BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Anthony Cipriano West Islip, NY, Respondent.	DECISION Complaint No. C07050029 Dated: July 26, 2007

Respondent failed to disclose material information and made baseless price predictions when recommending a speculative stock to several customers, in violation of the antifraud provisions of the federal securities laws and NASD rules. Held, Hearing Panel's findings affirmed and sanctions modified.

Appearances

For the Complainant: Joel R. Beck, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: Pro Se

Decision

Pursuant to NASD Procedural Rule 9311, Anthony Cipriano ("Cipriano") appeals an August 10, 2006 Hearing Panel decision. The Hearing Panel found that Cipriano failed to disclose material information concerning a speculative stock he recommended to several customers and made unreasonable price predictions for the stock, in violation of the antifraud provisions of the federal securities laws and NASD rules. The Hearing Panel suspended Cipriano in all capacities for two years, imposed a $40,000 fine, required that Cipriano requalify in all capacities, and ordered that he pay $3,961.10 in costs. After a thorough review of the record, we affirm the Hearing Panel's findings. We reduce, however, the two-year suspension to one year. Further, we affirm the $40,000 fine and the Hearing Panel's order that Cipriano requalify in all capacities and pay costs. Finally, we order that Cipriano pay restitution of $606 to a single customer.

I. Background

Cipriano entered the securities industry in January 1998 and first became registered as a general securities representative in September 1998. At the time of the events at issue in this case, Cipriano was a general securities representative with Clark Street Capital, Inc. ("Clark Street"). Cipriano was associated with Clark Street in this capacity from June 2001 until June 2003. Cipriano is currently registered as a general securities representative with another member firm.

II. Procedural History

A. Complaint and Hearing Panel Decision

In late 2002, NASD received an anonymous call alleging fraudulent activity at Clark Street related to sales of Sequiam Corporation stock, and shortly thereafter, NASD commenced an investigation. On April 18, 2005, NASD's Department of Enforcement ("Enforcement") filed a one-cause complaint against Cipriano.[1] The complaint alleged that in connection with the sale of Sequiam Corporation stock to four customers, Cipriano violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110 by: (1) failing to disclose material financial information regarding Sequiam Corporation and failing to disclose the existence of a consulting agreement between Clark Street and Sequiam Corporation; and (2) making baseless price predictions regarding Sequiam Corporation stock. Cipriano, through counsel, contested Enforcement's allegations and requested a hearing.

On March 14 and 15, 2006, a Hearing Panel conducted a hearing. Enforcement presented four witnesses (three of Cipriano's customers and an NASD investigator), and Cipriano testified on his own behalf. In a decision dated August 10, 2006, the Hearing Panel found that Cipriano had violated the antifraud provisions of the federal securities laws and NASD rules as alleged in the complaint. The Hearing Panel suspended Cipriano in all capacities for two years, fined him $40,000, required that he requalify in all capacities, and imposed $3,961.10 in costs.

B. Cipriano's Appeal and Subsequent Requests for Relief

Cipriano, acting pro se, timely filed a notice of appeal and attached several documents to the notice to support allegations, raised for the first time, that he had a negative net worth and lacked substantial assets. In subsequent correspondence, Cipriano expressly raised his alleged inability to pay the fine imposed by the Hearing Panel and ultimately filed a motion (the

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[1] The complaint also charged Anthony Whitter ("Whitter"), another registered representative at Clark Street, with similar violations involving Sequiam Corporation stock. Whitter failed to answer or otherwise respond to the complaint, and on November 14, 2006, the Hearing Officer issued a default decision barring Whitter in all capacities.

"Motion") ostensibly seeking the following relief: (1) an order to compel production of the record index and an entire copy of the record in this case; (2) an order to exclude all records listed in the record index as untimely for purposes of the appeal; (3) an order to compel the Office of Hearing Officers to consider Cipriano's offer of settlement; (4) summary disposition based upon Cipriano's alleged inability to pay and inability to "deal effectively with the appeal process"; (5) reversal of the Hearing Officer's rulings on matters related to discovery; and (6) the introduction of additional evidence not previously presented by Cipriano. In connection with his request to adduce additional evidence, Cipriano attached to the Motion a one-page statement of financial position, copies of 2003 and 2004 personal income tax returns, letters from testifying customers DA and HC requesting leniency on appeal, several bank statements for an account owned by his wife, and a print-out of Cipriano's credit scores.

Enforcement filed an opposition to the Motion, and a subcommittee of the National Adjudicatory Council ("Subcommittee") denied the relief requested in the Motion. Although the Subcommittee denied Cipriano's request to adduce additional evidence, it provided Cipriano with a standard statement of financial condition discussed in NASD's Sanction Guidelines and ordered Cipriano to document his financial status through the use of the form and any required supporting documentation. Cipriano subsequently filed the form and certain documents.[2]

As an initial matter, we find that the Subcommittee properly denied the relief requested in the Motion. First, with respect to Cipriano's request to compel production of the record and to exclude all records as untimely, the record indicates that the Office of Hearing Officers timely filed the record on appeal and that Cipriano was timely served with the record index pursuant to Procedural Rule 9321.[3] Second, with respect to Cipriano's request to compel consideration of his settlement offer, such relief is not available to Cipriano pursuant to NASD's rules, and thus the Subcommittee properly denied Cipriano's request. Third, Cipriano's request for summary disposition on appeal based upon proposed additional evidence allegedly documenting his financial condition and his alleged inability to deal effectively with the appellate process is procedurally improper pursuant to Procedural Rule 9264, and substantively the request is without merit.

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[2] We discuss Cipriano's alleged inability to pay in Section V.B., *infra*. Further, we note that because Cipriano expressly waived oral argument before the Subcommittee, we have considered this case on the basis of the written record.

[3] The Certification of Record is dated October 2, 2006, which was the deadline for filing the record with the Office of General Counsel. The Office of General Counsel's time-stamp indicates that the record was received on October 3, 2006. Even assuming that the record was filed on October 3, 2006, Cipriano's request was properly denied, as Cipriano did not and could not demonstrate that a one-day delay in filing the record in this case caused him any harm or prejudice. Further, the Subcommittee provided Cipriano with an additional copy of the record index and instructions on ordering and obtaining a full copy of the record well in advance of Cipriano's briefing deadline.

Fourth, the NAC also finds that the Hearing Officer properly denied Cipriano's request for documents and information from Enforcement, Cipriano's motion to compel discovery pursuant to Procedural Rule 9252, and Cipriano's motion for reconsideration of the motion to compel. The record shows that Enforcement complied with Procedural Rule 9251 in providing Cipriano with information, and Cipriano's initial request for 30 categories of information from Enforcement was overbroad and sought information not relevant to the proceeding. Further, Cipriano's request to compel Enforcement to issue sweeping Procedural Rule 8210 requests to all other member firms at which each named customer maintained an account was properly denied as overbroad, vague, and untimely. The Hearing Officer also properly denied Cipriano's request for reconsideration, as Cipriano did not advance any new arguments to demonstrate how the information he sought had any relevancy to the issues of this proceeding.

Finally, we find that Cipriano's request to adduce additional evidence was properly denied by the Subcommittee pursuant to Procedural Rule 9346. Cipriano did not demonstrate good cause for failing to introduce such evidence below (where he was represented by counsel), nor did he demonstrate, with respect to the proposed financial information, that his circumstances had changed since the hearing in this matter.[4] Further, with respect to the customer declarations, Cipriano did not demonstrate the relevancy of the statements provided by two customers (who both testified before the Hearing Panel). *See Raymond M. Ramos*, 49 S.E.C. 868, 871-72 (1988) (finding that plea for leniency by customer was irrelevant to findings and sanctions). For these same reasons, we do not consider an additional, similar customer declaration attached to Cipriano's letter in reply to Enforcement's brief.

III. Facts

A. Sequiam Corporation's Formation

Sequiam, Inc. was a privately held corporation founded by Nicholas Van den Brekel ("Van den Brekel") and Mark L. Mroczkowski ("Mroczkowski") in January 2001 to research, develop, produce and market a document management software product. As of December 31, 2001, Sequiam, Inc. listed assets totaling $150,000, no net sales for the year, and a net loss in excess of $730,000.

Wedge Net Experts, Inc. ("Wedge Net") was a publicly traded company formed in September 1999. Wedge Net's public filings with the SEC described its proposed business as the provision of computer and internet consulting, technical support services, and access to an online database of computer and software information through a web site. As of April 2002, Wedge Net had not completed the development of its proposed web site, and operated rent free out of the home of one of its founders. Similar to Sequiam, Inc., Wedge Net generated minimal revenue, suffered significant operating losses from its inception through the end of 2001, and had minimal assets.

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[4] *See NASD Sanction Guidelines* 5 (2006) (General Principles Applicable to All Sanction Determinations, No. 8), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

During the first quarter of 2002, Wedge Net did not have sufficient capital to continue its operations, and thus sought a merger partner. Sequiam Corporation ("Sequiam") was formed through a reverse merger, effective April 1, 2002, between Wedge Net and Sequiam, Inc.[5] Upon completion of the merger, Wedge Net changed its name to Sequiam. Van den Brekel became the president and chief executive officer of Sequiam, as well as chairman of the board of directors. Mroczkowski became Sequiam's chief financial officer. Sequiam was listed on the OTC Bulletin Board, and between June and September 2002, the price for Sequiam's stock ranged from $.75 to $2.01 per share.

For the first six months of 2002, Sequiam did not generate any significant revenues, experienced substantial losses, and disclosed that it had total assets of approximately $355,000. Indeed, in an August 2002 filing with the SEC, Sequiam disclosed that during the quarter ending June 30, 2002, it did not have any available credit, bank financing or other external sources of liquidity. Further, Sequiam disclosed that it needed additional capital over the next 12 months to continue its operations.

B. Sequiam's Acquisition of Brekel Group, Inc.

On July 19, 2002, Sequiam acquired another corporation controlled by Van den Brekel, Brekel Group, Inc. ("BGI"). Sequiam acquired BGI because Sequiam "continued to need additional capital and sources of liquidity", and management expected that the acquisition would give Sequiam greater ability to attract new financing. BGI's primary business was digital on-demand publishing services, and it was party to a contract with the World Olympian Association ("WOA") to develop, create, host, and maintain its internet site. Pursuant to the WOA contract, BGI was obligated to develop WOA's internet site at BGI's own expense, and in return BGI would receive 35 percent of sponsorship revenues and 35 percent of the net proceeds from the sale of merchandise through the site. Sequiam disclosed that it did not expect to begin receiving any revenue under the WOA contract until sometime in 2003. Unaudited financial statements showed that as of June 30, 2002, BGI had more than $1.6 million in operating losses.

In connection with Sequiam's acquisition of BGI, Sequiam booked more than $10 million in goodwill. Consequently, and primarily as a result of the acquisition, Sequiam's total assets increased from $355,000 as of June 30, 2002, to $12.058 million as of September 30, 2002, although Sequiam's net losses continued. In February 2003, however, the SEC required Sequiam to delete the $10 million in goodwill from its balance sheet because the acquisition of

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[5] Sequiam, Inc. (later known as Sequiam Software, Inc.), Wedge Net, and Sequiam were all development-stage companies. A development-stage company is a company that "is devoting substantially all of its efforts to establishing a new business and . . . planned principal operations have not commenced [or] . . . there has been no significant revenue [from principal operations]." *See* Accounting and Reporting by Development Stage Enterprises, Statement of Fin. Accounting Standards No. 7, §§ 8-9 (Fin. Accounting Standards Bd. 1975), *available at* http://www.fasb.org/pdf/fas7.pdf.

BGI was a related-party transaction. As a result of the required amendment, Sequiam's total assets decreased to $1.953 million.

C. Cipriano's Sales of Sequiam Stock

1. Cipriano's Basis for Recommending Sequiam

Sometime in or around the summer of 2002, during conversations between Cipriano and his managers at Clark Street, Cipriano's managers mentioned Sequiam as a potential investment for his customers. Initially, Cipriano was not interested in Sequiam and did not recommend it to his customers because he thought that "there really wasn't anything interesting about it." In addition, Cipriano considered Sequiam to be a penny stock and believed that the company had few assets. Cipriano testified that it was his policy never to recommend penny stocks to his customers because "a company has got to have something, a good business plan and something behind it for me to at least make an attempt at it."

Despite Cipriano's initial reluctance to recommend Sequiam, he attended a presentation to generate interest in a private placement of Sequiam stock hosted by Van den Brekel and Mroczkowski. A private placement memorandum dated August 28, 2002 (along with certain SEC filings for Sequiam and Wedge Net), a business plan, and a broker fact sheet were distributed at this meeting. Cipriano allegedly reviewed these documents and went to Sequiam's web site to investigate the company.[6]

Shortly thereafter, Cipriano reconsidered Sequiam as a potential investment for his customers and concluded that he should recommend Sequiam for several reasons. First, Cipriano concluded that Sequiam had a solid business plan and the company was "moving forward" as evidenced by the increase in assets resulting from the BGI acquisition. Second, Cipriano believed that Sequiam would likely generate substantial revenue from the WOA contract, although he did not review the contract as part of his due diligence. Third, Cipriano concluded that the principals of Clark Street were "behind Sequiam" and liked Sequiam's business plan based upon the fact that Clark Street had entered into a consulting contract with Sequiam, although Cipriano did not review this agreement and relied upon his managers' general descriptions of the agreement.[7]

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[6] Similar to the statements regarding the company's lack of liquidity made in its SEC filings, Sequiam's private placement memorandum stated that "[w]e require substantial capital to pursue our operating strategy and we currently have nominal assets and nominal revenues and we have limited internal sources of liquidity. We have not established any lines of credit or financing with financial institutions or other unrelated parties. We currently have no cash reserves." Cipriano did not sell any shares in connection with the private placement.

[7] The consulting agreement dated June 13, 2002 (the "Consulting Agreement"), required Clark Street to assess Sequiam's financial requirements, assist with financing and developing corporate partnerships, and assist the company in becoming listed on the American Stock Exchange. In return, Clark Street was to receive warrants to purchase Sequiam stock at a fixed

[Footnote continued on next page]

Cipriano's positive views concerning Sequiam were, in his mind, further bolstered by an opinion letter from Sequiam's attorney dated September 9, 2002, which was accompanied by unaudited financial statements for the company. The letter opined that Sequiam's securities were excluded from regulation under the Penny Stock Reform Act of 1990 and related SEC rules because Sequiam's net tangible assets exceeded $2 million as of December 31, 2001. Cipriano received the opinion letter from his managers at Clark Street, and he relied upon this opinion letter and his managers' statements and assurances concerning Sequiam's net tangible assets in making some recommendations to purchase Sequiam stock.[8]

2. Sales to Customers

Cipriano began recommending and selling Sequiam stock to customers in late July 2002. Cipriano contacted approximately one-third of his 400 customers in connection with purchasing shares of Sequiam, and ultimately 28 of his customers purchased the stock. The complaint charged Cipriano with misconduct in connection with sales to four customers.[9]

a. Customer HC

At the time of the hearing in this matter, HC was a 61 year-old retired chemical engineer with little investment experience. HC's account was transferred to Clark Street from another member firm, and Cipriano was assigned as HC's broker. At the hearing on this matter, HC testified that he first learned of Sequiam from Cipriano in September 2002. Cipriano informed HC that Sequiam was a very promising firm, and Cipriano predicted substantial short-term increases in the price of Sequiam's shares and that the stock "had great potential and would double or triple." Cipriano further told HC that Sequiam's revenues were increasing and its

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price and pursuant to a vesting schedule attached to the Consulting Agreement. Although the parties executed the Consulting Agreement, at the hearing there was conflicting testimony as to whether the parties performed under the agreement.

[8] Although Cipriano testified that prior to September 9, 2002, he was aware that the opinion letter would be issued, certain sales of Sequiam occurred prior to this general awareness. In addition, Cipriano claims that during this time period he called Van den Brekel and Mroczkowski on several occasions to confirm Sequiam's assets, although he could not say specifically what he learned from his inquiries.

[9] Although the complaint alleged that Cipriano made baseless price predictions and failed to disclose material financial information in connection with the sale of Sequiam stock to four customers, the Hearing Panel did not rely upon the testimony of customer DA in reaching its decision because his recall of discussions with Cipriano was not very good. In addition, although the declaration of one customer not named in the complaint, customer JB, was admitted into the record, the Hearing Panel decision does not reference JB.

share price was moving up quickly. HC testified that Cipriano did not discuss Sequiam's adverse financial condition in detail or mention any particular risks involved with the purchase of the stock, and failed to inform HC of Clark Street's Consulting Agreement with Sequiam. Upon Cipriano's recommendation, HC purchased 1,500 shares of Sequiam at $2.01 per share.[10]

b. Customer JG

JG was a 71 year-old retired engineer, with some experience with speculative investments. JG's account was transferred to Clark Street from another firm, and Cipriano was assigned as JG's registered representative. At the hearing on this matter, JG testified that in September 2002, Cipriano contacted him and recommended that he sell shares in his account to purchase shares of Sequiam. JG further testified that Cipriano predicted substantial short-term increases in Sequiam's share price[11] without disclosing the risks of purchasing shares in the company. Further, JG testified that Cipriano failed to inform him that Clark Street had entered into the Consulting Agreement with Sequiam, and that Cipriano made no disclosures regarding Sequiam's finances. Upon Cipriano's recommendation, JG purchased 2,000 shares of Sequiam stock at a price of $1.69 per share.[12]

c. Customer BH[13]

BH's securities account was transferred to Clark Street in 2002, and Cipriano was BH's

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[10] Two weeks after his purchase, HC sold 700 of those shares at a price of $1.29 per share (for a realized loss of $504 plus $102 in fees and commissions). As of the date of the hearing, HC still owned 800 shares of Sequiam stock.

[11] In a declaration executed by JG in November 2003, JG deleted a reference to a price increase of 30 to 40 percent for Sequiam stock. JG testified that he deleted this language because although Cipriano may well have mentioned a specific percentage increase, JG could not remember for certain whether Cipriano referenced an exact percentage at the time he executed the declaration. JG further testified, however, that Cipriano definitely told him that Sequiam was going to make money and the share price was going to increase.

[12] JG testified that he eventually transferred the shares to another firm and sold the shares for a loss of approximately $600. The record does not contain any documentation of JG's loss.

[13] BH did not testify at the hearing below but executed a sworn declaration that the Hearing Officer admitted into evidence. The SEC has upheld the use of affidavits to support findings in NASD disciplinary proceedings. *See Harry Gliksman*, 54 S.E.C. 471, 480-81 (1999) (finding customer affidavit, corroborated by NASD examiner's testimony regarding his conversations with customer, was admissible because it was probative and reliable), *aff'd*, 24 F. App'x 704 (9th Cir. 2001). We find that BH's affidavit is relevant and consistent with the NASD investigator's live testimony concerning his conversations with BH (and with the live testimony of HC and JG), and thus was properly admitted into evidence.

broker. In September 2002, Cipriano contacted BH and recommended that he purchase shares of Sequiam. Cipriano informed BH that Sequiam was a software company affiliated with the Olympics, and that its share price was poised to make a big move soon and would be over $6 per share in 60 to 90 days. Cipriano did not mention any risks associated with Sequiam, and based upon Cipriano's advice BH purchased 2,400 shares at $1.49 per share. Several weeks later, Cipriano again contacted BH and recommended that BH sell some of his shares in Sequiam for a profit, as the share price had increased. Again following Cipriano's advice, BH sold his shares for a profit of approximately $630. Two weeks later, Cipriano called BH and recommended that BH again purchase Sequiam shares, as the price had decreased a bit and Cipriano still expected a big price move in the stock. BH purchased 1,750 shares of Sequiam at $1.70 per share. As of the end of 2003, BH still held 1,750 shares in Sequiam.

IV. Discussion

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe[.]" Exchange Act Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security, "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[.]" Conduct Rule 2120 is NASD's antifraud rule and is similar to Exchange Act Rule 10b-5. *See Market Regulation Comm. v. Shaughnessy*, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NBCC June 5, 1997), *aff'd*, 53 S.E.C. 692 (1998).

To establish that Cipriano failed to disclose material information or made fraudulent misrepresentations of material facts in violation of Exchange Act Rule 10b-5, Enforcement must demonstrate by a preponderance of the evidence that: (1) the omission or misrepresentation involved material information; (2) the omission or misrepresentation was made in connection with the purchase or sale of a security; and (3) Cipriano acted with scienter.[14] *See Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2004 NASD Discip. LEXIS 9, at *11 (NAC May 18, 2004) (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2d Cir. 1996)). Whether a fact is material "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding that information is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

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[14] There is no dispute that Cipriano's misconduct occurred in connection with the purchase or sale of securities. In addition, there is ample evidence in the record to demonstrate that Cipriano used "any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange," which is also required to establish a violation of Exchange Act Rule 10b-5.

In addition, "'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). A showing of recklessness is sufficient to demonstrate that Cipriano acted with scienter. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990). "Reckless conduct has been defined as a highly unreasonable misrepresentation or omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Dep't of Enforcement v. Abbondante*, Complaint No. C10020090, 2005 NASD Discip. LEXIS 43, at *28 (NAC Apr. 5, 2005) (citations omitted), *aff'd*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23 (Jan. 6, 2006), *aff'd*, 2006 U.S. App. LEXIS 30982 (2d Cir. Dec. 12, 2006).

We apply these standards first to the allegations that Cipriano failed to disclose to customers Sequiam's adverse financial condition and the Consulting Agreement between Clark Street and Sequiam. We then apply these standards to the allegations that Cipriano affirmatively provided customers with fraudulent price predictions.

A. Cipriano's Failure to Disclose Material Information

We affirm the Hearing Panel's finding that Cipriano knowingly failed to disclose to his customers material information in connection with the sale of Sequiam stock. First, we find that Cipriano failed to disclose to his customers Sequiam's financial condition, the risks involved with investing in Sequiam, and the Consulting Agreement.[15] Both HC and JG testified that Cipriano did not discuss Sequiam's finances, did not make any negative or cautionary statements regarding Sequiam or imply any particular risk with an investment in Sequiam outside that of a normal stock purchase, and did not disclose the existence of the Consulting Agreement. Such testimony was consistent with the previous declarations executed by each customer and was consistent with BH's declaration that Cipriano did not discuss any risks associated with Sequiam.[16] The Hearing Panel found that the witnesses' testimony was consistent and credible, whereas Cipriano's testimony that he discussed all such matters with his customers was disingenuous and not credible.

We uphold the Hearing Panel's findings. Cipriano's statements that he discussed Sequiam's financial condition, the risks of an investment in Sequiam, and the Consulting

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[15] The complaint also alleged that Cipriano failed to disclose the fact that Clark Street was selling shares of Sequiam from its own account at the same time its brokers were selling Sequiam stock to customers. The Hearing Panel found that there was insufficient evidence to conclude that Cipriano knew of Clark Street's sales. We agree with the Hearing Panel's determination.

[16] Likewise, customer JB's declaration (supported by the investigator's notes) is consistent with the testimony of HC and JG regarding Cipriano's failure to disclose financial information and the risks involved with investing in Sequiam.

Agreement with each of his customers are undercut by his own testimony. Cipriano's testimony revealed that he knew very little about Sequiam's finances[17] and had never seen the WOA contract or the Consulting Agreement prior to making his recommendations, despite the fact that such documents allegedly helped form the basis of his recommendations. Similarly, Cipriano admitted that he had performed minimal research on BGI prior to making his recommendations. In contrast, while the testifying customers' memories had faded somewhat, their testimony and declarations were similar in nature and consistent with their prior declarations. Consequently, we will not disturb the Hearing Panel's credibility determinations. *See Dep't of Mkt. Regulation v. Sciascia*, Complaint No. CMS040069, 2006 NASD Discip. LEXIS 22, at *18 (NAC Aug. 7, 2006) (holding that credibility determinations of the initial fact-finder are entitled to considerable weight and deference and should be overturned only if there is substantial evidence for doing so); *Alvin W. Gebhart*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *19 n.18 (Jan. 18, 2006) (holding that similarities among investors' testimony strengthens the reliability of that testimony), *appeal docketed*, No. 06-71021 (9th Cir. Feb. 27, 2006).[18]

Second, we find that the information Cipriano failed to disclose was material and that Cipriano violated his duty to give full and complete information to customers. *See De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002); *Hanly v. SEC*, 415 F.2d 589, 596-97 (2d Cir. 1969). At the time Cipriano recommended Sequiam to his customers, there is no dispute that Sequiam was in poor financial condition. Sequiam had never made a profit and was in need of additional capital to continue its operations. Despite the acquisition of BGI, Sequiam's liabilities substantially exceeded its tangible assets, and Sequiam was a speculative and risky security. *See Clinton Hugh Holland, Jr.*, 52 SEC 562, 565 n.16 (1995) (holding that securities of companies "with a limited history of operations and no profitablility" are speculative), *aff'd*, 105 F.3d 665 (9th Cir. 1997) (table opinion). Further, the Consulting Agreement provided that as compensation for its consulting services Clark Street would receive warrants to purchase shares of Sequiam at set prices. There is little doubt that in connection with a decision to invest in Sequiam, a reasonable investor would consider all of this information to have altered the total mix of information available. *See, e.g., SEC v. Hasho*, 784 F. Supp. 1059, 1109 (S.D.N.Y. 1992) (holding that negative financial and performance information is material); *Dep't of Enforcement v. Gebhart*, Complaint No. C02020057, 2005 NASD Discip. LEXIS 40, at *40-41 (NAC May 24, 2005) (holding that failures to disclose risks associated with an investment involved material omissions), *aff'd*, 2006 SEC LEXIS 93; *Dist. Bus. Conduct Comm. v. Kunz*, Complaint No. C3A960029, 1999 NASD Discip. LEXIS 20, at *35-36 (NAC July 7,

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[17] Indeed, the Hearing Panel found that Cipriano did not appear to understand corporate financial statements.

[18] Cipriano suggests that the fact that NASD paid travel expenses for the witnesses who testified in person impugns their credibility. Cipriano has not pointed to any specific bias or impropriety on the part of any witness as a result of NASD's payment of their expenses. Indeed, each customer's testimony was consistent with his respective declaration executed several years prior to the hearing, and the declarations were consistent with the investigator's notes of phone conversations with each customer several months after the sales of Sequiam stock.

1999) (finding that consulting relationship between representative and issuer of stock was material), *aff'd*, 55 S.E.C. 551 (2002), *aff'd*, 64 F. App'x 659 (10th Cir. 2003).

Finally, we find that Cipriano acted with scienter. Although Cipriano argues that he did not act with "ill intent," he knew or should have known that his failure to disclose basic and obvious information concerning Sequiam's adverse financial condition, the risks of investing in Sequiam, and the existence of the Consulting Agreement presented a danger of misleading customers. A cursory review of Sequiam's SEC filings during the period in question reveals that an investment in Sequiam involved a great deal of risk and that Sequiam needed additional capital to continue its operations. Further, despite the fact that Cipriano understood that Sequiam's sudden increase in assets was due almost entirely to the $10 million of goodwill booked as a result of the BGI acquisition and not Sequiam's operations, Cipriano still relied on this increase in assets as a basis for his recommendations.[19] Likewise, Cipriano knew that the opinion letter contained inaccurate information, yet he still relied upon it in making his recommendations. For example, the letter stated that pursuant to audited financial statements, Sequiam's net tangible assets exceeded $2 million as of December 31, 2001. Cipriano knew, however, that just prior to the BGI acquisition in July 2002, Sequiam only had assets of $355,000. Further, Cipriano did not question the representations made by his managers and Sequiam's officers concerning Sequiam's assets, and did minimal overall diligence in researching Sequiam. Finally, Cipriano was aware of the Consulting Agreement and admitted that the existence of the Consulting Agreement would be important to investors, yet he again failed to disclose this material fact. At a minimum Cipriano acted recklessly. Consequently, we affirm the Hearing Panel's findings that Cipriano violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Conduct Rules 2120 and 2110.[20]

B. Baseless Price Predictions

Absent a reasonable basis for a registered representative's prediction that a security's price will rise, such prediction violates Exchange Act Rule 10b-5. *See Hasho*, 784 F. Supp. at 1109. "A securities dealer occupies a special relationship to a buyer of securities in that by his position he implicitly represents he has an adequate basis for the opinions he renders." *Hanly*, 415 F.2d at 596. The fact that a registered representative offers a price prediction as an opinion does not ameliorate the fraud if the representative does not have a reasonable basis for the prediction. *See Hasho*, 784 F. Supp. at 1109. Moreover, it is highly unlikely that there can be a reasonable basis for a price prediction in the case of a speculative security. *See Steven D. Goodman*, 54 S.E.C. 1203, 1210 (2001) (holding that "it is inherently fraudulent to predict

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[19] Cipriano testified that he was not certain what goodwill represented, although he appeared to understand that goodwill is an intangible asset.

[20] A violation of Conduct Rule 2120 is also a violation of Conduct Rule 2110. *See Dist. Bus. Conduct Comm. v. Euripides*, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *18-19 (NBCC July 28, 1997). In addition, NASD Rule 0115 makes all NASD rules applicable to both NASD members and all persons associated with NASD members.

specific and substantial increases in the price of a speculative security"); *Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17, at *25-27 (NAC June 25, 2001) (citing cases).

The Hearing Panel found that HC credibly testified that although he could not remember Cipriano's exact words, Cipriano informed HC that Sequiam's share price would rapidly double or triple. Similarly, JG credibly testified that Cipriano told him that Sequiam's share price would increase in a short period of time. Such testimony is consistent with BH's declaration that Cipriano informed him that Sequiam was "poised to make a big move soon and would be over $6 per share within 60 to 90 days." Although Cipriano generally denied making specific price predictions, as set forth above the Hearing Panel found that he was not credible. We affirm the Hearing Panel's findings that Cipriano made price predictions concerning Sequiam and that such predictions were material facts. *See Dep't of Enforcement v. Faber*, CAF010009, 2003 NASD Discip. LEXIS 3, at *22-23 (NAC May 7, 2003) (finding that specific price predictions regarding a speculative security were material), *aff'd*, Exchange Act Rel. No. 49,216, 2004 SEC LEXIS 277, at *16 (Feb. 10, 2004).

We further find that Cipriano had no reasonable basis for his price predictions, and that such predictions were, at a minimum, reckless in light of the facts and circumstances. It is undisputed that Sequiam was a development-stage corporation and that its stock was speculative. Moreover, Sequiam had a history of nothing but operating losses and consistently disclosed that it required additional capital infusions to continue its operations. Despite these facts, and despite Cipriano's failure to conduct a reasonable investigation into Sequiam, Cipriano made predictions to customers that Sequiam's share price would rapidly increase. Cipriano based his predictions on the WOA contract and the Consulting Agreement, yet he admittedly had never reviewed either document and was unfamiliar with each document's terms. Likewise, as set forth above, Cipriano's reliance on Sequiam's increase in assets resulting from the BGI acquisition was unreasonable and baseless. Cipriano has not satisfied the high burden of demonstrating that he had a reasonable basis for predicting a price increase for a speculative stock such as Sequiam. *See Hanly*, 415 F.2d at 595 (sustaining Commission's finding that optimistic representations that stock price would increase in the face of continuous operating losses and lack of working capital violated Exchange Act Rule 10b-5); *Donald A. Roche*, 53 S.E.C. 16, 18-19 (1997) (holding that registered representative's statements that stock price of speculative company would rapidly double in price were fraudulent). Accordingly, we find that Cipriano violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Conduct Rules 2120 and 2110.

Cipriano suggests that his reliance upon his managers at Clark Street and the representations of Sequiam's management in connection with his recommendations of Sequiam somehow exonerates his misconduct. We disagree. "[B]rokers and salesman are under a duty to investigate. . . . Thus, a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant. He must analyze sales literature and must not blindly accept recommendations made therein." *Hanly*, 415 F.2d at 595-96; *Goodman*, 54 S.E.C. at 1210 (holding that statements made by company's management concerning the company are not an adequate basis for representations to customers). Cipriano's minimal due diligence, coupled with his reliance on statements by his managers and Sequiam's management in the face of inconsistent information, did not satisfy his obligation to investigate

Sequiam prior to recommending it. Further, the record does not include any information about Sequiam or its business prospects that would support the price predictions made by Cipriano. We thus affirm the Hearing Panel's findings.

V. Sanctions

For fraudulent misrepresentations or omissions of material facts, NASD's Sanction Guidelines ("Guidelines") recommend a suspension of 10 business days to two years in cases involving intentional or reckless misconduct, and a bar in egregious cases.[21] The Guidelines also suggest a fine of $10,000 to $100,000 for intentional or reckless material misrepresentations or omissions. Additionally, the Guidelines provide that "[w]here appropriate, Adjudicators should require a respondent to requalify in any or all capacities. . . . Such a sanction may be imposed when Adjudicators find that a respondent's actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry."[22] Further, the Guidelines recommend that adjudicators consider ordering restitution where appropriate to remediate misconduct, and that restitution may be ordered "when an identifiable person, member firm or other party has suffered a quantifiable loss as a result of a respondent's misconduct, particularly where a respondent has benefited from the misconduct."[23]

The Hearing Panel suspended Cipriano in all capacities for two years, fined him $40,000, required that he requalify in all capacities, and ordered that he pay $3,961.10 in costs. The Hearing Panel, however, found that there was insufficient evidence to order restitution to any of Cipriano's four customers. After a thorough review of the record, we modify the two-year suspension imposed upon Cipriano by reducing it to a one-year suspension. Further, we fine Cipriano $40,000 and order that he pay $606 to HC as restitution. Finally, we affirm the Hearing Panel's order that Cipriano requalify in all capacities and pay $3,961.10 in costs.

We first address the appropriate sanctions in this case, and then address Cipriano's alleged inability to pay.

A. Modification of Certain Sanctions Imposed by the Hearing Panel Is Appropriate

In determining sanctions, the Hearing Panel found that while Cipriano acted intentionally or recklessly, many of the aggravating factors enumerated in the Guidelines were not present in this case. The Hearing Panel specifically found that Cipriano's misconduct did not extend over a

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21 *Guidelines*, at 93.

22 *Id.* at 5 (General Principles Applicable to All Sanction Determinations, No. 7).

23 *Id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

lengthy period and that there were only a few small transactions.[24] We agree with the Hearing Panel that Cipriano's misconduct occurred during a brief period and involved sales of approximately $10,000 of Sequiam stock to only a handful of customers. We further note that although Cipriano's misconduct resulted in financial gain, Cipriano's gross commissions on such sales totaled only several hundred dollars.[25] Despite noting these factors and finding a lack of many aggravating factors normally present in cases involving fraudulent misrepresentations or omissions, the Hearing Panel imposed the maximum suspension short of a bar recommended by the Guidelines.[26] We find that in light of these factors, a two-year suspension, especially when combined with the other sanctions imposed by the Hearing Panel, was too harsh.

Cipriano's misconduct, however, was serious. Cipriano acted recklessly in recommending Sequiam stock to his customers and failing to disclose key facts concerning Sequiam.[27] Further, Cipriano had no basis to predict increases in the price of Sequiam to his customers. While Cipriano has apologized for his "admitted incompetence and poor decisions," he continues to place the blame for his misconduct on his firm, his managers, and NASD.[28] Thus in determining sanctions we do not consider Cipriano's admission of incompetence to be either mitigating or aggravating. Similarly, while customer losses were minimal, as a general rule the absence of customer harm is not a mitigating factor. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). In addition, contrary to Cipriano's arguments, we do not consider the fact that no customers complained to NASD to be relevant. *See Maximo Justo Guevara*, 54 S.E.C. 655, 664 (2000). Cipriano's "clean record" is also not a mitigating factor. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006).

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[24] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 18) (adjudicators should consider "[t]he number, size and character of the transactions at issue"); *see also id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

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

[26] Although not determinative to our assessment of sanctions, we note that the Hearing Panel decision erroneously states that Enforcement sought a two-year suspension and a $40,000 fine. The record indicates that after all evidence was presented at the hearing, Enforcement lowered its recommended suspension from two years to one year and its recommended fine from $40,000 to $15,000.

[27] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

[28] Similarly, Cipriano's argument that representatives at other firms regularly perform the same amount or even less research with regard to their recommended securities as Cipriano performed in connection with Sequiam is dubious, and, even if true, irrelevant. *See Charles E. Kautz*, 52 S.E.C. 730, 733 (1996) (holding that it is no defense that others in the industry are also acting improperly).

Further, Cipriano's stated lack of understanding of "all of the details and rules" does not excuse his fraudulent omissions of material facts and baseless price predictions. *See Dist. Bus. Conduct Comm. v. Merz*, Complaint No. C8A960094, 1998 NASD Discip. LEXIS 40, at *33 (NAC Nov. 11, 1998) ("The SEC has repeatedly held that ignorance of the NASD's rules is no excuse for their violation."). Likewise, Cipriano's allegation that his sanctions are harsh when compared to the sanctions imposed upon others who similarly violated federal securities laws and NASD rules is irrelevant. *See Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997) ("It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding."). In addition, the attorney's fees Cipriano has incurred in connection with this proceeding and the impact this matter has had on his career do not serve as mitigating factors. *See Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanctions imposed upon [respondent] by the NASD excessive or oppressive").

Finally, Cipriano argues that he received bad legal advice from his attorney in the proceeding before the Hearing Panel. While NASD rules permit the participation of counsel in disciplinary proceedings, they do not afford a right to representation, and in any event NASD disciplinary proceedings remain undisturbed by a respondent's claim of ineffective assistance of counsel. *See Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 559 (1995) (holding that respondents in NASD disciplinary proceedings have neither a constitutional nor statutory right to the assistance of counsel), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996).[29] Thus, we do not find this factor to be mitigating.

Under the facts and circumstances of this case, and after considering all of the factors discussed above, we suspend Cipriano for one year and impose a $40,000 fine.[30] Further, while we find that the Hearing Panel correctly refrained from ordering restitution to three of the four customers based upon a lack of evidence in the record, we find that the record supports payment of restitution to HC. Thus, we order restitution to HC in the amount of $606. We further affirm the order that Cipriano requalify in all capacities and pay $3,916.10 in costs. In light of the foregoing, these sanctions are appropriately remedial and will discourage registered representatives from engaging in similar misconduct in the future.

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[29] Indeed, because NASD is not a governmental actor, Cipriano's argument that the sanctions are cruel and unusual in violation of the Eighth Amendment must fail. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (noting that Amendments to the Constitution protect individuals only against violation of constitutional rights by the government, not private actors); *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating that it is a well-settled principle that NASD is not a governmental actor).

[30] We note that the fine imposed is on the lower-end of the range prescribed by the Guidelines for intentional or reckless misrepresentations or omissions. *See Guidelines*, at 93.

B. Cipriano's Alleged Inability to Pay

Cipriano submitted a standard statement of financial condition, along with certain documentation, pursuant to the Subcommittee's direction and in connection with Cipriano's alleged inability to pay the monetary sanctions imposed by the Hearing Panel. Cipriano asserts that the executed form and supporting documentation demonstrate that he is unable to pay. We disagree, and find that Cipriano has not demonstrated a bona fide inability to pay.

A respondent has the burden of introducing evidence sufficient to prove bona fide insolvency. *See Toney L. Reed*, 52 S.E.C. 944, 947 n.12 (1996). 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). Evidence of a respondent's negligible net worth and income is insufficient to prove bona fide insolvency. *See Dist. Bus. Conduct Comm. v. Schiff*, Complaint No. C10970156, 1999 NASD Discip. LEXIS 15, at *22 (NAC Apr. 9, 1999).

While some of the documents submitted by Cipriano indicate that he may have a negligible net worth and income, much of the information provided by Cipriano simply raises additional, unanswered questions. Indeed, the documentation submitted is incomplete and insufficient to demonstrate Cipriano's bona fide inability to pay. For example, it is unclear from the documentation provided how Cipriano calculated his monthly income.[31] Further, Cipriano has not submitted any mortgage documents, credit card statements, bank statements, loan documents, statements for pension and retirement accounts, or documents supporting alleged adverse judgments against him. Moreover, certain of the information listed on the statement of financial condition and provided without documentation, such as a substantial monthly payment for attorney and professional fees, raises additional questions concerning Cipriano's financial condition. Cipriano has not satisfied his burden of demonstrating a bona fide inability to pay, despite having numerous opportunities in these proceedings to do so. Thus, the imposition of the monetary sanctions discussed herein is appropriate. *See Dep't of Enforcement v. Kapara*, Complaint No. C10030110, 2005 NASD Discip. LEXIS 41, at *40-41 (NAC May 25, 2005).

VI. Conclusion

We find that Cipriano failed to disclose material information and made baseless price predictions in connection with the sale of Sequiam stock, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Conduct Rules 2120 and 2110.

Accordingly, we suspend Cipriano for one year, fine him $40,000, order that he make restitution to customer HC in the amount of $606 (plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. §

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[31] The amount of Cipriano's income remains unclear despite his alleged clarification of this figure in response to Enforcement's appellate brief.

6621(a), from September 23, 2002, until paid), order that he requalify before acting in any capacity requiring registration, and assess $3,961.10 in costs.[32]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and Corporate Secretary

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[32] Pursuant to 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.

Further, restitution is to be paid in the amount set forth herein. In the event that customer HC cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of HC'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 7, no later than 90 days after the date when this decision becomes final.

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