras*, 50 S.E.C. 1286, 1289 (1992)). The annual turnover rate measures the number of times during a given year that the securities in an account are replaced by new securities. *Id.* at 339. Generally, an annual turnover rate of six or higher reflects excessive trading. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 490 (6th Cir. 1990) (citations omitted); *David Wong*, 55 S.E.C. 602, 611 n.18 (2002); *Peter C. Bucchieri*, 52 S.E.C. 800, 805 (1996) (citing *Mihara*, 619 F.2d at 821). Here, the annual turnover rate in FG's account was 86.88.**]** This is significantly beyond the level that would normally constitute excessive trading.[16] Under these facts, we find that Brigandi violated the suitability rule by trading excessively in FG's account.

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[15] Brigandi claims that Ali controlled the account because FG had given Ali a power of attorney. Brigandi's argument has no merit. First, it is clear that Brigandi began his course of trading before he had a purported power of attorney. In fact, it is undisputed that Brigandi conducted aggressive short-term trading in FG's account for four weeks prior to receiving the purported power of attorney. Brigandi therefore established his de facto control over the account from the beginning when Ali had absolutely no authority to object to Brigandi's recommendations. Second, once Ali provided the power of attorney, which was invalid, Ali did not disrupt the de facto control that Brigandi had established over the account because Brigandi was still able to generate a high level of activity that generated steady commissions for Brigandi. Third, Ali's employment situation—serving as a cold caller and subordinate of Brigandi—demonstrates that Ali was in no position to take control over the account away from Brigandi.

[16] The Commission has found trading to be unsuitable where the turnover ratios were much lower than the ratio for FG's account. *See Gerald E. Donnelly*, 52 S.E.C. 600, 602-603 & 603 n.11 (finding annualized turnover ratios between 3.1 and 3.8 to be excessive); *Samuel B. Franklin & Co.*, 42 S.E.C. 325, 330 (1964) (finding turnover ratios of 3.5 and 4.4 to be excessive).

3. *Brigandi Did Not Have a Reasonable Basis for Believing That the Trading in FG's Account Was Suitable*

Brigandi argues that the transactions at issue were suitable for FG because Ali told him that FG was a "wealthy," international businessman who had several other accounts across the country. Rule 2310, however, "requires that a registered representative have reasonable grounds for believing, on the basis of information furnished by the customer . . . that the recommended transaction is not unsuitable for the customer." *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *23 (Feb. 10, 2004) (citation omitted). Brigandi admitted that prior to opening an account, he would typically interview customers to find out their investment objectives and current financial situation. In this case, he did not interview FG, but rather relied almost exclusively on Ali's assessment of FG's financial situation. In addition, Brigandi never asked Ali to provide any evidence to support this assessment. We find that Brigandi did not have reasonable grounds for believing that FG was a wealthy international businessman.

The financial information reviewed by Brigandi indicated that FG's net worth was only $500,000. Brigandi therefore had no concrete information to support Ali's representations that FG was wealthy.[17] Instead, Brigandi assumed improperly that FG had other assets and that aggressive short-term trading was therefore suitable for FG when he initiated the trading in January 2000. *See Jack H. Stein*, Exchange Act Rel. No. 47335, 2003 SEC LEXIS 338, at *11 (Feb. 10, 2003) (stating that it was improper for a broker to make recommendations "on the basis of guesswork" regarding a customer's net worth where a customer refused to provide broker with any information regarding other assets not listed on her new account form). Even if FG did have other assets, Brigandi did not have enough information about these assets to ascertain whether FG could afford to lose the money in the Roan-Meyers account. *See David Joseph Dambro*, 51

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[17] Brigandi asserts that it was improper for the Hearing Panel to find that he violated the suitability rule, claiming that the Hearing Panel did not have a full understanding of FG's financial resources. Brigandi fails to understand that it is his own assessment of FG's finances that is critical—not the Hearing Panel's assessment. In his opening appellate brief, Brigandi sought to introduce newly discovered evidence of FG's financial condition, arguing that the assets listed in the new account form only represented a small percentage of FG's net worth. Brigandi, who was represented by counsel before the Hearing Panel, offers no reason why this evidence was not introduced at the hearing other than his claim that the Hearing Panel did not ask him any questions on the topic. Moreover, Brigandi testified that he did not rely on any of this evidence at the time he made his suitability determination for FG. Instead, Brigandi only relied on Ali's representations, FG's final monthly statement from his Royal Hutton account, and FG's new account form from the Roan-Meyers account that indicated FG's net worth was only $500,000. It is therefore immaterial to our consideration of whether Brigandi appropriately assessed FG's financial status before recommending the transactions at issue and we decline to consider this information. *See* NASD Procedural Rule 9346(b) (stating that a respondent seeking to adduce additional evidence must "demonstrate that there was good cause for failing to introduce it below [and] why the evidence is material to the proceeding").

S.E.C. 513, 517 & n.14 (1993). Moreover, a proper suitability determination is based on "the appropriateness of the investment for the investor, not simply by whether the salesman believes that the investor can afford to lose the money invested." *Id.*

We also reject Brigandi's argument that the trades he recommended were suitable because FG approved each of the trades after discussing them with Ali.[18] The test for whether a broker's recommendations are suitable is not whether the customer acquiesced in them, but whether the recommendations are consistent with the customer's financial situation and needs. *See Faber*, 2004 SEC LEXIS 277, at *23-24 (citation omitted); *Wendell D. Belden*, Exchange Act Rel. No. 47859, 2003 SEC LEXIS 1154, at *11 (May 14, 2003); *James B. Chase*, 2003 SEC LEXIS 566, at *17 (citations omitted). Here, Brigandi executed a high volume of short-term trades that were not appropriate for someone with FG's modest financial background. These trades generated more than $42,000 in commissions for Brigandi and depleted all the funds in FG's account. FG's apparent approval of these trades does not justify Brigandi's excessive trading in the account.

B. The Proceedings Below Were Fair

The Securities Exchange Act of 1934 requires that a self-regulatory organization "provide a fair procedure" for the disciplining of its membership. 15 U.S.C.S. §78o-3(b)(8) (2006). Brigandi challenges the fairness of these proceedings, arguing that the Hearing Panel relied on testimony that was not credible in reaching its decision. Brigandi makes numerous attacks on FG's credibility, pointing to statements made by FG that contradict FG's affidavit. For example, FG stated that he had not "worked" since he sold his dry cleaning store and moved to Italy in 1989, but later did not dispute that he and two associates subsequently "owned" a construction company from 1992 to 1997. FG also testified that he did not have a Citibank account and later corrected himself by saying that he possibly had such an account before 1997 that was related to the construction company. Similarly, FG testified that he did not have an account at Banco de Sicilia, but shortly thereafter explained that had put aside around $8,000 euros in a Banco de Sicilia account for his daughter's marriage.[19] The Hearing Panel did not find

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[18] Brigandi testified that he assumed Ali would inform FG of the risks associated with short-term trading. A broker, however, does not satisfy the suitability rule merely by informing his customer of trading risks. *See James B. Chase*, Exchange Act Rel. No. 47476, 2003 SEC LEXIS 566, at *18 (Mar. 10, 2003) (stating that "[a] registered representative must 'be satisfied that the customer fully understands the risks involved and is . . . able . . . to take those risks'") (*quoting Patrick G. Keel*, 51 S.E.C. 282, 284 (1993)). Here, Brigandi claims to have explained the risks of short-term trading to Ali, but made no effort to determine if either Ali or FG understood these specific risks. Instead, Brigandi assumed that Ali was aware of the risks and that since FG had owned a dry cleaning business, he also would generally understand "risk" enough to engage in short-term trading.

[19] FG also denied signing an affidavit provided by NASD. FG's daughter, however, was later shown a copy of the affidavit and identified her father's signature on the affidavit. FG's

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that these inconsistencies undermined FG's credibility and we find no reason to do so on appeal. *See Dane S. Faber*, 2004 SEC LEXIS 277, at *17-18 (citations omitted); *Anthony Tricarico*, 51 S.E.C. 457, 461 (1993) (refusing to overturn SRO Hearing Panel's credibility determination of witness who was unable to recall certain details even though respondent had identified certain inconsistencies in witness' testimony concerning these details).

Brigandi also asserts that FG was being coached by "his wife and maybe others" while providing his telephone testimony and asked that his entire testimony be stricken from the record.[20] FG's wife was with him in Italy when he testified by phone. On three occasions during his testimony, FG appeared to ask his wife to help him verify certain information. First, FG asked his wife how long she had been receiving a pension. At this point, the Hearing Officer instructed FG that he should only testify from information based on his own personal knowledge. Later, however, FG asked his wife how many times he had been to the United States and South America since he retired in 1989. It also appears that FG consulted his wife when asked a question concerning the conversion rate for dollars and euros. At this point, Brigandi's lawyer reminded FG that he should not consult with his wife while testifying. At no point after this does the record show that FG consulted his wife during his testimony. We therefore do not find that the record supports Brigandi's contention that FG was being "coached" by his wife throughout his testimony. The record suggests that FG was simply unaware of the protocol for testifying. We therefore find that the Hearing Officer took appropriate steps to ensure that FG's testimony reflected FG's personal knowledge, and we do not find that he abused his discretion by allowing the Hearing Panel to consider FG's testimony. Consequently, we reject Brigandi's request to strike FG's testimony in its entirety.

V. Sanctions

After concluding that Brigandi's continued employment within the securities industry posed a threat to investors, the Hearing Panel barred him from associating with any NASD member.[21] In determining sanctions, the Hearing Panel found that Brigandi's conduct was

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daughter testified that FG had received and reviewed statements from Roan-Meyers with her during the period at issue. FG claimed that he did not recall going over these statements with his daughter.

[20] Brigandi also asserts that it was improper to allow FG to testify by telephone. NASD's rules, however, do not prohibit the use of telephone testimony during a hearing. *See* NASD Procedural Rule 9262. Telephone testimony is particularly appropriate in instances where, as in this case, it would be burdensome for the witness to travel thousands of miles to the location of the hearing. Moreover, the Commission has previously upheld reliance on telephone testimony. *See Daniel Joseph Alderman*, 52 S.E.C. 366, 368 (1995).

[21] In light of this bar, the Hearing Panel did not impose a fine.

reckless and in disregard of his customer's best interests. The Hearing Panel also found Brigandi's refusal to accept responsibility for his suitability violation to be a particularly aggravating factor. In addition, the Hearing Panel determined that Brigandi had a flagrant disregard for the rules of the securities industry. After a thorough review, we affirm the Hearing Panel's sanctions.

For violations of the suitability rule, NASD's Sanction Guidelines ("Guidelines") recommend a fine of $2,500 to $75,000, and a suspension ranging from 10 days to one year.[22] A fine may be increased by the amount of a respondent's ill-gotten gain.[23] In egregious cases, the Guidelines recommend that we impose a suspension of up to two years or a bar. In imposing sanctions, we have also considered the "Principal Considerations In Determining Sanctions" set forth in the Guidelines.[24]

Brigandi asserts that his "spotless record" should be considered a mitigating factor in the determination of sanctions. We do not, however, consider an associated person's lack of disciplinary history to be mitigating. *See Robert J. Prager*, Exchange Act Rel. No. 51974, 2005 SEC LEXIS 1558, at *56 (July 6, 2005) (rejecting respondent's argument that his "pristine" disciplinary record and cooperation with regulatory authorities justified a more lenient sanction in light of the serious nature of his misconduct); *see also Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (stating that a "[l]ack of a disciplinary history is not a mitigating factor").[25] Brigandi benefited from his misconduct at FG's expense.[26] Brigandi's trading earned him more than $42,000 in gross commissions. This trading generated almost half of Brigandi's commissions during the period at issue. In contrast, FG lost all of the funds in his account.

We further find that Brigandi's conduct was reckless.[27] Brigandi initiated his aggressive short-term trading in FG's account with very little knowledge of or regard for FG's true financial status. Brigandi also started this trading prior to receiving the power of attorney forged by Ali and despite the fact that the new account form clearly indicated that there was no power of

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22 http://www.nasd.com/RegulatoryEnforcement/NASDEnforcementMarketRegulation/NASDSanctionGuidelines/index.htm [hereinafter Guidelines].

23 *Id.* at 5 & n.4 (General Principles Applicable To All Sanction Determinations, No. 6).

24 *Id.* at 6-7 (Principal Considerations In Determining Sanctions).

25 Even if we were to consider Brigandi's lack of disciplinary history, we find that the mitigating effect would be far outweighed by the aggravating factors associated with his misconduct in this case.

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

27 *Id.* (Principal Considerations In Determining Sanctions, No. 13).

attorney associated with the account. Moreover, Brigandi made very little effort to independently determine FG's financial situation before engaging in the unsuitable trades.

We also agree with the Hearing Panel's finding that Brigandi's refusal to accept responsibility for his excessive trading was an aggravating factor.[28] The Commission has acknowledged that a respondent's refusal to accept responsibility is aggravating where he repeatedly portrayed himself as an innocent victim despite his pivotal role in the misconduct at issue. *See Prager*, 2005 SEC LEXIS 1558, at *55. Here, Brigandi initiated the aggressive trading without a proper examination of FG's financial needs. Brigandi, however, blames his firm and Ali for his suitability violation and fails to appreciate that the minimal effort he made to determine FG's financial needs was insufficient.

Brigandi argues that since the trading only occurred over a six-month period, we should impose a more lenient sanction.[29] Over the course of these six months, however, Brigandi lost all of the money in FG's account while generating significant commissions and margin fees. Brigandi's unsuitable trading caused FG to lose all of his investment in a short time period. It is therefore not mitigating that Brigandi did not continue this improper trading for a longer period.

In addition, Brigandi argues that NASD's sanction is punitive because there is no danger that he would commit another violation. Brigandi points to his statement that he would not have agreed to handle FG's account if he had known that FG was not wealthy as proof that he is not likely to commit another suitability violation.[30] In explaining why he would not have agreed to handle FG's account, Brigandi stated, "[w]hy would I want to—where is the risk-reward for me? They have already got a big loss [and] . . . I would pass." We find that Brigandi's response suggests that he continues to pose a threat to investors. It is clear from this response that Brigandi remains focused on his needs without enough consideration for the financial needs of his customers. Brigandi's purported decision to deal solely with "wealthy" customers to accommodate his preference for engaging in aggressive short-term trading therefore does not eliminate this threat.

Brigandi also suggests that his decision to never again handle an account with a power of attorney would prevent any future suitability violations. Brigandi, however, began making unsuitable trades approximately four weeks before he even received FG's power of attorney. On the whole, Brigandi has not demonstrated that he sincerely intends to make sufficient inquiries into his customer's financial situation before pursuing the aggressive trading he prefers. As a

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[28] *Id.* at 6 (Principal Considerations In Determining Sanctions, No. 2).

[29] *Id.* (Principal Considerations In Determining Sanctions, No. 9).

[30] Brigandi also testified that the disciplinary process had "soured" him on handling retail accounts and that unless the customer is "a CEO of a company and knows the game" he probably would not handle a retail account "because you can't believe what [customers] tell you."

result, we are not persuaded that Brigandi's pledge to deal directly with his future customers will prompt him to accurately assess their financial needs in the future.

The Hearing Panel did not find any mitigating factors associated with Brigandi's misconduct and imposed a bar. We agree. Moreover, we are troubled by the fact that Brigandi still believes that trading that produces a cost-to-equity ratio of 240% is suitable for investors he believes to be wealthy. We also do not find that Brigandi appreciates the harm that his aggressive trading imposed on FG. We conclude that Brigandi's misconduct was egregious and that Brigandi continues to pose a threat to investors. Accordingly, we find that imposing a bar is an appropriate sanction for Brigandi's misconduct.[31]

VI. Conclusion

We find that Brigandi made unsuitable recommendations to FG in violation of NASD Conduct Rules 2310 and 2110. We reject Brigandi's arguments that he had a reasonable basis for believing the recommendations were suitable because of his erroneous assumption that FG was wealthy.[32] Accordingly, we bar Brigandi from associating with any NASD member firm in any capacity.

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and Corporate Secretary

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[31] This sanction will also act as a deterrent to other brokers who feel that they can be reckless with regard to their obligation to make a sufficient inquiry into their customer's financial background before recommending aggressive, high-risk transactions.

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