BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Geoffrey Ortiz Malibu, CA, Respondent.	DECISION Complaint No. E0220030425-01 Dated: October 10, 2007

Respondent forged the initials of two customers, submitted forged documents to his member firm, and provided false information to the Financial Industry Regulatory Authority. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Cynthia A. Kittle, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For Respondent: Geoffrey Ortiz, Pro Se[1]

Decision

Geoffrey Ortiz ("Ortiz") appeals a June 9, 2006 Hearing Panel decision. The Hearing Panel found that Ortiz forged or caused to be forged the initials of two customers on account applications and submitted the applications to his member firm in violation of NASD Rule 2110 and provided false information to the Financial Industry Regulatory Authority in violation of NASD Rules 8210 and 2110.[2] The Hearing Panel barred Ortiz. After a complete review of the record, we affirm the Hearing Panel's findings of violation and the sanctions imposed.

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[1] Ortiz was represented by counsel throughout the proceedings below.

[2] As of July 30, 2007, NASD consolidated with the member firm regulation functions of the NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

I. Background

Ortiz entered the securities industry and first registered as a general securities representative in 1988. He has been associated with several FINRA member firms since he entered the securities industry. Ortiz's conduct relevant to this decision occurred while he was associated with UBS Financial Services Inc. ("UBS" or the "Firm") and worked in the Beverly Hills, California branch office. UBS terminated Ortiz in December 2003. Ortiz is not currently registered with another member firm.

II. Procedural History

The Department of Enforcement ("Enforcement") filed a three-cause complaint against Ortiz on August 30, 2005. Cause one of the complaint alleged that Ortiz forged or caused to be forged the initials of two customers on amended account applications. Cause two of the complaint alleged that Ortiz submitted or caused to be submitted the forged account applications to his member firm. Cause three of the complaint alleged that Ortiz provided FINRA with false and misleading information and on-the-record testimony during FINRA's investigation. Ortiz admitted that he submitted the amended account applications to UBS but denied that he forged the customers' initials or provided false information to FINRA.

The Hearing Panel held a hearing on April 18 and 19, 2006. Enforcement presented seven witnesses: two of Ortiz's customers (DB and YB); a UBS regulatory attorney; the manager of UBS's Beverly Hills branch office; handwriting expert Howard Rile, Jr. ("Rile"); the Beverly Hills branch office administrative manager Jackie Kaden ("Kaden"); and Ortiz's sales assistant Vivian Sanders ("Sanders"). Ortiz testified on his own behalf and presented his own handwriting expert, Paul Edholm, Jr. ("Edholm"). On June 9, 2006, the Hearing Panel found Ortiz liable for the three causes alleged in the complaint. The Hearing Panel barred Ortiz. This appeal followed.

III. Facts

A. Ortiz's Involvement with Customers DB and YB and Submission of Account Applications

Customer DB first became involved with Ortiz when DB began purchasing bonds from him. DB's wife, YB, was more risk tolerant than DB, and she primarily engaged in self-directed investing in no-load, low-cost stock mutual funds. As early as 1996, Ortiz attempted to persuade YB to open a managed account with him through UBS's ACCESS program. YB was wary of the fees associated with these accounts and declined Ortiz's assistance at the time.

In the spring of 2001, after the stock market declined significantly, YB became more receptive to the idea of a managed account and invested $250,000 in such an account with another brokerage firm. The annual management fee on that account was 1.5%. YB was accustomed to investing in no-load mutual funds with lower expense ratios and thought that a 1.5% annual fee was high, but she was willing to pay the fee to have someone else manage her investments.

Ortiz met with DB and YB several times throughout 2001 to discuss moving YB's investments to a UBS ACCESS account.[3] YB was most concerned with the fees that UBS charged on the ACCESS accounts, and she told Ortiz that she was willing to pay no more than 1.5% annually. Ortiz indicated to YB that the standard fees for the ACCESS accounts were higher, but that he had discretion to discount the fees and that it was "likely" that he could "get her that fee."[4]

In August 2001, DB and YB decided to invest a total of $500,000 in five ACCESS accounts.[5] Each account was funded with an initial investment of $100,000 and was managed by a different manager employing a different investment strategy. Ortiz provided the customers with five ACCESS account applications for their signature. In the fee schedule section on each application, Ortiz had written "1.5" next to the printed standard fees. The customers signed the applications and dated them August 8, 2001. Ortiz retrieved the signed applications from the customers' home on August 9, 2001, and signed each application as the financial adviser. The Beverly Hills branch sent the applications to UBS's home office in New Jersey for processing on or about August 13 or August 14, 2001.

On August 16, 2001, the home office received the customers' ACCESS applications and subsequently transmitted a message to the Beverly Hills branch that UBS could not process the accounts because the 1.5% fee fell below UBS's maximum allowable discounted rate. The home office also noted that the applications required signed trustee certification forms because the customers intended to invest through a trust.[6] The home office telephoned Ortiz that same day and advised him that UBS would not approve the customers' account applications in the then-

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[3] The record reflects that Ortiz was under some pressure from UBS to increase production. The Firm considered Ortiz a "low" producer compared with others with similar years of experience. Ortiz's branch manager testified that he had ongoing discussions with Ortiz about increasing Ortiz's sales production.

[4] The ACCESS account fee schedule provided that the standard fee for the first $500,000 invested was 2.8% annually, 2.2% for the next $500,000, 1.6% for the next $4,000,000, and 1.4% for amounts exceeding $5,000,000. UBS representatives had discretion to discount fees on ACCESS accounts to 1.75% for the first $500,000; 0.90% for the next $4,000,000; and 0.75% for amounts over $5,000,000.

[5] Ortiz's broker's notes from August 9, 2001, and his testimony, show that the customers planned to deposit an additional $300,000 in the ACCESS accounts upon an upturn in the market. In addition, Ortiz testified that the customers opened an additional UBS account at the time because they had planned to move more than $1 million of their bond portfolio to UBS.

[6] The customers both signed the trustee forms, but there is no evidence showing when this occurred or when Ortiz submitted the forms to UBS in New Jersey. DB testified that the signatures on the trustee forms were genuine. Neither DB nor Ortiz recalled when the customers signed these forms.

current form.[7] Ortiz subsequently had his sales assistant Sanders wire the home office that the customers' fee schedule was to be changed from 1.5% to 1.75% on the first $500,000 invested and 1.4% on any subsequent amounts. The next morning, on August 17, 2001, the home office informed Sanders that UBS required that the customers initial the changes on the applications. Once the customers had initialed the changes, the applications were to be faxed to the home office.

Later in the day on August 17, 2001, Ortiz gave the customers' revised applications to Sanders to fax to the home office. In the fee schedule section of these applications, the "1.5" previously handwritten by Ortiz was struck out and new handwritten percentages of "1.75" and "1.4" had been inserted to signify the fees charged at the breakpoints.[8] Additionally, the customers' purported initials written as "DB" and "YOB" appeared next to the fee revisions on each of the applications.

Sanders prepared a fax cover sheet to transmit the revised applications to the home office and noted on the cover sheet "[b]reakpoint changed and initialed." The revised applications with the customers' purported initials approving the fee changes were faxed on the afternoon of August 17, 2001.[9] The branch office's administrative manager Kaden testified that the fax number stamped on the top of the cover sheet and the revised application documents belonged to the branch office's operations department's outgoing fax machine. Sanders did not have direct access to this fax machine, but it was the regular practice of the sales assistants to have an operations representative fax documents for them.

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[7] Ortiz's version of these events shifted throughout the proceedings. In his investigative testimony, Ortiz stated that he received the telephone call from the home office regarding rejection of these accounts on August 16, 2001. At the hearing below, Ortiz testified that he received the home office's telephone call "within a day or two before the wires were received" on August 16. As the Hearing Panel correctly found, the home office could not have telephoned Ortiz about the customers' accounts before August 16, 2001, because the home office did not receive the applications until that date.

[8] Pursuant to these revisions, UBS would charge 1.75% on the first $500,000 invested and 1.4% on amounts reaching the next two breakpoints.

[9] While the branch office's files contained the fax cover sheet that Sanders prepared, the revised applications were not found at the branch. The cover sheet reflects that six pages, including the cover sheet, were faxed and includes the following in the "Comments" section: "Please Ref. Star Cases #11720470, 11720477, 11720554, 1120567, and 11720575." These case numbers correspond with the numbers that UBS assigned to DB and YB's ACCESS account documents during the approval process. The cover sheet also has the date, time, and fax number imprinted at the top. The copies of the revised applications located in the home office's files show that they were faxed on August 17, 2001, at the same time as the cover sheet and from the same fax number.

The UBS home office approved the customers' ACCESS accounts after it received the faxed copies of the revised applications and the customers had funded the accounts.[10] After experiencing market losses, the customers closed the ACCESS accounts in September 2002.[11]

In or around January 2003, while preparing their taxes, the customers determined that UBS had charged them management fees related to their ACCESS accounts in excess of the 1.5% that that they had agreed upon. The customers sent a letter to Ortiz, on January 5, 2003, in which they demanded reimbursement of the fees that they had paid in excess of 1.5% plus interest.[12] Ortiz referred the matter to Firm management. The UBS Beverly Hills branch office administrative manager Kaden, who assisted the branch manager with customer complaints, discussed the situation with Ortiz. Ortiz told Kaden that after the Firm rejected the customers' ACCESS account applications, he went to the customers' house on August 17, 2001, the customers agreed to the revised fees, and he witnessed the customers initial the revised fee schedules on the applications. Kaden relayed Ortiz's version of events to DB, and Kaden took the position that the customers had approved the revised fee schedule as documented by their initials on the applications. DB replied that he and YB never agreed to a fee increase and had not initialed the revised applications. The Firm provided the customers with copies of the revised applications, and the customers subsequently filed a report with the Beverly Hills Police Department alleging forgery. The police referred the matter to FINRA.

B. Ortiz Provided False and Misleading Information to FINRA

During the course of its investigation, Enforcement requested from UBS, pursuant to NASD Rule 8210, that Ortiz provide a written statement addressing the customers' accusation that their initials on the revised account applications were forged. Ortiz responded to Enforcement in a letter dated May 5, 2003. In the May 5 letter, Ortiz stated that he "immediately contacted" the customers upon learning that UBS had rejected their initial ACCESS applications, met with the customers at their home "on or about August 17, 2001," and that the customers, at that time, agreed to and initialed the fee changes.[13] In response to a second FINRA information

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[10] UBS approved three of the ACCESS accounts on August 24, 2001, one account on August 26, 2001, and one account on August 28, 2001.

[11] DB remained one of Ortiz's customers subsequent to closing the ACCESS accounts and purchased municipal bonds from him in November 2002.

[12] The customers determined that UBS overcharged them $2,292.10 and demanded reimbursement of that amount plus $573.03 in interest and "penalties."

[13] With the exception of the bracketed material, the relevant text of the May 5, 2003 letter appears exactly as follows:

> Upon submitting the [customers'] agreements to my office for processing, I was informed by our Access Administration department that the fees I had indicated were below our minimum discounts that we offered, which were 1.75% on amounts below

[Footnote continued on next page]

request, Ortiz questioned whether the purported meeting with the customers to approve the revised fees had occurred on August 17, 2001, or "the early part of the following week." Ortiz went on to state that "[w]hile I am not certain as to the exact time or date of the meeting, I do recall that both [DB and YB] were present at the meeting at their home to discuss the details of the rate structure."

On November 26, 2003, Ortiz also provided on-the-record testimony pursuant to NASD Rule 8210. Ortiz testified that he spoke with DB on August 16, 2001, advised him of the increased fee structure, informed DB that he had to initial the revised fee structure to approve the increase, and met with the customers on August 17, 2001, to approve the fees. The following colloquy between Ortiz and FINRA staff is relevant to Ortiz's purported meeting with DB and YB on August 17, 2001:

Ortiz: "I left the office mid morning and drove to their home and had a short meeting with them at their home at their dining room table. I do recall [YB] offering me something to drink. I asked for a glass of water. I recall [DB] wasn't pleased about the fees at all, discussing fees or the increased fees. [YB] was much more agreeable. And I recall them both signing in succession, passing the papers back and forth to each other and signing the documents."

FINRA Staff: "So they both signed the documents in your presence?"

Ortiz: "Yes."

FINRA Staff: "And when I say signed, I think we both intend initialed, correct?"

Ortiz: "Yes."

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> $500,000 and 1.4% on amounts over $4 million. After hearing this information, I immediately contacted the [customers] and informed them of this, and that I would need to meet with them again to confirm these rates. They agreed to meet on or about August 17, 2001 at their home. At that meeting I explained the details of the rate structure to the [customers] over their dining room table. I recall indicating to them that the blended rate on $1 million in assets in the Access program would be 1.575%, but that the rate on assets below $500,000 would be 1.75%. I apologized for my misunderstanding of the rate structure, and for previously informing them that the rate would be 1.5% on all of the assets. The [customers] understood the structure that I explained, and although they were not happy about the changes, they agreed to the amended rate structure and signed the agreements consenting to such. This occurred at their home the week after they initially signed the agreements with the incorrect rates reflected on them. The alteration in question was done with the [customers'] authorization after we discussed the issue in detail. Moreover the [customers] each initialed the change on the agreement in my presence.

. . .

FINRA Staff: "And what did you discuss during that meeting?"

Ortiz: "We discussed the fees. And, in fact, the majority of the discussion was with [YB]. [DB], I recall him not sitting at the table for extended periods, while [YB] was at the table the entire time. And the majority of the discussion revolved around the fees . . . ."

The customers, however, consistently denied that the August 17, 2001 meeting with Ortiz took place, that they approved the increased fees, that they initialed the revised account applications, or that they gave anyone authority to do so. The customers also provided documentary evidence showing that YB was in North Carolina, and not in California, from August 13, 2001, to August 18, 2001, and therefore could not have approved and initialed the revised applications as Ortiz repeatedly claimed.

In January 2004, UBS settled with DB and YB for $3,000.

IV. Discussion

We have thoroughly reviewed the record and affirm the Hearing Panel's findings of violation. We conclude that Ortiz was responsible for the forgery of DB's and YB's initials on UBS customer account documents and caused these documents to be submitted to the Firm in violation of NASD Rule 2110.[14] We further find that Ortiz made false statements in written responses to FINRA and gave false testimony during an on-the-record interview in violation of NASD Rule 8210 and NASD Rule 2110. We discuss the violations in detail below.

A. Forgery of Customers' Initials

The focus of NASD rules is the "professionalization of the securities industry." *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NASD NAC June 2, 2000). Accordingly, FINRA's disciplinary authority under NASD Rule 2110 is "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade." *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996). A respondent violates the rule when he engages in unethical conduct. *See Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *8 (NASD NAC May 7, 2003). It is well settled that the act of forgery is unethical conduct that violates NASD Rule 2110. *See Donald M. Bickerstaff*, 52 S.E.C. 232, 235-36 (1995); *Dep't of Enforcement v Grafenauer*, Complaint No. C8A030068, 2005 NASD Discip. LEXIS 29, at *7 (NASD NAC May 17, 2005).

The weight of the evidence shows that DB and YB did not initial the change in fees as shown on the revised ACCESS account documents. It is undisputed that DB and YB did not

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[14] NASD Rule 2110 requires that FINRA members shall, in conducting their business, "observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 0115 makes all NASD rules, including NASD Rule 2110, applicable to both FINRA members and all persons associated with FINRA members.

provide Ortiz with authority to affix their initials onto any documents.[15] In addition, DB and YB testified directly and consistently that they did not authorize the increase in fees or initial the changes to the fee structure on the ACCESS account documents. The customers also provided evidence of YB's out-of-state travels that conflicted with the date that Ortiz asserted that the customers initialed the documents and when the revised applications were faxed to the UBS home office for approval. Moreover, Enforcement presented the expert testimony of Rile, a forensic document examiner, who examined the initials on the faxed copies of the five revised ACCESS account documents and compared them with the customers' known initials on other documents.[16] Rile concluded "with a high level of certainty" that the initials on the revised account documents were not signed by DB and YB.[17]

Ortiz disputes that he forged the customers' initials and has repeatedly claimed that the customers met with him at their home and initialed the changes. In his May 5, 2003 written response to FINRA, Ortiz stated that he met with DB and YB "on or about August 17, 2001 at their home" and that he explained the change in fee structure to them "over their dining room table." He further stated that the customers agreed to the changes and "signed the agreements consenting to such." In a subsequent letter to FINRA, Ortiz equivocated on the exact date of the meeting with the customers, but reiterated that he met with both customers at their home to discuss the change in fees. In his investigative testimony, Ortiz described, in significant detail, meeting with the customers on August 17, 2001, at their home, and the customers' written ratification of the fee increase.[18] At the hearing before the Hearing Panel, Ortiz testified that he recalled going to the customers' home on August 17, 2001, to witness them initial the documents, but after seeing other evidence presented at the hearing, he was no longer certain that he met with the customers and obtained their initials on the revised applications. Because Ortiz had repeatedly claimed that he personally obtained the customers' initials and UBS notified him when the customers' accounts were approved, the Hearing Panel asked Ortiz to provide an alternative explanation for the forgery that excluded his involvement. He was unable to do so. Ortiz, in his appellate brief, again asserts that he arranged to meet the customers at their home to

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[15] If, however, Ortiz had authorization from DB and YB to affix their initials, then there is no forgery. *See Bickerstaff*, 52 S.E.C. at 235-36.

[16] Rile examined several documents bearing the customers' genuine signatures and initials. These documents ranged in date from 1980 to 2003.

[17] Rile further stated that the discrepancies between the questioned initials and the customers' known initials "cannot be attributed to the copy process" and that there were "significant differences in design" between the writings. In contrast, Ortiz's handwriting expert provided no opinion on the issue of whether the customers themselves had initialed the revised applications. Other evidence in the record also suggests that the initials were forged. DB testified that since 1964 he has consistently signed his initials as "DSB" rather than "DB" as marked on the modified documents. The documents that Rile examined bearing the customers' genuine initials support DB's testimony.

[18] Ortiz's branch manager and Kaden both testified at the hearing below that Ortiz told them, after the customers complained in 2003, that he met with the customers at their home and the customers both initialed the fee changes on the account documents.

initial the changes in fees. Ortiz further states that "[a]fter this was done, the five ACCESS applications with the inked initials of the two clients were carried to the Beverly Hills UBS/Paine Webber office, and once again were left with the sales assistant who had the responsibility to forward these new documents to the Weehawken, NJ office."

The Hearing Panel found that customers YB and DB were direct and credible witnesses. In comparison, the Hearing Panel found that Ortiz's hearing testimony was "tentative and unconvincing." Credibility determinations are squarely within the province of the Hearing Panel and may not be overturned on appeal absent substantial evidence. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We have no reason to disturb the Hearing Panel's credibility findings here. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) (stressing that deference is given to initial decision maker's credibility determination based on "hearing the witnesses' testimony and observing their demeanor").

A review of the timeline of events demonstrates that Ortiz had the access and opportunity to initial the applications.[19] UBS first notified Ortiz on August 16, 2001, that the Firm was rejecting the customers' account applications as a result of the fee schedule. Sanders, at Ortiz's request, then wired the home office that the customers' fee schedule would be modified. On the morning of August 17, 2001, UBS informed Sanders that the customers were required to initial the change of fees on the applications. Later in the day on August 17, 2001, Ortiz gave the revised applications with the customers' purported initials approving the revised fee schedule to Sanders to forward to the home office. Sanders then faxed these applications to the home office on the afternoon of August 17, 2001. Given YB's travel schedule, it is clear that she could not have initialed the applications as Ortiz claimed. Throughout these proceedings, Ortiz has repeatedly asserted that he personally witnessed the customers initial the changes to the fee schedule when he met with them at their home. Compelling evidence shows, however, that the customers did not meet with Ortiz or approve the changes contrary to his assertions. When Ortiz was confronted at the hearing below with evidence that conflicted with his version of events, Ortiz was unable to provide an explanation as to how the purported initials of the customers came to appear on the revised applications that he possessed and was directly involved in processing by having Sanders forward them to UBS in New Jersey for approval.[20]

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[19] While there is no direct evidence that Ortiz forged the applications, we find that a preponderance of the evidence presented supports the Hearing Panel's findings that Ortiz was responsible for the forgery in violation of NASD Rule 2110. *See, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (stating that circumstantial evidence is "intrinsically no different from testimonial evidence"); *Dep't of Enforcement v. Kapara*, Complaint No. C10030110, 2005 NASD Discip. LEXIS 41, at *18 n.12 (NASD NAC May 25, 2005) ("Proof of a securities law violation can be made through an inference from circumstantial evidence and not solely upon direct testimonial confession." (*citing SEC v. Moran*, 922 F. Supp. 867, 890 (S.D.N.Y. 1996)).

[20] Ortiz was also unable to provide an explanation to DB who spoke with Ortiz around the time UBS terminated Ortiz's employment. DB testified that Ortiz telephoned him and questioned why the customers would "do this over such a small amount of money." DB recalled

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The SEC has sustained FINRA's finding of forgery when misconduct harmed a customer or benefited the forger. *See Rooney A. Sahai*, Exchange Act Rel. No. 51549, 2005 SEC LEXIS 864, at *20 & n.17 (Apr. 15, 2005) (collecting cases). Both factors are met here. The customers were harmed by paying fees in excess of those that they had agreed upon. Ortiz also benefited because he had a financial incentive to facilitate the opening of the customers' ACCESS accounts. Ortiz's branch manager testified that Ortiz's sales production was low compared with others and that the Firm had ongoing discussions with Ortiz on this issue. If the account fees exceeded 1.5%, Ortiz knew that YB would likely not go forward with opening the accounts because she expressed this to him in their meeting in early August 2001 when the customers completed the initial paperwork. Ortiz also knew that he had the potential of increasing the customers' assets under management. Ortiz testified that the customers planned to invest an additional $300,000 in the ACCESS accounts.

Both Enforcement and Ortiz presented expert testimony on the issue of Ortiz's handwriting.[21] The experts reviewed the faxed copies of the customers' revised ACCESS applications and an exemplar of Ortiz's handwriting dated January 26, 2006. Enforcement's expert, Rile, could "neither identify nor eliminate" Ortiz as the person who forged the customers' initials. Ortiz's expert, Edholm, opined that the initials on the revised application "were probably completed by someone other than" Ortiz and that the initials "were probably completed by two different persons." Both experts agreed that review of fax-transmitted documents was not entirely suitable for comparison purposes. Rile explained that a copied document may eliminate the "subtle strokes that would be indicative" of handwriting as opposed to a drawing. Rile further explained that a drawing is the "product of someone who is trying to simulate someone else's writing." The Hearing Panel was not convinced by Edholm's opinion that Ortiz was "probably" not the person responsible for the forgery and found Rile's conclusion that it was not reasonably possible under the circumstances to identify the forger as more persuasive. We agree with the Hearing Panel's determination. Ortiz provided the handwriting exemplar specifically for Edholm's use in formulating his opinion. Neither Edholm nor Rile observed Ortiz provide the January 2006 exemplar. Thus, neither expert had personal knowledge of the conditions under which Ortiz provided the exemplar or if Ortiz was even the person who wrote it. We have previously determined that faulty methodology in collecting handwriting samples undercuts an expert's findings.[22] *Dist. Bus. Conduct Comm. v. Bruno*, Complaint No.

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that Ortiz complained that he had lost his job and would no longer be able to work elsewhere as a result and wanted DB to withdraw the allegation. Ortiz repeatedly denied to DB that he forged the documents, but could not explain what occurred or why he told FINRA that he personally obtained the customers' initials.

[21] We note, however, that expert testimony is not required for a finding of forgery in FINRA cases. *Dep't of Enforcement v. Masceri*, Complaint No. C8A040079, 2006 NASD Discip. LEXIS 29, at *23 (NASD NAC Dec. 18, 2006).

[22] Ortiz suggests that Rile's review of the customers' known signatures and initials was equally faulty because Rile did not observe the customers provide the samples. We disagree.

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C10970007, 1998 NASD Discip. LEXIS 51, at *26 (NASD NAC July 8, 1998) (stating that an individual with a motive to disprove a forgery allegation may intentionally attempt to alter his writing when collecting handwriting samples from him). The Hearing Panel could not determine who forged the initials through the expert testimony and instead relied on other evidence in finding that Ortiz was responsible for the forgery. We likewise conclude that Edholm's testimony does not exonerate Ortiz from a forgery finding.

Ortiz argues that he should not be held responsible because UBS failed to produce the customers' original ACCESS applications and the original amended documents reflecting the initialed changes and that UBS should be investigated for providing "misleading and inaccurate information to NASD."[23] Ortiz is correct that UBS was unable to locate the original revised applications with the customers' initials. John Cannistraci ("Cannistraci"), UBS's regulatory attorney responsible for providing documents to FINRA in this matter, testified at the hearing below about UBS's document production.[24] Cannistraci testified that while UBS was unable to locate the original amended applications, UBS did produce photocopies of the original faxes for three of the five amended applications. UBS also produced what it believed was a genuine photocopy of the original faxes of the other two amended applications. Cannistraci testified that, during the relevant time period, amended applications were customarily faxed, and not sent, to the New Jersey office. The original of an amended document was to remain in the broker's file in the branch office. Kaden similarly testified that, under normal practice, an amended document was faxed to the New Jersey office after a customer initialed a change and the original initialed document was kept in the broker's file. *See generally Howard Brett Berger*, Exchange Act Rel. No. 55706, 2007 SEC LEXIS 895, at *25 (May 4, 2007) (relying on business practice and standard firm procedure where witness did not have specific recollection regarding the matter at issue), *granting motion to remand* No. 07-2692-ag (2d Cir. Sept. 13, 2007). We note that the formal rules of evidence do not apply to FINRA proceedings, and the Hearing Officer properly admitted and relied upon the photocopied applications, which are relevant and probative to this matter. *See* NASD Rules 9145(a), 9263, 9346(g). Ortiz's contentions do not lessen his culpability.

Ortiz for the first time on appeal contends that UBS "had the opportunity and the means to commit the alleged forgeries" and that he therefore should be absolved from liability. We determine that Ortiz's argument is without merit. Ortiz cannot reconcile this accusation against UBS with his own statements that he personally orchestrated the execution of the revised

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The customers provided documents that they executed over the course of more than 20 years and that were not prepared for the purpose of analyzing their handwriting.

[23] Our finding of liability in this case does not hinge on the genuineness of the customers' original ACCESS applications. The customers testified that they completed these documents.

[24] Ortiz asserts that Cannistraci refused to cooperate with FINRA and provided untruthful testimony. We disagree with Ortiz's assertions. The hearing transcript reflects that Cannistraci's testimony was direct and other independent evidence in the record supports his testimony.

documents when he met with the customers at their home and witnessed them initial the changes—which was later refuted by evidence of YB's travels during the relevant time period and the customers' credible testimony. Ortiz's statements illustrate a chain of custody that began and ended with him. *See, e.g.*, *Eliezer Gurfel*, 54 S.E.C. 56, 62 (1999) (affirming FINRA's finding that respondent forged or caused to be forged another's signature when forged documents were in respondent's possession), *aff'd*, 340 U.S. App. D.C. 292 (D.C. Cir. 2000). Moreover, if someone else had committed the forgery, Ortiz would have been alerted to it when UBS approved the customers' ACCESS accounts. Ortiz, however, never questioned UBS upon the accounts being approved.[25]

A preponderance of the evidence thus fully supports an inference that Ortiz forged or caused to be forged DB's and YB's initials on the amended ACCESS account documents. Accordingly, we affirm the Hearing Panel's finding that Ortiz's conduct violated NASD Rule 2110 as alleged in the first cause of the complaint.

B. Submission of Forged Documents to UBS

A registered person's submission of forged customer account documentation fails to comply with basic standards of moral and ethical behavior and unquestionably violates NASD Rule 2110. *See Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *6 (NASD NAC Dec. 18, 2000). "The violation is equally problematic whether the forgery is submitted to NASD or to a member firm." *Dist. Bus. Conduct Comm. v. Peters*, Complaint No. C02960024, 1998 NASD Discip. LEXIS 42, at *5 (NASD NAC Nov. 13, 1998). It is therefore inconsistent with NASD Rule 2110 to submit forged documents maintained in a member firm's official records. *See Dep't of Enforcement v. Salaverria*, Complaint No. C07040077, 2005 NASD Discip. LEXIS 10, at *16-17 (NASD NAC Dec. 12, 2005). As the SEC has stated, "[t]he entry of accurate information on official Firm records is a predicate to the NASD's regulatory oversight of its members. It is critical that associated persons . . . comply with this basic requirement." *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996).

Ortiz does not dispute that he directed his assistant to submit the revised ACCESS applications to UBS in New Jersey. He testified that it was his usual practice to have Sanders submit documents on his behalf, and he admitted that he did so in this instance. Ortiz maintains, however, that he did not forge the customers' initials. As we previously discussed, Ortiz cannot overcome his statements that he personally obtained the customers' initialed approvals, which the evidence shows is false. We therefore conclude that Ortiz knew that the customers had not initialed the revised applications and that he submitted the revised ACCESS applications to the Firm under false pretenses. By directing Sanders to submit the revised account documents that he knew included forged approvals of the fee schedules, Ortiz failed to uphold the industry

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[25] Ortiz has never suggested that his sales assistant Sanders, who had direct access to the account documents, forged the initials and submitted the applications without his knowledge to UBS. The Hearing Panel, however, considered the possibility. Sanders testified at the hearing below and denied forging the customers' initials on the revised applications. The Hearing Panel, who observed and questioned Sanders, found her a credible witness. There is no reason to disturb that finding. *See Faber*, 2004 SEC LEXIS 277, at *17-18.

standards for dealing with customers justly and equitably.

We find that Ortiz's actions were improper and unethical and, therefore, violated NASD Rule 2110.

C. False and Misleading Information Submitted to FINRA

The complaint further alleged that Ortiz provided false and misleading documents and testimony to FINRA during its investigation in violation of NASD Rule 8210 and NASD Rule 2110. The Hearing Panel concluded that the evidence supported these allegations, and we affirm that finding.

NASD Rule 8210 requires persons associated with a member to provide information orally, in writing, or electronically in response to requests from FINRA staff in connection with an investigation or examination. The rule prohibits an associated person from providing false or misleading information to FINRA in connection with an examination or investigation. *See John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *36-38 (Jan. 22, 2003) (upholding FINRA's finding that respondents violated NASD Rule 8210 by giving false testimony during an on-the-record interview); *Dist. Bus. Conduct Comm. v. Doshi*, Complaint No. C10960047, 1999 NASD Discip. LEXIS 6, at *5-6 (NASD NAC Jan. 20, 1999) (finding that respondent violated NASD Rules 8210 and 2110 when he denied to staff during an on-the-record interview that voice on customer's tape recording was his but later recanted). NASD Rule 8210 is a "key element in NASD's efforts to police its members." *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993). Providing false and misleading information therefore subverts FINRA's ability to carry out its regulatory functions.[26]

Ortiz provided in two written responses to FINRA and testified during an on-the-record interview that he met with the customers and received their initialed approvals of the changes in fees related to the ACCESS accounts. This was false. As the Hearing Panel found, the events set forth by Ortiz could not have transpired in the way that he represented to FINRA. In fact, as Ortiz acknowledged at the hearing upon being confronted with additional evidence, he was no longer certain that he had met with the customers or witnessed them initial the revised applications in his presence.

On appeal, Ortiz disputes that he was untruthful regarding the date on which the purported meeting with the customers took place because he told FINRA that he met with DB

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[26] Providing false or misleading information to FINRA also is conduct inconsistent with just and equitable principles of trade under NASD Rule 2110. *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (determining that respondent engaged in conduct contrary to just and equitable principles of trade when he provided false and misleading information to FINRA); *Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997) (table format). Providing false information in an effort to minimize one's own responsibility is the antithesis of upholding high standards of commercial honor. *See Dist. Bus. Conduct Comm. v. Pelaez*, Complaint No. C07960003, 1997 NASD Discip. LEXIS 34, at *13-14 (NASD NBCC May 22, 1997).

and YB "on or about August 17, 2001," and argues that he included the August 17, 2001 date in his responses to FINRA only at the direction of UBS. More important than Ortiz's imprecision regarding the date, however, is the fact that the customers never met with Ortiz regarding the modification of fees or initialed the changes on the applications as Ortiz stated in significant detail to FINRA. Furthermore, the sequence of events does not provide for the possibility of a date other than August 16 or 17, 2001, given when UBS notified Ortiz of the deficiencies and when the revised documents were faxed to New Jersey.

We find that the evidence amply supports a finding that Ortiz violated NASD Rule 8210 and NASD Rule 2110 by providing false and misleading information to FINRA.

V. Procedural Arguments

Ortiz raises several procedural arguments on appeal. Ortiz contends that Enforcement during its investigation colluded with UBS and the customers against him and that he was denied due process. Federal courts and the SEC have determined that the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution do not apply to FINRA proceedings. *See D.L. Cromwell Invs. Inc. v. NASD Regulation, Inc*., 279 F.3d 155, 162 (2d Cir. 2002); *Datek Sec. v. NASD*, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims regarding a disciplinary proceeding because FINRA is not a governmental actor); *E. Magnus Oppenheim & Co., Inc.*, Exchange Act Rel. No. 51479, 2005 SEC LEXIS 764, at *10 n.15 (Apr. 6, 2005). Ortiz further contends that UBS "deceived and duped" him during FINRA's investigation because UBS's attorney represented Ortiz at that time, and as a result, he was denied a fair hearing.[27] Section 15A(h)(1) of the Securities Exchange Act of 1934 requires FINRA proceedings to be fair. Ortiz was represented by counsel of his own choosing at the hearing below during which several UBS staff persons were subjected to his counsel's cross-examination. In addition, Ortiz could have compelled the testimony of other UBS staff before the Hearing Panel through NASD Rule 9252, but he declined to do so. The procedural safeguards required by Section 15A(h)(1) were satisfied here. *See Oppenheim*, 2005 SEC LEXIS 764, at *10 & n.15 (finding requirements of Section 15A(h)(1) met when FINRA brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and FINRA kept a record of the proceedings).

Ortiz also asserts that he is the victim of bias on the part of FINRA. For example, he states that Enforcement counsel, in her opening statement at the hearing below, identified YB as being of Japanese descent, which "caused the entire proceeding to be tainted, and evoked prejudice against" Ortiz. He further states that the Hearing Panel's decision "shows a strong bias and prejudice toward [Ortiz] throughout the entire" decision. We find that Ortiz's claims of bias are unsubstantiated. "[U]nsubstantiated assertions of bias are an insufficient basis to invalidate

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[27] Ortiz seems to suggest that UBS's counsel's representation was ineffective. "[A]lthough NASD rules permit the participation of counsel in disciplinary proceedings, they do not afford a right to representation"; thus, any claims of ineffective assistance of counsel must fail. *Dep't of Enforcement v. Love*, Complaint No. C3A010009, 2003 NASD Discip. LEXIS 17, at *27 (NASD NAC May 19, 2003), *aff'd*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318 (Feb. 13, 2004).

NASD proceedings." *Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999), *aff'd*, 54 S.E.C. 655 (2000). We have considered the full record and determine that Ortiz's claim of bias is without merit.

Pursuant to NASD Rule 9346(b), Ortiz made a motion before the National Adjudicatory Council ("NAC") subcommittee ("Subcommittee") empanelled to consider this appeal. In this motion, Ortiz requested leave to introduce additional evidence to show "collusion between Enforcement, and UBS . . . and the [customers] to falsify statements, declarations, and evidence, in an elaborate attempt to frame the respondent." Ortiz sought to introduce five original UBS ACCESS applications completed by DB and YB; all communications between the customers and Enforcement from August 2001 to June 2006; all communications between certain UBS staff and Enforcement from August 2001 to June 2006; and all communications from August 2001 to June 2006 between Enforcement and any person related to FINRA's investigation of this matter. Ortiz did not possess any of the additional evidence that he sought to introduce. The Subcommittee denied Ortiz's motion pursuant to NASD Rule 9346. We find that the Subcommittee properly denied the motion. Ortiz did not demonstrate good cause for failing to introduce such evidence below where he was represented by counsel. In addition, many of the persons about whom he complains, including several UBS staff and the customers, testified at the hearing and were subjected to cross examination.[28]

We determine that Ortiz was not denied the procedural fairness to which he was entitled under the Securities Exchange Act of 1934 and NASD's Code of Procedure.

VI. Sanctions

The Hearing Panel barred Ortiz for forgery and submitting forged documents to UBS in violation of NASD Rule 2110 and imposed a separate bar for the NASD Rule 8210 violation. We conclude that Ortiz's misconduct was a serious breach of his obligations as a registered person and deserves significant sanctions. We therefore affirm the bars.

A. Forgery and Submission of Forged Documents

The FINRA Sanction Guidelines ("Guidelines") for forgery and falsification of records recommend a fine of $5,000 to $100,000 and, in cases in which mitigating factors exist, a suspension for up to two years.[29] In egregious cases, the Guidelines recommend consideration of

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[28] The Subcommittee also denied Ortiz's request to have the format of the index to the record modified. NASD Rule 9321 provides that the Office of Hearing Officers shall prepare an index to the record and transmit that index to the parties, which occurred here. NASD rules do not set forth a required format for the index. We find that the Subcommittee properly denied Ortiz's request.

[29] *FINRA Sanction Guidelines* 39 (2006), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

a bar.[30] The principal considerations are the nature of the documents forged and whether the respondent had a good-faith, but mistaken, belief of authority to make a writing on behalf of another.[31] We find that the principal considerations serve to aggravate Ortiz's misconduct and that his misconduct was egregious.

The nature of the forged documents is an aggravating factor. Ortiz forged or caused to be forged the customers' initials on managed account applications and altered the fees to be charged. Ortiz then deliberately submitted the forged documents to UBS for processing. Ortiz knew that UBS would process the account applications *only* upon the customers' approval of the higher management fees. Ortiz's willingness to supply forged documents to his member firm evidences a total disregard of his responsibilities. Ortiz had an obligation to ensure the accuracy of documents submitted to UBS. He failed to meet this "basic requirement." *See Kautz*, 52 S.E.C. at 734. We also find that Ortiz did not have a good faith belief of authority to sign the customers' initials. As shown by the customers' and Ortiz's testimony, Ortiz had no authority from the customers to sign their initials approving the increased fees.

Ortiz's misconduct was also intentional.[32] There is no question that DB and YB did not authorize Ortiz, or anyone at UBS, to sign their initials on any documents and did not approve the increased fees. Indeed, YB gave explicit instructions to Ortiz that she would not agree to open an account with a fee higher than 1.5%. Ortiz ignored that directive in order for UBS to open the accounts, which gave him the potential for monetary gain.[33] We further find aggravating that Ortiz caused damage to customers DB and YB and to UBS as a result of his misconduct.[34] As we previously noted, the Firm has paid a settlement to the customers in connection with the forgery. Ortiz also repeatedly provided false information that served to conceal his misconduct and impede FINRA's investigation into the circumstances surrounding the changes in fees.[35]

Ortiz has not accepted responsibility for his misconduct and blames others for his predicament. Ortiz conspiratorially characterizes this regulatory action brought against him as premised upon the "collusion between UBS, the [customers,] and Enforcement" where

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30 *Id.*

31 *Id.*

32 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

33 *See id.* (Principal Considerations in Determining Sanctions, No. 17). Ortiz represented in his appellate reply brief that he would receive a commission of approximately $400 at the end of the first year from these ACCESS accounts. Further, Ortiz had ongoing discussions with his manager regarding his low sales production and opening these accounts would assist him in this respect.

34 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 11).

35 *See id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10 & 12).

"manufactured evidence and tainted facts were submitted to the hearing panel that caused them to reach a prejudiced decision." We find that Ortiz's failure to appreciate the gravity of his misconduct and the potential threat that his actions posed warrants significant sanctions. Ortiz's actions cast serious doubt upon his commitment to the standards demanded of registered persons in the securities industry. To protect investors and prevent Ortiz from similar misconduct in the future, we bar Ortiz from associating with any member firm in any capacity. A bar will also serve to deter others from engaging in similar misconduct by forging customer approval on managed account documents and submitting those to a member firm. *See Mark F. Mizenko*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655, at *18-19 (Oct. 13, 2005) (barring respondent for forgery and noting that the bar "will serve to deter others in the industry who might otherwise engage in similar misconduct").

B. Providing False and Misleading Information to FINRA

The Guidelines for failing to respond truthfully suggest that, absent mitigating factors, a bar should be standard.[36] *See, e.g., Dep't of Enforcement v. Walker*, Complaint No. C10970141, 2000 NASD Discip. LEXIS 2, at *31 (NASD NAC Apr. 20, 2000) (finding that untruthful responses are tantamount to complete failure to respond and warrant a bar). We determine that Ortiz's submission of false and misleading information is an egregious violation, and we do not find any facts in mitigation. We thus determine that a bar is appropriate.

We find that the subject matter of the information requested—the forgery—was vitally important to FINRA's investigation and supports the imposition of a bar.[37] The SEC has emphasized that untruthful responses "are more damaging than a refusal to respond to a request for information since they mislead NASD and can conceal wrongdoing." *Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728, at *15-16 (Apr. 1, 2005), *aff'd*, 444 F.3d 1208 (10th Cir. 2006). We also find that Ortiz's submission of false information on multiple occasions is an aggravating factor for purposes of sanctions.[38]

Ortiz made a deliberate decision to submit inaccurate information and provide false testimony to FINRA during the course of its investigation in an attempt to mask his misconduct both from his Firm and FINRA.[39] Ortiz's untruthfulness reflects strongly on his fitness to serve in the securities industry. *See Rita Delaney*, 48 S.E.C. 886, 890 (1987) (affirming bar where applicant deliberately falsified firm records to conceal activities from FINRA during its investigation and stating that "[i]n a business that depends so heavily on the integrity of its participants, such behavior cannot be countenanced"). Accordingly, we bar Ortiz in all

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36 *Id.* at 35 (Failure to Respond Truthfully to Requests Made Pursuant to NASD Procedural Rule 8210).

37 *Guidelines*, at 35.

38 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 8).

39 *See id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10 & 13).

capacities. The bar will serve as a deterrent to others who may be inclined to provide false or misleading information to FINRA and to prevent Ortiz from doing so again.

VII. Conclusion

We affirm the Hearing Panel's findings that Ortiz forged or caused to be forged two customers' initials on account documents and caused the forged documents to be submitted to his member firm in violation of NASD Rule 2110. We also affirm the finding that Ortiz provided false and misleading information to FINRA in violation of NASD Rule 8210 and NASD Rule 2110. Accordingly, for the forgery violation and the submission of forged documents, we impose a bar in all capacities. We impose a separate bar in all capacities for providing false and misleading information to FINRA. Ortiz is also ordered to pay hearing costs of $4,778.52. The bars are effective upon service of this decision.[40]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

[40] We also have considered and reject without discussion all other arguments of the parties.