BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

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| In the Matter of<br><br>Department of Enforcement,<br><br>Complainant,<br><br>vs.<br><br>Kevin M. Glodek<br>New York, NY,<br><br>Respondent. | DECISION<br><br>Complaint No. E9B2002010501<br><br>Dated: February 24, 2009 |

**Respondent made material misrepresentations to customers, in violation of the antifraud provisions of the federal securities laws and FINRA's rules. Held, findings affirmed and sanctions modified.**

## Appearances

For the Complainant: Paul D. Taberner, Esq. and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: William A. Rome, Esq.

## Decision

Pursuant to NASD Rule 9311, the Department of Enforcement ("Enforcement") appeals the Hearing Panel's determination of sanctions in the decision in this matter. In that decision, the Hearing Panel found that Kevin M. Glodek ("Glodek") made fraudulent misstatements to eight customers concerning Metropolitan Health Networks, Inc. ("MDPA") stock, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110.[1] The Hearing Panel fined Glodek $25,000 and

[1] Glodek initially filed a cross-appeal, asserting that the Hearing Panel's findings of violation were erroneous. Glodek later abandoned his cross-appeal and admitted to the misconduct as found by the Hearing Panel. Glodek now asserts that the Hearing Panel's decision should be affirmed in all respects.

suspended him for 60 days in all capacities. After thoroughly reviewing the record, we affirm the Hearing Panel's findings of violation, but modify the sanctions by increasing the suspension to six months.

## I. Background

Glodek entered the securities industry in 1993 and first registered as a general securities representative in 1994. Glodek has been associated with several FINRA member firms since he entered the securities industry. Glodek's conduct relevant to this decision occurred during the time when he was associated with William Scott & Co. LLC ("William Scott" or "the Firm"). Glodek was associated with William Scott from March 1994 to September 2005. Glodek is currently associated with another FINRA member firm as a general securities representative.

In January 2000, Glodek entered into an advisory agreement with MDPA that gave him a warrant to purchase 225,000 shares of MDPA at $0.17 per share in exchange for assisting the company in negotiating an agreement with the owner of certain convertible stock. He exercised the warrant in October 2000 and received 225,000 restricted shares of MDPA. In January 2001, Glodek extended the advisory agreement with MDPA for one year. The terms of the extended agreement broadened Glodek's responsibilities, including to "[b]ring to the company a strategic market maker which would serve as 'eyes and ears' in the trading box"; "[m]aintain a working relationship with [the former CEO of MDPA]"; "[m]aintain a line of communication with [MDPA] on a daily basis and periodically raise capital for [MDPA's] daily operations"; "[m]arket [MDPA] to accredited investors to increase activity on the open market"; and "[i]ntroduce [MDPA] to mid-tier hedge funds to develop awareness to the market." Pursuant to the extended advisory agreement, Glodek received an additional 150,000 restricted shares of MDPA in September 2001 for his responsibilities as set forth by the agreement.

During a routine examination of William Scott in 2002, FINRA staff learned of Glodek's advisory agreement with MDPA and his receipt of restricted shares. FINRA staff subsequently reviewed Glodek's recorded telephone conversations with his customers from March 19, 2001, through April 30, 2001 ("Review Period").[2] FINRA's review of these calls led to the initiation of this disciplinary action against Glodek.

## II. Procedural History

Enforcement filed a three-cause complaint against William Scott, Glodek, and Joseph Glodek on August 1, 2005. William Scott and Joseph Glodek settled the charges against them. As relevant to Glodek, the complaint generally alleged that he made material misrepresentations

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[2] FINRA staff chose this period to review Glodek's telephone conversations because it coincided with a price increase in MDPA stock and the Firm's use of a telephone taping system. Pursuant to NASD Rule 3010(b)(2), generally known as the "Taping Rule," William Scott was required to tape record all telephone conversations between its registered representatives and its existing and potential customers.

to customers about MDPA stock, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, NASD Rules 2120 and 2110, and IM-2310-2. The complaint specifically alleged that the misrepresentations were related to predictions of substantial and specific increases in the price of MDPA stock, statements regarding the listing of MDPA common stock on the American Stock Exchange ("AMEX"), statements that MDPA was a debt-free company, statements that MDPA was the fastest-growing company in the healthcare industry and that the healthcare industry was a recession-proof industry, and projections of MDPA's quarterly earnings. The complaint further alleged that Glodek made these misrepresentations in connection with the sale of MDPA stock or to convince current MDPA shareholders not to sell their MDPA holdings. In his answer, Glodek denied that he engaged in the alleged misconduct.

The Hearing Panel held a hearing on October 24 and 25, 2006. Four of Glodek's customers testified at the hearing on Glodek's behalf and one additional customer submitted a written statement supporting Glodek. None of Glodek's customers was willing to cooperate with Enforcement. On April 24, 2007, the Hearing Panel found Glodek liable for violating the antifraud provisions of the federal securities laws and FINRA's rules as alleged with the exception of IM-2310-2.[3] The Hearing Panel fined Glodek $25,000 and suspended him for 60 days. This appeal followed.

## III. Facts

### A. MDPA Was Historically a Speculative Security

MDPA was incorporated in 1996 with the purpose of developing an integrated healthcare delivery network. MDPA pursued this business plan through the acquisition of physician care practices and diagnostic and rehabilitation centers. The company's business model proved unsuccessful and MDPA incurred substantial losses through 1999. For example, MDPA incurred a $6 million loss for the six-month period that ended on December 31, 1999. In addition, MDPA's unaudited quarterly financial statements issued prior to the company's annual report for the fiscal year that ended on December 31, 2000, included a "going concern" statement by MDPA's management. The statement noted that MDPA had incurred substantial losses since inception; that in the absence of achieving consistent profitable operations, additional funding would be necessary to sustain operations; and that these conditions raised substantial doubt regarding MDPA's ability to continue as a going concern.

In 2000, the company changed its business plan to specialize in managed care risk contracting and hired new management. As a result of the new business strategy, more than 90 percent of MDPA's revenue during the fiscal year that ended on December 31, 2000, and the six months that ended on June 30, 2001, which includes the Review Period, was generated by a single managed care contract with Humana.

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[3] The Hearing Panel dismissed the allegation that Glodek violated IM-2310-2, related to fair dealing with customers, because Enforcement did not address this provision during the proceedings. We affirm that finding.

On April 2, 2001, MDPA filed its 2000 annual report with the SEC. That report showed that during the fiscal year that ended on December 31, 2000, MDPA generated approximately $119 million in annual revenues and $4.9 million in annual profit, of which $4 million was attributed to a one-time gain.[4] The report further showed that the company had long term debt of more than $1.2 million, approximately half of which was due to mature in 2001, and owed the IRS more than $2.5 million in unpaid payroll taxes. For the first quarter of 2001, MDPA reported year-to-date revenue of $29.5 million and a year-to-date net income of $1.2 million. MDPA's revenue for the first quarter of 2001, however, declined by approximately $400,000 when compared with the company's revenue during the same period in 2000.

Around the time relevant to the misconduct at issue, MDPA was traded on the Over-the-Counter Bulletin Board. From the end of December 2000 through December 2001, MDPA's share price fluctuated as follows: On December 29, 2000, the closing price per share of MDPA was $0.84. By March 2001, the closing price ranged between $1.00 on March 1 and $1.84 on March 30. On April 30, 2001, the share price reached a new high and closed at $3.12. MDPA's closing share price peaked at $3.34 on May 7, 2001, and steadily declined thereafter. By the end of 2001, MDPA shares were trading between $1.10 and $1.44.

On June 13, 2001, MDPA applied for listing on the AMEX. MDPA withdrew its initial AMEX listing application on March 8, 2002, but later reapplied. MDPA began trading on the AMEX on November 22, 2004.

B. Glodek's Statements to Customers

Enforcement introduced into evidence 35 telephone recordings that included conversations between Glodek and Firm customers. All of the customers already owned MDPA stock at the time of the conversations with Glodek. The Hearing Panel found that within these recordings, Glodek made four types of misstatements: price predictions, statements related to MDPA's AMEX listing, statements that MDPA was a debt-free company, and earnings projections.

*1. Price Predictions*

On a number of occasions, Glodek offered specific predictions of the future price of MDPA stock. For example, on March 22, 2001, customer KC expressed concern about the price of MDPA, which was trading at approximately $1.50 per share. Glodek told KC that he thought the stock would "go to $5 and I'll be blowing out of it between five and 10." Glodek further stated that he thought "within two weeks we'll see it over $2." On March 27, 2001, Glodek told customer AA that "[m]y price target . . . is like $5 on the stock." On March 29, 2001, customer LW complained to Glodek about losses in his account with the Firm. Glodek told LW "I think that the MDPA goes back to $5; I really feel that comfortable about it." Glodek reiterated his

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[4] In September 2001, MDPA restated its 2000 financial statements by increasing its payable payroll taxes. This restatement reduced MDPA's reported profit by $400,000.

price prediction to LW on April 4, 2001, when he stated that "I hope that, you know, over the next two to three months we'll be selling the stock, half of our position out at $5." In another conversation, when customer PK asked Glodek on April 10, 2001, whether MDPA was "going to do anything in the near term" that would warrant PK holding the MDPA rather than liquidating it to invest in another stock, Glodek stated "Metro's going to be $5 hopefully within the next two to three months."

*2. AMEX Listing*

Glodek made statements to three different customers that suggested that MDPA would qualify for imminent listing on the AMEX.[5] On March 27, 2001, Glodek told customer AA that the MDPA "[s]tock will probably drift over $2 and then you'll see it approved for . . . the AMEX and then the stock will be off from there." On April 25, 2001, Glodek told customer MO that after MDPA reported its first quarter earnings, "the stock will easily be over $3, and if that's the case, the company qualifies for the AMEX. . . . Then if it's on the AMEX, you're going to get another run out of it." Glodek told customer PK on April 26, 2001, that MDPA was "basically qualifying for the AMEX . . . by Memorial Day weekend." Four days later, on April 30, 2001, and after MDPA's share price rose above $3, Glodek told PK, "[n]ow we're waiting for the numbers to do [sic] out and they just qualified for AMEX under my understanding, so they get the okay to get on the AMEX we're going to get a whole 'nother run of the stock."

*3. Debt-Free Company*

Glodek told four customers that MDPA either had "no debt" or was "debt-free."[6] On March 27, 2001, Glodek told customer AA that MDPA "have [sic] no debt." On April 4, 2001, Glodek told one customer, "Joe," that with respect to MDPA, "the company has no debt." The next day, Glodek told another customer, "Mike," that "[t]he company went from astronomical amounts of debt in '99 to a debt-free company in 2000."[7] On April 12, 2001, Glodek told customer PK that "[w]e've got a company with no debt."

*4. Earnings Projections*

Glodek also made quarterly earnings projections regarding MDPA to one customer. On March 26, 2001, Glodek told customer MR that MDPA's quarterly earnings were due out the following day and that "they're going to do $120 million for the year and earn about $6 million in cash . . . for this quarter right now. . . . [W]hat they earned already in the first quarter of 2001, they earned enough in the . . . first quarter now to cover all of last year. . . . Yeah they earned like $6 million already supposedly in the first quarter, that's what I'm hearing."

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5 One of these conversations also included price predictions as discussed in Part III.B.1.

6 One of these conversations also included a price prediction and statements related to MDPA's AMEX listing as discussed in Parts III.B.1-2.

7 Enforcement was unable to identify with certainty the last names of these two customers.

IV. Discussion

The parties do not dispute the Hearing Panel's findings that Glodek violated the antifraud provisions of the federal securities laws and FINRA's rules.[8] A discussion of the findings of violation, however, is necessary background for our discussion of the appropriate sanctions.

Glodek made at least 14 material misstatements to eight customers related to MDPA stock during conversations that took place between March 22, 2001, and April 30, 2001.[9] The Hearing Panel found, and Glodek does not dispute, that he projected MDPA's earnings and predicted repeatedly the future price of MDPA stock when he had no reasonable basis for these projections and predictions, and he was reckless in making them.[10] "Every Court of Appeals that

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[8] The Hearing Panel found that Glodek violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. Section 10(b) of the Exchange Act makes it "unlawful for any person . . . to 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." 15 U.S.C. § 78j. Exchange Act Rule 10b-5 makes it unlawful "[t]o employ any device, scheme, or artifice to defraud; to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. NASD Rule 2120 is FINRA's antifraud rule and is similar to Section 10(b) and Exchange Act Rule 10b-5. *Mkt. Regulation Comm. v. Shaughnessy*, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NASD NBCC June 5, 1997), *aff'd*, 53 S.E.C. 692 (1998).

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 FINRA rules, including NASD Rule 2110, applicable to both FINRA members and all persons associated with FINRA members. Conduct that violates other SEC or FINRA rules is inconsistent with the high standards of commercial honor and just and equitable principles of trade and therefore also violates NASD Rule 2110. *Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). "Misrepresentations also are inconsistent with just and equitable principles of trade and violate NASD . . . Rule 2110." *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *14 (2004).

[9] The Hearing Panel found, and the parties do not dispute, that Glodek's misstatements were made in connection with the purchase or sale of a security.

[10] At the hearing, Glodek was unable to articulate a reasonable basis for his predictions. For instance, Glodek cited several research reports that covered MDPA as a source, but these reports were issued after he made the price predictions at issue. Further, nothing in the materials

[Footnote continued on next page]

has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 n.3 (2007); *accord Irfan Mohammed Amanat*, Exchange Act Rel. No. 54708, 2007 SEC LEXIS 2558, at *35 (Nov. 3, 2007), *aff'd*, 269 F. App'x 217 (3d Cir. 2008). Glodek did not review MDPA's SEC filings to verify the appropriateness of his statements and instead relied on the company's representations. Statements made by MDPA's management about the company are not necessarily an adequate basis for representations to customers. *See Hanly v. SEC*, 415 F.2d 589, 597 (2d Cir. 1969) ("A salesman may not rely blindly upon the issuer for information concerning a company although the degree of independent investigation which must be made by a securities dealer will vary in each case. Securities issued by smaller companies of recent origin obviously require more thorough investigation."); *Steven D. Goodman*, 54 S.E.C. 1203, 1210 (2001). MDPA was historically a speculative security, and therefore rendering any specific prediction that it would appreciate in value was inherently fraudulent.[11] *See SEC v. Hasho*, 784 F. Supp. 1059, 1109 (S.D.N.Y. 1992); *Richard J. Buck & Co.*, 43 S.E.C. 998, 1006 (1968) ("[P]red[i]ctions of a sharp increase in earnings with respect to such a security without full disclosure of both the facts on which they are based and the attendant uncertainties are inherently misleading."); *Charles P. Lawrence*, 43 S.E.C. 607, 610 (1967) ("We have repeatedly held that a specific prediction of the future value of a speculative or unseasoned security is inherently fraudulent."), *aff'd*, 398 F.2d 276 (1st Cir. 1968). Further, Glodek's violation "is not ameliorated . . . where the positive prediction about the future performance of securities is cast as opinion or possibility rather than as a guarantee." *Hasho*, 784 F. Supp. at 1109; *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991) (holding that statements of opinion can be a basis for fraud claim because opinion includes implicit statements of fact).

The Hearing Panel also found, and Glodek does not dispute, that Glodek's other misstatements about MDPA's imminent listing on the AMEX and its status as a "debt-free" company were equally misleading. These misrepresentations were material. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (stating that information is material "if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] 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" (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Further, Glodek had a duty to provide his customers with accurate information with respect to MDPA. *See Magnum Corp. v. Lehman Bros. Kuhn Loeb, Inc.*, 794 F.2d 198, 200 (5th Cir. 1986); *Hanly*, 415 F.2d at 596-97.

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that Glodek cited supported the specific earnings projection that Glodek made. As Glodek admitted in his appellate brief, the Hearing Panel "properly conclude[d] that [he] was reckless."

[11] MDPA was a speculative security because MDPA had little operating history and had operated historically at a deficit. *See Clinton Hugh Holland, Jr.*, 52 S.E.C. 562, 565 n.16 (1995), *aff'd*, 105 F.3d 665 (9th Cir. 1997) (table format). Glodek agreed that MDPA was speculative.

Glodek also lacked a reasonable basis for these statements. On April 10, 2001, Glodek had a conversation with MDPA's president who told him that the company's board had not authorized a filing of an application to list MDPA's stock, but that he expected that it would occur "soon." While Glodek might have had a basis to represent that MDPA intended to seek an AMEX listing, he went beyond that and told customers that MDPA *would* qualify once the share price reached $2 or $3.[12] The share price, however, is merely one factor considered for listing on the AMEX. *See Listing Standards for Original Listing*, http://www.amex.com/equities/howToLst/eq_HTL_ListStandards.html (setting forth both quantitative and qualitative standards for listing). In evaluating listing eligibility, the AMEX evaluates, among other things, "the nature of a company's business, market for its products, reputation of its management, historical record and pattern of growth, financial integrity, demonstrated earnings power, and future outlook." *Id.* Moreover, MDPA ultimately first applied for listing on June 21, 2001, months after Glodek represented that the listing was imminent, and did not begin trading on the AMEX until November 2004, more than three years later. With respect to MDPA's indebtedness, MDPA's annual report for the fiscal year that ended on December 31, 2000, which was filed on April 2, 2001, showed that the company had significant debt, including long term debt of more than $1.2 million, approximately half of which was due to mature in 2001, and owed more than $2.5 million to the IRS.

Accordingly, we affirm the Hearing Panel's finding that Glodek violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110.

## V. Sanctions

The Hearing Panel fined Glodek $25,000 and suspended him for 60 days. We affirm the fine, but for the reasons set forth below, we increase the suspension to six months.

The FINRA Sanction Guidelines ("Guidelines") for intentional or reckless misrepresentations of material facts recommend a fine of $10,000 to $100,000, and a suspension of 10 business days to two years.[13] In an egregious case, the Guidelines recommend a bar.[14] Enforcement argues that this is such a case and that Glodek should be barred from the securities industry. The Hearing Panel found that Glodek's misconduct was not egregious, and we agree with that finding. We determine, however, that Glodek's misconduct was serious and therefore warrants a longer suspension than the 60 days ordered below.

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[12] We do not address any possible issues concerning premature disclosure and "tipping" of nonpublic information or the impact of Regulation FD since they were not raised below.

[13] *FINRA Sanction Guidelines* 93 (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

[14] *Id.*

In determining the proper remedial sanction, the Guidelines for misrepresentations of material facts advise that adjudicators consider the "Principal Considerations in Determining Sanctions."[15] We find that several of these factors apply to Glodek's misconduct. Upon his own admission, Glodek acted recklessly when predicting the specific increases in MDPA's price and earnings and stating that the company was debt free and would soon qualify for AMEX listing.[16] The Hearing Panel credited Glodek's testimony when he stated that he did not intend to deceive his customers and found that there was reason for "measured optimism" regarding MDPA's prospects. We too give some credit to the fact that MDPA recently had become profitable and determine for sanctions purposes that there was some basis for Glodek's enthusiasm. Glodek's unwavering belief in MDPA, however, did not excuse his recklessness in communicating misstatements to his customers. *Faber*, 2004 SEC LEXIS 277, at *22. As a result, the customers could not truly assess whether their investment in MDPA was in their best interests. Even so, based upon the record, none of the customers suffered losses as a result of Glodek's misconduct.

The Hearing Panel found in support of a lesser sanction that there was no pattern to Glodek's misconduct because of the relatively small number of proven misrepresentations when considered in the context of the total number of calls that FINRA staff reviewed. We disagree that there is no pattern. The Hearing Panel found that, over the course of six weeks, Glodek made at least 14 misstatements to eight customers. Thus, Glodek's misstatements were not an isolated occurrence.[17]

We also consider relevant in assessing the appropriate remedial sanctions that Glodek's misconduct resulted in the potential for monetary gain.[18] Glodek had an advisory agreement with MDPA when he made the misstatements; thus, he had a personal financial interest in the increase in MDPA's share price. Glodek received 225,000 restricted shares of MDPA in October 2000, and Glodek agreed to broaden his duties for MDPA in January 2001 to, among other things, "market the Company to accredited investors to increase activity on the open market." For the responsibilities set forth in the advisory agreement, Glodek received an additional 150,000 restricted shares of MDPA in September 2001. There is, however, no clear evidence that customers were unaware of Glodek's relationship with MDPA. Several of the customers who testified stated that they knew of Glodek's advisory agreement with MDPA.

Glodek contends that the sanctions should not be increased because none of his customers complained, and in fact many supported him, coupled with the fact that the customers were sophisticated investors. While the majority of the customers testified in support of Glodek, several of the customers did not and their opinions are unknown. Regardless, the views of the

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15 *Id.* at 6-7 (Principal Considerations in Determining Sanctions).

16 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

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

18 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

customers who supported Glodek are not determinative because we look beyond the interests of particular investors in assessing the need for sanctions to protect investors generally. *See Arthur Lipper Corp.*, 46 S.E.C. 78, 100 (1975) ("[W]e must weigh the effect of our action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally."), *modified on other grounds*, 547 F.2d 171 (2d Cir. 1976); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *39 (NASD NAC July 26, 2007) ("[W]e do not consider the fact that no customers complained to NASD to be relevant."). Ratifications of fraudulent conduct do not limit our ability to sanction that conduct. *See, e.g., Wilshire Disc. Sec., Inc.*, 51 S.E.C. 547, 551 n.15 (1993) ("[E]ven assuming that certain investors ratified or endorsed [respondent's] action, that would not alter the objective fact that [respondent] fraudulently departed from the . . . stated use of proceeds.").

With respect to the customers' sophistication, the Hearing Panel found that the customers were experienced investors and some of these customers had direct contact with MDPA management. The sophistication of the affected customers provides Glodek with some mitigation.[19] Irrespective of the customers' sophistication, however, Glodek was not free to make material misrepresentations about MDPA. *See Lester Kuznetz*, 48 S.E.C. 551, 554 (1986) (stating that a customer's investment experience does not give a representative "license to make fraudulent representations"), *aff'd*, 828 F.2d 844 (D.C. Cir. 1987). As Glodek admitted in his appellate brief, he had been "overly optimistic" about MDPA "and therefore misleading."[20]

In support of its assertion that Glodek should be barred, Enforcement contends that Glodek has failed to accept responsibility for his misconduct. During the appeal proceedings, Glodek admitted that he has made mistakes and that he engaged in the misconduct as found by the Hearing Panel. The Hearing Panel determined that Glodek did not accept responsibility

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[19] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 19).

[20] Glodek makes additional arguments in support of a finding that this is not an egregious case and that militate against a bar. For example, Glodek contends that his lack of disciplinary history is relevant. While the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating. *See Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (determining that the lack of disciplinary history is not mitigating and representative "was required to comply with the NASD's high standards of conduct at all times"). Glodek also contends that he did not delay FINRA's investigation and cooperated fully. The Guidelines recognize as generally mitigating a respondent's substantial assistance to FINRA in its investigation of misconduct. *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12). We do not find that Glodek provided substantial assistance to FINRA but, instead, cooperated with the investigation as he was obligated to do. When Glodek registered with FINRA, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate with NASD." *See Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006). In any event, we agree with the Hearing Panel's finding that Glodek's misconduct was not egregious and does not warrant a bar.

below. Thus, in this case, we do not consider acceptance of responsibility as either mitigating or aggravating.

Based on the facts of this case, we determine that a $25,000 fine and six-month suspension are appropriately remedial.

VI. Conclusion

We affirm the Hearing Panel's findings that Glodek made material misrepresentations to customers, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. Accordingly, we fine Glodek $25,000 and suspend him in all capacities for six months. We affirm the Hearing Panel's imposition of hearing costs in the amount of $5,525.56.[21]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and Corporate Secretary

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

Because any proceeding to summarily suspend or expel a member that fails to pay any fine, costs, or other monetary sanction imposed in this decision would commence after December 15, 2008, when the first phase of a new Consolidated Rulebook of FINRA Rules became effective, FINRA Rule 8320 would apply to such proceeding. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Pursuant to this rule, 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.