

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Iftikhar Ul Haq
Toms River, NJ,

Respondent.

DECISION

Complaint No. ELI2004026701

April 6, 2009

Respondent engaged in unauthorized transactions and unsuitable excessive trading in one customer's account. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Samuel L. Barkin, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Pursuant to NASD Rule 9311(a), respondent Iftikhar Ul Haq ("Haq") appeals a November 1, 2007 Hearing Panel decision. In that decision, the Hearing Panel found that Haq violated NASD Rules 2110 and 2310 ("Rules 2110 and 2310") by engaging in unauthorized transactions and unsuitable excessive trading in the account of his customer, KS. The Hearing Panel imposed separate bars on Haq for his unauthorized transactions and unsuitable excessive trading, ordered him to pay \$66,184.73 in restitution to KS, and imposed hearing costs of \$1,546.30.

After thoroughly reviewing the written record,¹ we affirm the findings made and sanctions imposed by the Hearing Panel.

I. Background

Haq first registered with FINRA as a general securities representative on September 8, 2000. During the time relevant to our decision (October 2003 through May 2004 or “the relevant period”), Haq was registered with GunnAllen Financial, Inc. (“GunnAllen” or “the Firm”) in New York, New York. GunnAllen terminated Haq’s registration on November 18, 2005. Haq was registered with another FINRA member firm from October 27, 2005, until March 29, 2007. He is not currently associated with any FINRA member.

II. Procedural History

On November 30, 2006, FINRA’s Department of Enforcement (“Enforcement”) filed a three-cause complaint against Haq for misconduct associated with trading in a single customer’s account. Cause one alleged that Haq executed 83 transactions in KS’s account, without KS’s prior knowledge, authorization or consent, while KS was out of the country in Pakistan from October 29, 2003, until April 2, 2004. Cause one further alleged that Haq executed 39 more transactions in KS’s account, without KS’s prior knowledge, authorization or consent, after KS returned to the United States on April 2, 2004, and thereafter until May 18, 2004. Cause two, stated as an alternative to cause one, alleged that during the period from October 2003 until May 2004, Haq exercised discretionary trading authority in KS’s account without obtaining prior written authorization from KS and without obtaining GunnAllen’s written acceptance of the discretionary trading account.² Cause three alleged that Haq engaged in unsuitable excessive trading in KS’s account by executing 122 transactions from October 2003 until May 2004.

Through counsel, Haq filed an answer to the complaint on January 4, 2007, in which he denied the substantive allegations in the complaint and requested a hearing. On February 16, 2007, the Hearing Officer issued a scheduling order for the hearing to be conducted on August 21 and 22, 2007, in New York City.

¹ Haq specifically waived the opportunity for oral argument in this matter. Therefore, we decided the matter on the basis of the written record, which included written appeal briefs from both parties.

² Given its finding that Haq engaged in unauthorized trading as alleged in cause one of the complaint, the Hearing Panel did not address the alternative charge in cause two that Haq exercised discretion without written authorization in KS’s account. In light of our affirmance of the Hearing Panel’s finding that Haq engaged in unauthorized trading in KS’s account, we also find it unnecessary to reach the alternative charge of exercising discretion without written authorization.

The Hearing Officer conducted a final prehearing conference on August 14, 2007. Haq appeared by telephone, pro se, stating that he was no longer represented by counsel, and that he would not be participating in the hearing because he had made plans to be in Texas from August 19 to 25, 2007. The Hearing Officer noted that the hearing dates of August 21 and 22, 2007, had been scheduled and agreed upon in February 2007 and that there had been no request for a postponement. The Hearing Officer advised Haq to attend the hearing to protect his interest, and Haq stated that he would try to change his plans and attend.

On August 17, 2007, Haq sent a letter to counsel for Enforcement, stating that he would not be at the hearing, and adding that: "I am fully aware that your decision regarding my case is final and could have a lasting impact on my career in this industry."

The hearing proceeded as scheduled on August 21, 2007.³ The Hearing Panel issued its decision on November 1, 2007, finding that Haq engaged in unauthorized transactions and unsuitable excessive trading in KS's account, as alleged in the complaint.⁴ The Hearing Panel imposed separate bars on Haq for his unauthorized transactions and unsuitable excessive trading, ordered him to pay \$66,184.47 in restitution to KS, and imposed hearing costs of \$1,546.30.

Haq timely appealed the Hearing Panel's decision to the National Adjudicatory Council ("NAC").

³ Although Haq has not specifically raised the issue on appeal, we have considered the decision to proceed with the hearing and have concluded that, under all the circumstances, it was fair and appropriate for the Hearing Panel to have proceeded with the hearing as scheduled on August 21, 2007.

⁴ The Hearing Panel found that the evidence showed that Haq engaged in 85 unauthorized transactions in KS's account when KS was in Pakistan between October 2003 and April 2004, and another 38 unauthorized transactions in May 2004 after KS had returned to the United States, for a total of 123 unauthorized transactions. The complaint and the exhibit attached to it, however, allege that Haq engaged in 83 unauthorized transactions when KS was out of the country and 39 unauthorized transactions when KS returned, for a total of 122 unauthorized transactions. The Hearing Panel decision does not discuss this discrepancy. Because the difference in the total number of transactions does not materially affect the outcome of our decision, we resolve the difference in the fairest possible manner by choosing the lower of the two numbers in each category. Since Haq did not attend the hearing, we find that even if the evidence showed that he engaged in 85 unauthorized transactions when KS was in Pakistan, he should not be held liable for transactions for which he was not put on notice by the complaint, which listed 83 unauthorized transactions. Similarly, although the complaint listed 39 unauthorized transactions after KS returned to the United States in May 2004, the evidence showed only 38 for which Haq should be held responsible. Accordingly, we find that the total number of unauthorized transactions effected by Haq in KS's account during the relevant period, as alleged in the complaint and supported by the evidence, amounted to 121.

III. Facts

A. Customer KS's Background

KS emigrated from Pakistan to the United States in 1980 and settled in New York City. KS has a high school level education, and he was employed in New York City as a taxi driver and a construction worker. In 1999, KS sold a four-unit apartment building in Queens, New York, that he had built. KS used the proceeds to purchase, along with his brother, a motel in High Point, North Carolina. KS and his wife and five children relocated to North Carolina. He testified that his annual income during the relevant period was approximately \$20,000-25,000.⁵

B. Transactions in KS's Account Before Haq Became KS's Account Representative

In 2002, in response to a cold call, KS opened an account at Firm One with registered representative AMS. KS testified that when AMS contacted him, KS stated that he was wary of investing in stocks because he previously had a brokerage account with Firm Two and had sustained substantial losses. KS told AMS that he wanted to invest only in big companies. KS did not grant AMS any trading discretion and understood that AMS would not purchase any stocks without consulting first with KS. When AMS subsequently left Firm One and associated with GunnAllen in October 2002, KS decided to move his account to GunnAllen. The October 2002 account summary for KS's GunnAllen account shows a portfolio value of \$134,681.39 at the time of transfer.

KS's GunnAllen new account form, dated October 22, 2002, stated that KS was born in 1961, was married, lived in North Carolina, and owned a motel. The "client profile" section of the new account form stated that KS's investment objective was "income (quality emphasized)," his risk tolerance was "moderate," his annual income was \$100,000, and his net worth was \$500,000.⁶ KS testified that, in fact, his annual income at the time he opened his GunnAllen account with AMS was approximately \$30,000, and his risk tolerance was low. KS stated that, at AMS's request, he signed a blank new account form and mailed it back for AMS to fill out.

Shortly after KS opened the GunnAllen account with AMS, he traveled to Pakistan to take care of his elderly parents. KS remained in Pakistan from approximately October 2002 until April 2003. During the time that KS was in Pakistan, AMS effected only one transaction in KS's account, which AMS had recommended and KS had authorized. When KS returned to North

⁵ KS's tax returns from the years 2003 and 2004 are in the record. The 2003 return shows a total income of \$23,800, and the 2004 return shows a total income of \$22,354.

⁶ During his investigative testimony, Haq stated that he believed that KS's investment objective had changed from "income" to "trading," but Haq produced no evidence to support this statement.

Carolina in April 2003, he authorized AMS to make several other purchases and sales of securities in his GunnAllen account.

In October 2003, AMS told KS that he was leaving GunnAllen. KS decided against following AMS to a new firm and instead asked to have his GunnAllen account reassigned to Haq, to whom he had previously been introduced by AMS. Haq became KS's account representative at GunnAllen on October 21, 2003.

C. Transactions in KS's Account After Haq Became KS's Account Representative

KS testified that when Haq took over his GunnAllen account, Haq did not inquire as to KS's financial condition, risk tolerance, or investment interests. In his investigative testimony, Haq also testified that he did not remember ever having discussed those subjects with KS, and stated that he made suitability judgments for KS's transactions based only on KS's prior trading history. The record shows, however, that the trading that Haq effected in KS's account at GunnAllen was completely inconsistent with the trading that AMS did in KS's account previously at both Firm One and GunnAllen.

When Haq became KS's account representative in October 2003, KS informed Haq that he was about to leave again for Pakistan for several months to care for his ailing parents.⁷ KS testified that he told Haq that he wanted to maintain the two or three existing positions in his account while he was in Pakistan. KS gave Haq two telephone numbers where he could be reached in Pakistan—one at his parents' house and the other at his mother-in-law's house. On October 24, 2003, KS left North Carolina to embark on his trip to Pakistan.⁸

KS remained in Pakistan until April 2004. In KS's absence, Haq executed 83 trades in KS's account without KS's knowledge or authorization. In many instances, Haq held positions in KS's account for a few days or less. Haq marked most of those trades "solicited," yet KS's testimony and the telephone record evidence shows that Haq spoke with KS only three times while KS was in Pakistan.⁹ KS testified that those conversations were about personal matters

⁷ KS testified that he shared the duties of caring for his elderly parents with his brother, and that they both routinely left the United States to return to Pakistan for six months at a time. There is no support in the record for Haq's statement on appeal that KS's travels to Pakistan were "due to his investment in land and nothing to do with his sick parents."

⁸ Because KS had to travel to New York on his way to Pakistan, by prior arrangement, Haq picked KS up from LaGuardia Airport and drove him to John F. Kennedy Airport to catch his flight to Pakistan.

⁹ During his investigative testimony, Haq stated that he made many calls to KS in Pakistan—all from his office phone at GunnAllen. Similarly, Haq's appeal statement refers to "[w]ell over 35 phone calls . . . made to Pakistan," and argues that GunnAllen's phone records would show more calls made to KS's cell phone while he was in Pakistan. Yet GunnAllen's

and the stock market in general. KS further testified that Haq never told him in those conversations about the many stocks he had bought and sold in KS's account, except during the second conversation, when Haq told KS that he had sold two of KS's securities. KS testified that he then told Haq that he was not supposed to sell the stock, that Haq should call KS before making any trades, and that Haq agreed to do so.

KS returned to the United States on April 2, 2004, entering through New York. Haq met KS at John F. Kennedy Airport and drove him to LaGuardia Airport for his flight to North Carolina. KS testified that Haq told him there was no problem with KS's account. After KS settled back into his home in North Carolina, however, he found GunnAllen trade confirmations that had arrived in the mail in his absence, and he became aware of Haq's unauthorized trading.¹⁰ KS testified that he telephoned Haq to complain and told Haq that he did not have permission to make trades in KS's absence. KS stated that Haq replied that he had only effected the trades to make money for KS. KS testified that he got angry and told Haq that he "better do something" about the unauthorized trades or KS would talk to a "higher official." Haq thereafter began to avoid KS's phone calls.

Notwithstanding KS's complaint and instructions, Haq made 38 more unauthorized trades during May 2004 without discussing any of them with KS and while avoiding KS's phone calls. KS tried unsuccessfully to reach Haq's immediate supervisor, and then KS contacted GunnAllen's home office in Tampa to complain of Haq's unauthorized trading. Shortly thereafter, in late May or early June 2004, Haq's immediate supervisor returned KS's call and took over KS's account. KS subsequently closed the account at GunnAllen and moved it back to Firm Two in July 2004. On July 7, 2004, KS sent a letter to FINRA's Investor Complaint Center, complaining about Haq's unauthorized trading in KS's account.

D. Analyses of Trading Activity in KS's Account

Two FINRA examiners testified at the hearing and explained their analyses of the trading activity that occurred in KS's account during the period from October 2003 until May 2004.¹¹ Examiner Craig Thompson ("Thompson") testified that Haq did not have any written discretionary authority for KS's account as GunnAllen did not permit such accounts. Thompson

[cont'd]

telephone billing records and KS's testimony reflect only nine calls to KS, and six of those were just one minute long. KS testified that he did not have any telephone conversations with Haq of such short duration. Therefore, the Hearing Panel found that the one-minute calls were most likely unsuccessful attempts by Haq to reach KS. We agree with that finding.

¹⁰ KS testified that his brother collected his mail for KS to open upon his return from Pakistan, and stated that his brother never opened KS's mail when KS was out of town.

¹¹ The record includes a quantitative trading analysis, a trading summary, and a profit-loss analysis.

further testified that the account activity for KS's account "increased substantially" when Haq started to service the account, and that the "holding period" for securities in KS's account "decreased dramatically under [Haq's] servicing of the account." Additionally, Thompson testified that he performed a quantitative trading analysis of KS's account during the relevant period that showed that the average monthly equity in KS's account was \$97,864.69, and that the total purchases in KS's account during the relevant period amounted to approximately \$2.4 million. The turnover rate (total purchases divided by average monthly equity) for the period was about 24.7, or 37.1 on an annualized basis. The cost-to-equity ratio (the percentage return necessary to make a profit in light of fees associated with the trading activity) was 24.4 percent, or 36.6 percent annualized.

Examiner Patricia Hatzfel testified that she prepared a profit-loss analysis of KS's account during the relevant period that showed that Haq executed 121 trades in KS's account, producing total trading losses of \$43,394.40 and generating transaction costs—mark-ups, mark-downs, margin interest, and other charges—of \$22,790.33. Therefore, the total losses in KS's account amounted to \$66,184.73.

IV. Discussion

A. Haq Effected Unauthorized Transactions in KS's Account

The Hearing Panel found that Haq engaged in unauthorized transactions in KS's account between October 2003 and May 2004, in violation of Rule 2110. We affirm the Hearing Panel's findings.

Rule 2110 requires that a member "shall observe high standards of commercial honor and just and equitable principles of trade."¹² It is well settled that unauthorized trading in a customer's account is "a serious violation of just and equitable principles of trade." *Jonathan Garrett Ornstein*, 51 S.E.C. 135, 137 (1992); *Robert Lester Gardner*, 52 S.E.C. 343, 344 n.1 (1995). The Commission has characterized unauthorized trading as a "fundamental betrayal of the duty owed by a salesman to his customers." *Keith L. DeSanto*, 52 S.E.C. 316, 323 (1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996) (unpublished table decision).

The Hearing Panel found that the credible evidence adduced at the hearing established that Haq effected 121¹³ unauthorized transactions in KS's account, both while KS was in Pakistan (from October 29, 2003, until April 2, 2004) and following his return to the United States (in May 2004). The Hearing Panel based its finding on documentary evidence, KS's

¹² NASD Rule 0115 makes all FINRA rules, including Rule 2110, applicable to both FINRA members and all persons associated with FINRA members.

¹³ Again, we use the total of 121 unauthorized transactions, rather than the total of 123 transactions found by the Hearing Panel, for the reasons set forth in note 4.

demeanor, and the consistency of his testimony at the hearing. The Hearing Panel specifically found credible KS's statement that he spoke to Haq only three times during the almost six months that KS was in Pakistan. The Hearing Panel also found credible KS's testimony that during those conversations, KS and Haq did not discuss any trades that were contemplated or effected in KS's account during that time, except for two sales of stock that Haq mentioned he made, for which KS admonished Haq. Moreover, the Hearing Panel credited KS's testimony that even after he complained to Haq in April and May 2004 about the previous unauthorized trading in KS's account, Haq avoided communicating with KS and engaged in 38 additional unauthorized trades during a two-week period in May 2004.

“Credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference and can be overcome only where there is substantial evidence for doing so.” *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *21-22 (Jan. 22, 2003).

Here, substantial evidence does not exist for reversing the Hearing Panel's findings of credibility, and we will not disturb the Hearing Panel's findings. Moreover, KS's testimony that he did not authorize any of the 83 trades that occurred while he was in Pakistan, or the 38 trades executed upon his return in May 2004, is consistent with GunnAllen telephone records showing that Haq spoke with KS only three times during that time period.

Haq's arguments in his written statements on appeal are insufficient to overturn the Hearing Panel's finding. Haq has offered no evidence to support his self-serving comments that he had many telephone conversations with KS while KS was in Pakistan. In fact, the evidence here proves otherwise. In Haq's investigative testimony, he told FINRA examiners that he placed all telephone calls to KS in Pakistan from his office telephone, and he agreed with the examiner's hypothetical statement that if there were 60 trades, then there should be 60 telephone calls. In response to FINRA's request pursuant to NASD Rule 8210, GunnAllen produced all telephone records for calls placed from the Firm to Pakistan during the relevant period.¹⁴ During the hearing, KS identified two of his telephone numbers in Pakistan from that list, which resulted in nine telephone calls, six of which occurred for less than one minute. KS's testimony and this documentation led the Hearing Panel to conclude that KS and Haq had only three telephone conversations during the relevant period, and that the other six short telephone calls represented unsuccessful attempts by Haq to reach KS.

¹⁴ Notwithstanding Haq's investigative testimony that he placed all calls to KS in Pakistan from GunnAllen's phones, FINRA provided Haq with the opportunity to show that he had used his cell phone or his home phone to contact KS in Pakistan. The record contains a letter dated June 5, 2007, from FINRA to Haq, requesting pursuant to NASD Rule 8210 that Haq provide “copies of all bills, statements and other documents concerning phone calls made by [Haq] to [KS] on [Haq's] cell phone or home phone.” There is no evidence that Haq responded to this request.

Haq has also not produced any credible evidence to refute KS's testimony that even while he complained to Haq in May 2004 about the previous unauthorized transactions, Haq avoided KS's telephone calls and effected an additional 38 unauthorized transactions in KS's account. Thus, the Hearing Panel concluded that Haq had not spoken with KS prior to each of the 121 transactions that he effected in KS's account during this period, that KS did not authorize the transactions, and therefore all 121 transactions were unauthorized.

Haq had the opportunity to attend the hearing below and testify under oath to offer an alternative explanation of the trading and to allow the Hearing Panel to judge his credibility. Haq chose not to do so. Haq also failed to produce any evidence to support his contention that he had a telephone conversation with KS prior to every trade. Moreover, Haq chose not to seek to adduce additional evidence on appeal. Accordingly, we affirm the Hearing Panel's finding that Haq effected 121 unauthorized transactions in KS's account between October 2003 and May 2004, in violation of Rule 2110.

B. Haq Engaged in Unsuitable Excessive Trading in KS's Account

The Hearing Panel found that Haq engaged in unsuitable excessive trading in KS's account, in violation of Rules 2310 and 2110. We affirm the Hearing Panel's findings.

Rule 2310(a) requires that "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."¹⁵ Rule 2310 encompasses a "fundamental responsibility for fair dealing" that a registered representative owes to his or her customers. *Larry Ira Klein*, 52 S.E.C. 1030, 1036-37 (1996). A violation of Rule 2310 is also a violation of Rule 2110. *Daniel Richard Howard*, 55 S.E.C. 1096, 1101 (2002).

A registered representative can violate Rule 2310's suitability requirement either by recommending transactions that are unsuitable based on their quality, or by "[r]ecommending excessive activity in a customer's account." *Jack H. Stein*, Exchange Act Rel. No. 47335, 2003 SEC LEXIS 338, at *7 (Feb. 10, 2003); *Kettler*, 51 S.E.C. at 32 (holding that "[e]xcessive trading represents an unsuitable frequency of trading" and violates FINRA suitability standards). The Commission has held that "excessive trading, by itself, can violate NASD suitability standards by representing an unsuitable frequency of trading." *Pinchas*, 54 S.E.C. at 342.

¹⁵ "Transactions that were not specifically authorized by a client but were executed on the client's behalf are considered to have been implicitly recommended within the meaning of the NASD rules." *Rafael Pinchas*, 54 S.E.C. 331, 341 n.22 (1999) (citing *Paul C. Kettler*, 51 S.E.C. 30, 32 n.11 (1992)).

Excessive trading “occurs when a securities professional has control over trading in an account and the level of activity in that account is inconsistent with the customer’s objectives and financial situation.” *Id.* at 337. Both prongs of this standard are met here.

1. Haq Controlled the Trading in KS’s Account

As for the first prong, the record demonstrates that Haq had control over KS’s account between October 2003 and May 2004. Unauthorized trading constitutes “clear evidence of control” for the purposes of an excessive trading claim. *Olde Disc. Corp.*, 53 S.E.C. 803, 832 (1998); *Sandra K. Simpson*, 55 S.E.C. 766, 796 (2002) (stating that *de facto* control exists where broker controlled account either because customer relied on broker or because customer was incapable of controlling account due to unauthorized trading); *see also Leib v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 954 (E.D. Mich. 1978) (discussing that courts often interpret unauthorized trading as a usurpation of control by broker), *aff’d*, 647 F.2d 165 (6th Cir. 1981). As discussed above, the evidence demonstrates that all 121 of the trades at issue were unauthorized.

2. The Level of Trading Activity in KS’s Account Was Excessive

As for the second prong, whether the level of activity in an account is inconsistent with the customer’s objectives and financial situation “does not rest on any magical per annum percentage.” *Peter C. Bucchieri*, 52 S.E.C. 800, 805 (1996) (internal quotation omitted). Nevertheless, there are a number of factors that may be pertinent, including the turnover rate, the cost-to-equity ratio, and the number and frequency of trades. *See Harry Glikzman*, 54 S.E.C. 471, 477 (1999), *aff’d*, 24 F. App’x 702 (9th Cir. 2001). A pattern of in-and-out trading, or of holding securities for short periods of time, are other indicia of excessive trading. *See John M. Reynolds*, 50 S.E.C. 805, 808 n.12 (1991).

The turnover rate for KS’s account is strongly indicative of excessive trading. “The annual turnover rate is the number of times during a year that securities in an account are replaced by new securities.” *J. Stephen Stout*, 54 S.E.C. 888, 910 n.50 (2000). One method used for calculating the turnover ratio is the “modified Looper formula,” which divides the total cost of purchases over the relevant time period by the average monthly equity. *See Dist. Bus. Conduct Comm. v. Glikzman*, Complaint No. C02960039, 1999 NASD Discip. LEXIS 12, at *25 n.17 (NASD NAC Mar. 31, 1999), *aff’d*, 54 S.E.C. 471 (1999); *Stein*, 2003 SEC LEXIS 338, at *16 n.26. This calculation is then annualized to produce an annual turnover ratio. *See Michael T. Studer*, Exchange Act Rel. No. 50543, 2004 SEC LEXIS 2347, at *13-14 n.21 (Oct. 14, 2004), *appeal dismissed*, 260 F. App’x 342 (2d Cir. 2008) (unpublished).

Annualized turnover rates between three and five “have triggered liability for excessive trading, and it has been generally recognized that an annual turnover rate of greater than six evidences excessive trading.” *Stein*, 2003 SEC LEXIS 338, at *16 (footnotes omitted); *see also David Wong*, 55 S.E.C. 602, 611 at n.18 (2002) (finding an annualized turnover rate of 7.3 to be excessive); *Stout*, 54 S.E.C. at 912 (finding annualized turnover rates of 3.44 to 11.84 to be excessive). Here, the annualized turnover rate for KS’s account during the relevant period was 37.1, far in excess of the turnover rate of greater than six that typically reflects excessive trading.

The cost-to-equity ratio in KS's account also shows that Haq engaged in excessive trading. The cost-to-equity ratio shows the rate of return that must be achieved on a customer's average net equity to pay commissions and other transactions costs (i.e., for the customer to break even). Like the turnover rate, there is no bright-line threshold at which the cost-to-equity ratio conclusively establishes that trading was excessive. The Commission has held, however, that a "cost-to-equity ratio in excess of 20% indicates excessive trading." *Pinchas*, 54 S.E.C. at 340; *see also Bucchieri*, 52 S.E.C. at 805 (finding excessive trading with cost-to-equity factors of 21 to 30 percent). The 36.6 percent annualized cost-to-equity ratio for KS's account is well above that parameter.

Frequency of trading is also indicative of excessive trading. *See Stein*, 2003 SEC LEXIS 338, at *16. The record shows that Haq traded KS's account every day or two during the relevant period. Thus, the frequency of Haq's trading in KS's account further reinforces our conclusion that the trading was excessive.

Haq argues on appeal that he did not engage in unsuitable trading for KS because KS was "not a naive (sic) in trading and has had a history of trading speculative stocks," and because KS "always wanted [Haq] to trade his [account] aggressively." First, we note that Haq produced no evidence to support his allegations. Second, it is well settled that even when a customer seeks to engage in a highly speculative investment or aggressive trading, a registered representative has a duty to refrain from making unsuitable recommendations. *See Stein*, 2003 SEC LEXIS 338, at *8. There were no reasonable grounds for believing that the excessive trading that Haq effected was suitable for KS.

Haq's argument that his supervisors at GunnAllen failed to notify him that his trading in KS's account was excessive or that his commissions were too high¹⁶ is also unavailing. As a registered person, Haq cannot shift responsibility to his firm or his supervisor. *See Pinchas*, 54 S.E.C. at 338 & n.11.

Like the Hearing Panel, we find no evidence in the record to justify the quantity of trading that took place in KS's account during the period that Haq serviced the account, given KS's financial situation and investment objective of income. Accordingly, we affirm the Hearing Panel's finding that Haq engaged in unsuitable excessive trading in KS's account, in violation of Rules 2110 and 2310.

¹⁶ Haq appears to have mistakenly concluded that the excessive trading charge against him included an allegation that he engaged in "commission overcharge." This is incorrect. The analysis of the losses suffered by KS due to Haq's excessive trading included a calculation of the cost-to-equity ratio in KS's account (the rate of return that must be achieved on a customer's average net equity to pay commissions and other transactions), but there is no separate allegation that Haq charged excessive commissions.

V. Sanctions

The Hearing Panel imposed separate bars on Haq for his unauthorized transactions and unsuitable excessive trading, ordered him to pay \$66,184.47 in restitution to KS, and imposed hearing costs of \$1,546.30. We affirm the sanctions based on our finding that Haq's misconduct was egregious.

A. Unauthorized Transactions

The FINRA Sanction Guidelines ("Guidelines") for unauthorized transactions recommend a fine of \$5,000 to \$75,000 and a suspension from 10 business days to one year.¹⁷ In egregious cases, the Guidelines suggest a longer suspension (of up to two years) or a bar. In addition to the Principal Considerations in Determining Sanctions applicable to all sanctions determinations, the Guidelines for unauthorized transactions specifically direct us to consider: 1) whether the respondent misunderstood his or her authority or the terms of the customer's order; and 2) whether the unauthorized trading was egregious.

On the issue of Haq's authority over KS's account, the record in this matter is clear. Haq did not misunderstand his trading authority or the instructions that KS gave him. KS told Haq that he was going to be in Pakistan and that he did not want Haq to trade in KS's account without his permission while he was away. When Haq disclosed to KS that he had made two trades in KS's account, KS admonished Haq for not obtaining KS's authorization prior to making the sales and Haq told KS that he would not do it again. When KS returned to the United States, he complained to Haq about the unauthorized transactions that had occurred while he was in Pakistan, but Haq thereafter avoided KS's calls and made 38 additional trades in KS's account.

On the issue of whether Haq's unauthorized trading in KS's account was egregious, we look to the Guidelines, which identify three specific categories of egregious unauthorized trading: 1) quantitatively egregious unauthorized trading (i.e., unauthorized trading that is egregious because of the sheer number of unauthorized trades executed); 2) unauthorized trading accompanied by aggravating factors, such as, efforts to conceal the unauthorized trading, attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct (this list is illustrative, not exhaustive); and 3) qualitatively egregious unauthorized trading. *See Dep't of Enforcement v. Hellen*, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22, at *15-24 (NASD NAC June 15, 1999). In *Hellen*, the NAC identified two factors as relevant to determining whether the unauthorized trading was or was not qualitatively egregious: 1) "the strength of the evidence that the trades at issue were unauthorized"; and 2) "the evidence relating to the respondent's motives." *Id.* at *18.

¹⁷ *FINRA Sanction Guidelines* 103 (2007), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

Here, the sheer number of unauthorized trades—121 during a seven-month period—makes Haq’s violation quantitatively egregious. The strength of the evidence that the trades at issue were unauthorized and the following aggravating circumstances also lead us to conclude that Haq’s actions were qualitatively egregious. Haq knew that KS was out of the country, halfway around the world attending to his ailing parents; Haq’s misconduct resulted directly in significant monetary injury to KS, a loss of \$66,184.73 in seven months;¹⁸ Haq’s misconduct was intentional and not the result of inadvertence or negligence; and Haq’s misconduct was not an isolated occurrence—it constituted a pattern of conduct that resulted in 121 trades that continued over an extended period of time.¹⁹

We also consider that Haq has a prior disciplinary history.²⁰ In January 2005, the Missouri Securities Division censured him and fined him \$1,720.00 for failing to timely amend his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) to disclose a customer complaint, and for filing a Form U4 through the Central Registration Depository (“CRD”®) system that contained a statement that was false and misleading in a material respect.

Accordingly, we find that Haq’s unauthorized transactions were egregious. Given the danger that such conduct poses to the investing public, we find that barring Haq in all capacities is necessary to protect investors.

In addition, we find it appropriate to order restitution to KS for Haq’s unauthorized transactions. “Restitution is founded on the principle that a wrongdoer shall not be unjustly enriched by his wrongdoing, or that the wrongdoer should restore his victim to the status quo ante.” *Toney L. Reed*, 51 S.E.C. 1009, 1013 & nn.15, 16 (1994) (citing *Restatement of Restitution* §1 (1937)); see also *David Joseph Dambro*, 51 S.E.C. 513, 518 (1993). To that end, the Commission has expressed a “preference that the NASD issue orders of restitution, in contrast to fines payable to the NASD, in instances in which losses have been suffered by identifiable customers as a result of a respondent’s misconduct.” *Michael Frederick Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *49-50 (Oct. 6, 2008) (citing *Reed*, 52 S.E.C. at 946 & n.11). The Guidelines likewise recommend restitution “where necessary to

¹⁸ Haq argues on appeal that the loss calculation is too high and that some of KS’s losses must have been due to trades in KS’s account that were effected by different account representatives after Haq stopped serving as KS’s account representative in June 2004. The evidence is clear, however, that the losses were calculated only from the GunnAllen records of transactions that occurred in KS’s account from October 2003 through May 2004, when Haq was indisputably the account representative for KS’s account.

¹⁹ *Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 11, 13, 17, and 18).

²⁰ *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2).

remediate misconduct” and when an identifiable person “has suffered a quantifiable loss as a result of a respondent’s misconduct.”²¹

Here, Haq engaged in 121 unauthorized transactions in KS’s account, resulting in total trading losses of \$43,394.40 and generating transaction costs—mark-ups, mark-downs, margin interest, and other charges—of \$22,790.33. Therefore, the total losses in KS’s account amounted to \$66,184.73, an identifiable and readily quantifiable loss that resulted from Haq’s misconduct, which should be borne by Haq as a matter of equity. We therefore order Haq to pay restitution of \$66,184.73 to KS.

B. Unsuitable Excessive Trading

The Guidelines for unsuitable transactions recommend suspending a respondent in any or all capacities for 10 business days to one year, and, in egregious cases, imposing a longer suspension up to two years or a bar. The Guidelines also recommend a fine of up to \$75,000.²²

We find that Haq’s unsuitable excessive trading in KS’s account was egregious, for all the same reasons that we set forth above in finding Haq’s unauthorized transactions egregious. Accordingly, we affirm the Hearing Panel’s imposition of a separate bar on Haq for his unsuitable excessive trading violation. We also find that restitution would be appropriate for the unsuitable excessive trading;²³ however, we decline to impose restitution for this cause as we already have imposed full restitution to KS for the unauthorized transactions.

VI. Conclusion

We affirm the Hearing Panel’s findings that Haq engaged in unauthorized transactions and unsuitable excessive trading, in violation of Rules 2110 and 2310. We affirm the Hearing Panel’s imposition of separate bars on Haq for this misconduct. The bars are effective upon service of this decision. We also affirm the Hearing Panel’s order that Haq pay \$66,184.73 in restitution to KS and costs of \$1,546.30 for the proceedings before the Hearing Panel. We impose interest on the restitution, from May 2004 until paid, at the rate established for the underpayment of income taxes in Section 6621(1) of the Internal Revenue Code, 26 U.S.C.

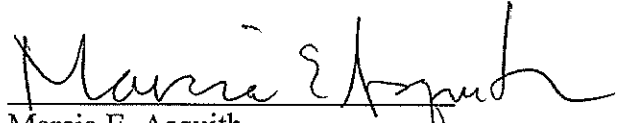
²¹ *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5) (“Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss as a result of a respondent’s misconduct, particularly where a respondent has benefited from the misconduct.”); *see also Wendell D. Belden*, Exchange Act Rel. No. 47859, 2003 SEC LEXIS 1154, at *17-18 (May 14, 2003) (“Restitution seeks to require the wrongdoer to restore the victim to the status quo ante.”).

²² *Guidelines*, at 99.

²³ *See Dambro*, 51 S.E.C. at 518 (“Restitution . . . is a particularly fitting sanction in cases of unsuitable recommendations.”).

§ 6621(a). Haq shall submit to Enforcement proof of payment of restitution within 30 days of the effective date of this decision. If KS cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned property fund for the state of the customer's last known residence.²⁴

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

²⁴ We also have considered and reject without discussion all other arguments advanced by the parties.