FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ANDREW W. QUINN (CRD No. 4092270), Respondent.	Disciplinary Proceeding No. 2005003295801 Hearing Officer – Sara Nelson Bloom **AMENDED EXTENDED HEARING PANEL DECISION** March 19, 2009

Respondent is barred from associating with any FINRA member in any capacity for sending unauthorized correspondence on firm letterhead that contained misleading and unwarranted statements and exposed his employer to liability, in violation of Rule 2110.

Appearances

Joel T. Kornfeld, Esq., Los Angeles, CA, and Mark P. Dauer, Esq., New Orleans, LA, for the Department of Enforcement.

Sylvia M. Scott, Esq., Freeman, Freeman & Smiley, LLP, Los Angeles, CA, for Respondent.

DECISION[1]

I. Procedural History

On August 10, 2007, the Department of Enforcement ("Enforcement") filed a one-cause Complaint alleging that Respondent Andrew Quinn ("Respondent") engaged in a course of conduct that was inconsistent with the high standards of commercial honor that Rule 2110

[1] This Amended Decision redacts the names of non-industry individuals, including the name of a customer, and corrects a footnote to properly attribute testimony to that customer.

requires. Specifically, the Complaint alleges that, at a customer's direction, Respondent issued six letters on Merrill Lynch, Pierce, Fenner & Smith ("Merrill") letterhead containing misleading statements, guarantees and/or promises of specific results, and unsupported opinions. The Complaint further alleges that the letters created a potential liability for Merrill that exceeded $1 billion. On September 10, 2007, Respondent filed his Answer and requested a hearing. On April 2-3, 2008, and June 17-19, 2008, a hearing was held before an extended hearing panel composed of the Hearing Officer and two current members of the District 2 Committee.[2] The parties submitted post-hearing briefs on August 22, 2008.

II. Respondent

Respondent has been in the securities industry since 1999. From March 8, 2000, through November 10, 2005, he was registered with FINRA member Merrill as a General Securities Representative. From November 3, 2004, through November 10, 2005, he was also registered as a General Securities Sales Supervisor. CX-1 p. 7; Tr. 676-77, 864. Respondent is currently employed with Wachovia Securities LLC. CX-1 p. 5. He has no prior disciplinary history.

Before entering the securities industry, Respondent earned a bachelor's degree in economics and finance, and a master's degree in business administration. He also served as an aerospace industry executive for approximately 15 years, where he purportedly negotiated transactions involving hundreds of millions of dollars. Tr. 674-76, 863.

Respondent initially worked in Merrill's Brea, California Office, the main office of the Brea-Fullerton Complex, which also included the Ontario office. Tr. 678-80. In January 2005, Robert Max ("Max"), Merrill's Manager/Director for the Brea Complex, promoted Respondent to branch manager of the Ontario Office, an office consisting of approximately 15

[2] References to the testimony of the hearing are designated as "Tr._", with the appropriate page number. References to the exhibits provided by Enforcement are designated as "CX-___", and references to Respondent's exhibits are designated as "RX-___". CX-1-117, CX-200-210 and RX-1-26 were offered and admitted into the record.

representatives. Tr. 70-71, 474, 680-81, 683. Respondent was a "producing manager," meaning that he not only supervised the Ontario branch, but also maintained his own book of client business, which amounted to approximately $35 million in customer assets. Tr. 75, 750. Respondent reported to Max and Ray Calderon ("Calderon"), the Administrative Manager for the Brea Complex. Tr. 63-65, 80, 111-12, 681.

III. Facts

It is undisputed that Respondent prepared six letters on Merrill letterhead at the request of his customer, MS. These letters were designed to induce others to deposit funds in an account that MS controlled. Among other things, the letters vouched for the integrity of MS and the Universal Humanitarian Foundation ("UHF"), and stated that UHF's Merrill account was designed to finance large international transactions and was prepared to handle hundreds of millions of dollars. Moreover, most of the letters guaranteed the safe return of funds deposited by "private investors." Some letters promised a 6% guaranteed return. In the aggregate, the letters provided guarantees exceeding $1 billion. CX-30b pp. 70, 77, 127-30. Respondent claimed that, with the exception of the 6% guaranteed return, which he included by mistake, these letters were approved by a supervisor. Tr. 918-20, 929-30, 1000-01. However, as discussed below, the Panel rejected this claim as not credible.

A. Respondent Meets MS and Learns of UHF

Respondent first spoke with MS in mid-2003 when MS made an unsolicited call to Merrill to inquire about opening an account for his non-profit organization, UHF. Tr. 271-72, 367-68, 689-90. MS testified that UHF intended to build hospitals and schools to serve poor villages in India. Tr. 263, 268-70. MS served as the President, Chairman, and CEO of UHF. UHF had no employees, and its office was located at MS's home in Fullerton, California.

Tr. 354-55, 723; CX-200. Respondent knew nothing about MS's financial condition except that he was unemployed. Tr. 692, 729.

After their first telephone conversation, Respondent met with MS several times before opening a Merrill account for UHF in October 2004. Tr. 270-71, 691-92, 694. MS said he chose Merrill in hopes of getting "a foot in the door" to a supposed secret trading program that guaranteed profits. Tr. 272-74. He deposited no funds into the account, but said that hundreds of millions of dollars would be wired in at a later time using "SWIFT," which would make the account among the largest in the Brea Complex, and certainly material to Respondent's book of business, which stood at $35 million in client assets. Tr. 47, 84, 695-96, 893; RX-4. Respondent was hopeful about the prospect. On October 12, 2004, he sent an e-mail to Calderon, with a copy to Max, stating, in part:

> I have been working with an Indian family for over a year and have gotten some small business…but am close to getting a 125Mil cash account from the head of the family.…Client indicated funds would be coming from HSBC in three tranches 25, 50, and 50Mil. The part I didn't understand is he said he would want us to issue or request (not sure) something called a SWIFT?

RX-4. Respondent asked Calderon for information on the meaning of SWIFT. Because Calderon was not familiar with the terminology, he forwarded Respondent's e-mail to the private banking group that specialized in large dollar accounts and international transfers. When Calderon received a response clarifying that SWIFT referred to international bank transfers, he forwarded it to Respondent for further action. That was the extent of Calderon's involvement in the matter. Tr. 553-58, 895; RX-4.

Despite MS's statement that he was "close to getting" $125 million, no funds were deposited in the UHF account. Four months later, in February of 2005, MS made his first deposit into the account: $250. CX-24 p. 4. However, Respondent was not discouraged; MS

continued to tell Respondent that millions of dollars would be coming into the account from a "donor." Tr. 696-98.

B. MS Explains Secret Trading Program

Over the course of their conversations and e-mails, MS explained to Respondent that UHF would generate funding for its projects through trading. Although MS testified extensively about his plan, his description was incomprehensible. [3] He claimed to know of a secret offshore trading program that would generate guaranteed profits of 15-25% per week. Tr. 438, 448-52. He claimed that billionaires, the CIA, and the Fed participated in the program through a "London Source" that he was unwilling to divulge.[4] Tr. 272-79. MS planned to get the requisite hundreds

[3] MS explained the program:

> What happens is the trading bank gives a credit line to either one of their own traders, or it may be an outside trader who's registered with the feds.… And what happens is the instruments or bank debentures are purchased at a wholesale price or a discounted price than what you can get in the marketplace, and they are able to then sell it with phone contracts to purchase and to sell at a profit…. It's a guaranteed profit situation, and only then they do the trade. And it in the trade contract states, "Profit" – "Trading for profit only," not for any risky ventures….
>
> And these are contracts which are executed before you start the trading. You have a buy contract for the instruments and a sale contract for the instruments, and they do it – it's all done between the banks, and neither myself or anybody else gets at all in that trading activity. All we get is a portion of the trading profits for our projects. There's a whole bunch of parties who participate in that. You've got Federal Reserve taking it, US Treasury taking portion, bank taking a portion, the trader taking a portion, and so forth. It's - I don't even know all the total parties, but I do know it's absolutely and positively real. There's no doubt.
>
> I've got government contacts also, like members of CIA…they are doing it also for raising funds for government projects.... [T]he government here in this country tries to prohibit doing this type of business because of the huge profit margins which are made, and it will affect the banking system in this country if they allow everybody to play this type of transaction…. [M]ost of it is done offshore…. And Merrill Lynch, I know, is very actively involved in doing it for the US government. So if some of the individuals here at Merrill Lynch at the lower level don't know about it, it's because it is done at very, very high level, normally at the level of treasurer or president and so forth. So they don't involve – and they are giving instructions to lower-level employees, "Don't even discuss this business." So that's why a lot of the transactions are being done offshore, not here in US." Tr. 275, 277.

[4] MS described the investors who participated in the secret program: "And these traders are very, very substantial, high-net-worth individuals. Most of them are billionaires, not millionaires, because they do volumes of 500 million, 1 billion.… [T]hese are large investors, either very high-net-worth individuals or corporations who have got these types of liquid assets, and if they see that there's no risk or exposure to the principal amount in any way, then they will allow those funds to be put into trade. If they feel there's any risk to the principal, then they will not come – and these are highly sophisticated individuals who know this business and are not going to just come in there without understanding how the business works…." Tr. 275-77.

of millions of dollars to participate in this program by persuading investors to transfer funds to the UHF account. He would then use the account to demonstrate to the secret London Source that he was eligible to participate in the secret program.[5] Through this program he would generate huge profits that he would deploy to charitable work through UHF. The funds originally deposited, along with a certain portion of the profits, would be returned to the "investors." Tr. 438.

C. Respondent Prepares Letters for MS on Merrill Letterhead

As discussed below, Respondent did not question MS. Instead, over the next several months, he prepared six letters on Merrill letterhead, largely from the text MS provided, to convince third parties to deposit funds in the UHF account at Merrill.

1. The July 5, 2005 Letter of Recommendation

On July 4, 2005, MS e-mailed Respondent that he was in Europe and about to conclude a $300 million transaction and would "[o]bviously…bring these funds as cash or Bank Debentures into the UHF Account at Merrill." Tr. 374, 706; CX-42. In connection with this, MS requested that Respondent provide a reference letter on Merrill letterhead with Respondent's scanned signature. MS included the proposed text. Tr. 376, 704-07; CX-42. On July 7, 2005, Respondent finalized, signed and faxed a slightly revised version of the letter to MS.[6] CX-45. The letter, on Merrill letterhead and signed by Respondent, read as follows:

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[5] MS explained why he needed investors to deposit funds in the UHF account: "…those funds which are put by the investor remain in our account either in the form of US Treasury bonds or a major bank debenture against that. We just reserve those in favor of the trading bank… [which] gives a credit line either to their own trading department or to an outside trader to go ahead and do the trading. But the contract clearly specifies it is strictly for profit only…. So there's absolutely no risk whatsoever to the capital of the investor." Tr. 278-79.

[6] Respondent made minor revisions to the letter to reflect that UHF was *established* to finance international projects and was *capable of* handling hundreds of millions of dollars, rather than stating that it was *involved* in such projects. Respondent also stated that he was *confident* that *Merrill and UHF* can handle large financial transactions rather than *strongly recommending UHF* for handling such transactions. He also changed references from "we" to "I." CX-115, CX-41; Tr. 917-20.

> To Whom It May Concern:
>
> It is my pleasure to acknowledge that Universal Humanitarian Foundation (UHF) [is] a California registered, non-profit foundation, represented by its chairman and CEO, [MS]. [MS] is a valuable client of Merrill Lynch and is serviced by Mr. Andrew Quinn, CFP. The UHF account is established to finance international projects and is capable of handling hundreds of millions of dollars.
>
> [MS] is a man of high integrity, honesty, and excellent reputation. I am confident that Merrill Lynch and UHF can handle large financial transactions in cash or widely traded bank debentures issued by first class international banks.
>
> Please feel free to contact at the above phone and fax should you have any further questions.

CX-19, CX-115, RX-11.

Respondent did not verify the representations in MS's letter. He did not ask MS whether UHF had completed any projects. He testified, "I am frankly not interested if he is paying the teachers, paying the rent, [building] the building." Tr. 699-700. Respondent acknowledged that he did not know whether UHF could handle "large financial transactions." He relied solely on the fact that UHF held an account at Merrill in making this representation. Tr. 732. He did no investigation to substantiate that MS was a man of high integrity, honesty and reputation, but relied solely on his interactions with MS. Had he investigated, he would have learned that MS was subject to an IRS tax lien and a $122,000 judgment in favor of a bank. Tr. 728. Respondent also did not ask MS what he meant by "widely traded bank debentures" or "first class international banks." Tr. 732-34. Respondent believed that all his clients were valuable and were capable of handling hundreds of millions of dollars in their Merrill accounts, so he believed that it was accurate to make these assertions about the UHF account. Tr. 725-26, 913-14. Respondent did not know who received the letter and did not get any calls about it. Tr. 720.

2. The August 15, 2005 Letter

On July 14, 2005, about a week after Respondent sent MS the letter of recommendation referenced above, MS e-mailed Respondent that he was in the Ukraine meeting with "private investors" who had over $100 million in cash deposits at Deutsche Bank. MS said he expected "2 of them to invest in [UHF] with 100 Million USD Bank Guarantee of 1 year maturity issued in favor of [UHF]." MS also said that he had met with "high officials of the Government of Ukraine" who "need finance for their projects and I need money for my projects, which I can create thru trading done against Bank Guarantees issued by top financial institutions." CX-49.

Respondent claimed that when he received this e-mail, he did not give it much thought, because, as a new branch manager, he was very busy. Tr. 736-37, 865-66. He testified, "if [a hundred million dollar deposit] comes in, that would be great. But I've really got other things to work on…." Tr. 736. Respondent did not doubt or question anything in MS's e-mail. Tr. 738-39. He did not ask why a "bank guarantee" would be needed for an investment, or why there would be "investors" in a charitable foundation. Tr. 736. He testified, "I didn't drill down…because there is nothing for me to do as regards this e-mail in the context of my day…." Tr. 737.

MS continued to press Respondent for more letters on Merrill letterhead to induce large transfers of assets to the UHF account. On August 10 and 11, 2005, MS repeatedly e-mailed Respondent about "progress" with two unidentified "clients," who agreed to transfer $100 million and $200 million, respectively, to the UHF account at Merrill. MS said that these clients required a "Bank Safe Keeping Receipt to be issued by Merrill," and provided text for letters to be placed under Merrill letterhead. CX-53-55. Respondent inquired within Merrill about "bank safe keeping receipts," but the Merrill employee he consulted was unfamiliar with the term.

Tr. 762-64, 934-35; CX-57. Respondent was not concerned and did not mention the request to his supervisors; instead, he told MS that Merrill could not accommodate the request. As a result, on August 12, 2005, MS "decided to concentrate on cash transactions" and sent revised text for the letters to Respondent, who confirmed he would prepare them. Tr. 762-65, 935-36; CX-58-59.

Later the same day, MS instructed Respondent to prepare three letters, referring to transfers of up to $150 million, $200 million, and $300 million, respectively. CX-60-61. On August 17, 2005, MS requested a revision to the third letter to increase the maximum transfer to $500 million. Tr. 771-72; CX-62. On August 18, 2005, Respondent faxed and mailed three letters referencing maximum transfers from $100 million to $500 million.

Each letter read as follows[7]:

> Dear Chairman [MS]:
>
> Please be advised that
>
> 1. Subject to the receipt of a minimal principal amount of one hundred million US Dollars ($100,000,000) and a maximum principal amount of five hundred million US Dollars ($500,000,000) in the form of cash, which is good, clean, and cleared US dollars transferred by a major international bank by SWIFT to Merrill Lynch account of Universal Humanitarian Foundation (UHF).
>
> 2. Subject to the receipt of irrevocable instructions for you and your joint signatory partner to the UHF account, instructing Merrill Lynch that no funds can be moved or transferred for a period one year from this account.
>
> Merrill Lynch guarantees the safe return of the principal amount back to the Funding Bank, at the end of one year, free and clear of any liens or encumbrances of any kind.

CX-30b p. 129.

[7] Only the dollar amounts varied. The letters referenced minimums of $30 million to $100 million and maximums of $150 million to $500 million. CX-30b pp. 127-30.

Respondent did not inquire as to the meaning of "good, clean and cleared" or "a major international bank," nor did he speak to anyone at Merrill as to the logistics of a $500 million transfer of cash. Tr. 84, 93, 499-500. He testified at the hearing that he was comfortable with Merrill's guarantee of the safe return of hundreds of millions of dollars because Merrill would have to follow the irrevocable instructions prohibiting transfers for one year. Tr. 757.

3. The September 12, 2005 Letter

Despite the August letters, no money was wired to the UHF account. On September 7, 2005, however, MS sent Respondent an e-mail stating that "very high officials" of the Ukrainian Government had agreed to issue a $250 million bank guarantee "in favor of UHF." MS stated that he had "[t]raders who can draw a credit line and place the credit line into a safe bank guaranteed Trade Program, which will give enough money for financing [the Ukrainian Government projects] and [his] project of building hospitals in India." CX-63.

On September 8, 2005, MS told Respondent that a "Mr. [SK]" would deposit $40 million into the UHF account if Merrill guaranteed the return of funds after one year. CX-65. Respondent agreed to MS's request, stating, "If you would like to draft the text for Mr. [SK]…I could prepare the letter text and fax it to him." CX-66.

Later that day, MS told Respondent that "Dr. [SK]" would increase the deposit to $110 million, if he were added as a joint signatory on the UHF account to ensure that funds would not be removed from the account without his signature along with MS's. MS continued, "My authority will be to place the cash into US Treasuries and then place these US Treasuries into a bank guaranteed trading program (Fed approved) which will make a ton of money for Dr. [SK] and my foundation. This will be done by my sole signature." MS's e-mail also stated, "If you think 6% is too high, is it possible to pay at least 5% at the end of the year? I will try to convince

the investor to accept such a written assurance from Merrill Lynch…." MS included the text of a draft letter for Respondent's signature. CX-67.

On September 12, 2005, Respondent advised, "[t]here is nothing in the market that is "risk free" that would provide the returns your [client] is after…. We could use some floating rate and ultra short term bond funds to get yields in the 4.5 – 5.0 range but the NAV will fluctuate and may drop if rates raise faster than assets mature in the fund." CX-68 p. 1.

Later that day, MS sent Respondent text for a letter from Merrill to SK. CX-74. On September 20, 2005, Respondent faxed a modified version of the letter,[8] which he placed on Merrill letterhead and signed, as follows:

> Dear Dr. [SK]:
>
> I have been informed by [MS] that you have been appointed as a Director of [UHF], irrevocably for a period of 2 years. I have provided paperwork with joint signatory authority on a new account of UHF identified as account number 205-04371. This account will be managed at the Merrill Lynch Ontario branch by me personally.
>
> I understand that you intend to transfer a total cash deposit of One Hundred Ten Million US Dollars ($110,000,000.00) from major international banks into this new account of UHF. Merrill Lynch has an existing relationship with UHF and looks forward to expanding that relationship to include these and other funds which may become available.
>
> The account opening documents provided for your signature identify yourself and Chairman [MS] as joint signers on the account for funds transfer and withdrawal. No funds will be moved or transferred without the joint signatories of both of you. Investment direction for this account will be provided by the sole signature of [MS]. Funds will be invested in US Treasuries.
>
> Merrill Lynch Guarantees the safe return of the principal amount back to the Funding Bank, at the end of one year, free and clear of any liens and encumbrances except any outstanding fee owed to Merrill. Funds can be transferred with proper written instructions subject to US banking regulations at

[8] Respondent made minor revisions to the letter to delete the phrases "act as Fiduciary," "guarantees with full corporate responsibility," and "non-depletion, interesting bearing account" and to replace references to "we" with "I." CX-67, CX-30b p. 70.

> that time. Fees related to this account will be invoiced quarterly for payment under the terms of the MLUA fee agreement provided for your signature.
>
> Thank you for considering Merrill Lynch for support of the many good things UHF is working toward.

CX-30b at p. 70; Tr. 775-76.

No funds were transferred to the UHF account, and no one contacted Respondent in response to the September 12, 2005 letter.

4. The September 28, 2005 Letter

In an attempt to address "investor" concerns, on September 19, 2005, Respondent sent MS an e-mail attaching a blank "private client trust" form that purportedly would provide "the protection of funds so important to our strategy." CX-85. On September 20, 2005, Respondent e-mailed this form to Max without any background information or explanation of its proposed use. After checking with the Trust Department, Max told Respondent that the trust was not something that Merrill could do, and referred Respondent to the Trust Department for further detail. RX-19; Tr. 176-77.

On September 22, 2005, MS told Respondent that he had "lined up two big investors," an "Australian" and a "German." CX-90. The Australian wanted to invest $200 million and receive a 6% fee for a total return of $212 million to be paid at the end of one year. Id.

The next day, MS sent Respondent the following e-mail:

> For the Australian client with the 200 Million USD, again the strategy will be to keep the funds in ML money market account for 30 days, enough time to get an official approval from the authorities. Because of Katrina…Feds are trying to raise lots money thru [sic] the offshore Trading Programs. Non-Profit Foundations are given a priority for approval and they grab a big chunk of the trade profits to finance these huge expenditures….
>
> I know a lot of the funds are not coming from the taxpayers. They are being generated from Fed approved Trading programs. The whole Marshal [sic] Plan of rebuilding Europe was funded by these type [sic] of Trading Programs, which are

> hush and hush and are not acknowledged publicly.... As soon as the Trading starts offshore, I will send to UHF account at least 25 Million USD to cover the target of 215 Million and I will stick to investing only in US Treasuries, so when the time comes to liquidate, we have no problem meeting our commitment to the client.

CX-94 at p. 1.

On September 25, 2005, MS reported to Respondent that he was making "excellent progress." He was now working with four clients, an Australian, a German, a Singaporean, and a Spaniard. CX-95. He said that the Spaniard was ready to invest €200 million as soon as Respondent sent the text of the letter MS requested, including Merrill's commitment to a 6% return.[9] Id. With respect to his trading plan, MS informed Respondent:

> As soon as we receive funds into UHF account, I will convert the Euros into US Dollars. I will purchase hedge insurance thru [sic] Merrill Lynch to make sure that I am able to convert the US Dollars back into Euros at the end of one year at a fixed agreed rate. I will then purchase US Treasuries and get trading done offshore against US Treasuries.

CX-95.

MS told Respondent that the Spanish investor was "moving very fast" and that he was "ready to move" €200 million. CX-95. MS urged Respondent to act quickly to approve the letter, the text of which he attached. Id. The next morning, Respondent e-mailed MS that Merrill could not accept Euro currency, but he would look into Merrill tools to hedge Euros. Respondent also said that while it would be difficult to support a guaranteed return of 6% without risking principal, a 4% return could be supported. Respondent said he would call MS to discuss ideas and pending transfers. CX-96-97.

After minor revisions, on September 28, 2007, Respondent signed and sent the final version of the letter by courier, e-mail and fax to MS and the Spanish investor's representative at

[9] MS testified that Respondent said it was "very easy" to achieve a 6% return by trading in Treasuries and that he could get up to an 8% return. Tr. 345-47, 423-24. At the hearing, Respondent denied making this statement. Tr. 818.

Banco Santander. Tr. 424-27, CX-98, CX-30b p. 76-77. This time, the letter was addressed to Banco Santander's purported "Head of Foreign Department" and was signed by Respondent, and read as follows:

> Please be advised that:
>
> At the request of our valued customer (UHF) of 2656 Camino Del Sol, Fullerton, California 92663 USA, and for their joint venture account with [DS], under the Account Name: [UHF] – D, for the implementation of their projects, we hereby confirm our readiness to receive by Swift from you for Account No. 205-04373 from your client's account named above, the sum of €200 Million Euros (Two Hundred Million Euros) of good, clean and cleared funds.
>
> We confirm that we have received irrevocable instructions from both of our Account signatories, namely [MS], Chairman of UHF and [DS], Director of UHF, joint signatory partner, that no funds will be removed or transferred from this account.… Payment of banking fees and charges owed to Merrill Lynch for their services and investments made to purchase US Treasuries or top international Bank Debentures, will be authorized by [MS].
>
> Merrill Lynch guarantees if the funds are held for one year, the safe return of the sum of Two Hundred Million Euros plus 6% to cover your interest, fees and banking charges, for a total amount of Two Hundred & Twelve Million Euros (€212 Million Euros) to be wire transferred to your bank.

CX-30b p. 77, CX-105-107; Tr. 809-10.

Respondent testified that he did not know and had never spoken with DS,[10] DU, or anyone at Banco Santander. Tr. 819-22. Again, Respondent was not concerned about MS's statement that he would move the funds to an offshore trading program; he did not focus on or recall that. Tr. 839-41. He also was not troubled by the concept of Merrill's guarantee to return the funds after a year. He claimed, however, that he told MS that Merrill could not provide a guarantee of a 6% return. He said the letter referred to Euros and a guaranteed 6% return by mistake. Tr. 811, 1025.

[10] Although MS referred to the investor as "Spanish," MS testified at the hearing that he was a Liberian diplomat "operating from Paris and Spain." Tr. 370-71.

D. Merrill Discovers Letters and Terminates Respondent

Banco Santander never transferred any funds to UHF's Merrill account. Tr. 427, 848. However, on October 3, 2005, MS told Respondent about a meeting scheduled at a San Diego Merrill office to "salvage" the transaction.[11] CX-112-113; Tr. 428, 849-50. On October 4, 2005, MS and others met with Gary Graessle, a senior Merrill employee who had experience in Merrill's international law compliance department in London. Tr. 30-33.

During the meeting, MS recounted his plan to put €200 million into a "federal-approved trading program" and that a department within the US Treasury would guarantee trading profits. Tr. 34-35, 430-31. Graessle stated that Merrill was not interested; he did not believe that the plan was legitimate. Tr. 36-38, 349-50, 430-31; CX-9. Then, MS's colleague said that he was working on another deal with a Brazilian company using a "prime bank guarantee" as collateral, terminology that Graessle knew was used in frauds. Tr. 38-39. Graessle terminated the meeting and elevated his concerns within Merrill, and Respondent's supervisors Calderon and Max were notified. Tr. 39-40. Calderon's first reaction was that the letters had to be forged because this was not the kind of thing that Respondent would do. Tr. 491-92, 507. Calderon then confronted Respondent, who admitted he had prepared and signed the letters. Tr. 507-08, 856. Respondent took part in a conference call with Max, Calderon, and a member of the Legal Department in New York, during which he was questioned further. Tr. 857-58. He then flew to New York with Max to meet with Merrill's Legal Department. After this meeting, Respondent was terminated. Tr. 104-05, 858-59. At no time during these interactions did Respondent claim that he had obtained approvals for the letters. Tr. 103, 105, 857-58.

[11] In an e-mail at the time, Respondent told MS that this was "excellent news." CX-113. However, at the hearing, Respondent said he told MS "they are not going to be able to help you." Tr. 850.

E. Respondent's Defenses at the Hearing

At the hearing, Respondent contested Enforcement's charges, claiming that either Calderon or Max had approved each of the letters, except for the language guaranteeing a 6% return, which he included by mistake.

1. Respondent's Claim that Merrill Supervisors Approved the Letters

It is undisputed that Merrill policies prohibited "letters or information that inflate the value of a client's holdings or contain misrepresentations or exaggerations regarding a client's assets, status, or relationship with the firm." CX-37 pp. 2, 4. These polices also prohibit any written or electronic communication with false or misleading statements, promises of specific results, or exaggerated or unwarranted claims. CX-35 p. 1. Merrill's procedures required a review of correspondence to ensure that these policies were not violated.

Merrill required supervisors to review a sampling of their representatives' written correspondence. Merrill did not detail the procedures for review, but allowed the branch supervisors to determine the timing and scope of their review and to impose more stringent requirements if they wanted to do so. Tr. 235-36. Branch supervisors were also required to review a sampling of 5-10% of all incoming and outgoing e-mails each month.[12] Tr. 237, 484-86; CX-34.

For the Brea Complex, Max required all outgoing written correspondence, including faxes, to be reviewed and approved by a member of the management team before it was sent out. Such review would be evidenced by the approving manager's initials or signature, and a copy of

[12] Merrill's tracking system for e-mail review shows that at some point Calderon opened an August 11, 2005 e-mail between Respondent and MS which included draft text for the August 15, 2005 letter. Tr. 604-05; CX-6. Calderon does not recall reviewing this e-mail. Tr. 581-82, 606; CX-6. There were also a handful of e-mails between Respondent and MS that were opened by other unidentified Merrill supervisors. CX-6. These records were insufficient to establish that Calderon reviewed and approved MS's e-mails, particularly because the e-mail tracking system was not used to approve communications. Moreover, there was insufficient evidence to establish that e-mails were reviewed before the issues in this case came to light, or that Calderon read the offending language, which appeared in the latter half of the e-mail.

the approved letter would be retained in the correspondence file.[13] Tr. 78-79, 202-03, 478, 524-27. Time-sensitive items could be e-mailed or faxed to the branch office for approval. Tr. 79-80, 245.

When Respondent was a registered representative in the Brea office, he knew that a supervisor had to review his correspondence before he sent it. Tr. 685. During his on-the-record interview ("OTR"), Respondent acknowledged that: "They need [ed] to see [correspondence] before it was transmitted. That was my understanding." CX-15 p. 11.

Calderon, the administrative manager, was responsible for reviewing Respondent's correspondence. Tr. 523, 687. If he was not available, Max, the overall supervisor, or Dena Schwartz, the Service Manager, could review and approve it. Tr. 67-68, 80-81, 109, 113-14. At least one manager was always available in the Brea office for this purpose. Tr. 476.

When Respondent became a Resident Manager and moved to the Ontario office, he also required pre-approval of all correspondence from the staff that he supervised. Tr. 875. Because Calderon was no longer in the same office, the logistics of reviewing Respondent's own correspondence were now different. Respondent knew that he could not review his own correspondence. Tr. 481, 685-87. Respondent claimed that he would read his letters over the phone to Calderon, or possibly Max, and receive oral approval. Then, Respondent would leave the correspondence in a folder in his office, and Calderon would review and initial the letters when he was there.[14] Tr. 687, 824, 873-74.

[13] Calderon approved letters with an R at the bottom corner of the document. Tr. 480.

[14] The Ontario office would have maintained the approved correspondence. Tr. 81. On average, that office generated 20-40 letters requiring review per month. Tr. 483.

At the hearing, Respondent maintained that either Max or Calderon -- he could not recall which one -- would have reviewed and approved each of the letters requested by MS. Tr. 704-05, 711. However, for a number of reasons, the Panel did not find Respondent's claim credible.

First, Respondent's claim is contrary to his prior written representations, testimony, and conduct. When Calderon and Max confronted him just prior to his termination, and when he met with the Legal Department in New York, Respondent never claimed that the letters were approved. Tr. 857-59. Moreover, in his December 2005 Rule 8210 response, Respondent told Staff that he did not receive supervisory approvals. Respondent said the same thing in his May 2006 OTR. CX-13 p. 2, CX-15 p. 43.

Second, Max and Calderon credibly testified that they did not review or approve the letters, and there are no documents indicating that they did. Tr. 89-90, 92-93, 97-98, 103, 493-96, 498-503, 600-01. The correspondence review file for the Ontario office contained no such approvals. Tr. 712. Moreover, Calderon only visited the office sporadically, once or twice a month, making timely on-site approvals unlikely. Tr. 476-77, 879.

Third, if Respondent wanted to obtain approval for the letters, instead of calling his supervisors and reading the letters to them, Respondent could have easily faxed or e-mailed the proposed letters to them, along with MS's implausible descriptions of his strategy. Respondent claimed that he did not send the drafts by e-mail because Calderon and Max discouraged the use of e-mails. Tr. 245-47, 710. However, the Panel did not find this credible because Respondent did not hesitate to e-mail Calderon and Max with regard to discrete issues such as the use of a trust and the meaning of the term SWIFT, which were answered promptly without complaint. Moreover, Max and Calderon both credibly testified that either e-mail or fax was an acceptable means for obtaining necessary approvals. Tr. 66, 80, 482. Max and Calderon also credibly

refuted Respondent's claim of oral approval. Max testified that he had never given verbal approval for a letter, and Calderon testified that while Respondent could have read proposed text to him over the phone, he would have required Respondent to send him the proposed text for approval. Tr. 122, 530.

Fourth, the far-fetched nature of the letters themselves, particularly with respect to the guarantees, which aggregated to more than $1 billion, lends credibility to Max's and Calderon's testimony that they would not have approved them. Indeed, it is hard to imagine any responsible supervisor approving these letters. Specifically, with respect to the July Letter, both Max and Calderon credibly testified that, as a general matter, letters expressing opinions, such as "[MS] is a man of high integrity, honesty and excellent reputation," or "UHF account is established to finance international projects and is capable of handling hundreds of millions of dollars" would not have been permitted. Tr. 90-91, 186, 494-95, 598. Consistent with their testimony, Merrill's procedures prohibit exaggeration of a client's assets, status, or relationship with the firm. CX-37 pp. 2, 4. Moreover, as Max and Calderon confirmed, subjective or ambiguous terms such as "widely traded bank debentures," "first class bank," "good clean and cleared funds," "SWIFT," and "irrevocable instructions" would not have been permitted. Tr. 90, 93-94, 494-97, 504-05. In addition, it is unlikely that Calderon and Max would have approved the representation that "Merrill Lynch guarantees the safe return of the principal amount back to the Funding Bank at the end of one year" because it would have been obvious to them that Merrill could not provide such a guarantee. Tr. 94, 197.

2. Respondent's Claim that He Inadvertently Guaranteed a 6% Return

Respondent conceded that a Merrill letter guaranteeing a 6% return would not have been acceptable because promises of specific results were prohibited by Merrill's written supervisory

procedures. CX 35 p. 1; Tr. 94, 99, 196-97, 505, 829-30. In fact, when MS first raised the subject, Respondent advised:

> I don't think I will be successful to include the words "ML Guarantees" but we could use phrases like:
>
> > ML will invest the funds with an expected return of $xxxx
> > Investments will be selected to provide an expected return of $xxx
> > Invest in a portfolio which has historically produced returns of $xxx

CX-91.

Respondent also told MS:

> Knowing that we are looking to invest in Treasury and other safe investments, it is difficult to support a guarantee return of 6%. This is the same issue creating delay on the other two letters.

CX-96.

Respondent testified that he told MS the guarantee of a 6% return was not possible, and that it was included in the letters by mistake. Tr. 811-14. However, the reference to a 6% return appeared in numerous e-mails. On September 25, 2005, MS e-mailed a draft of the Banco Santander letter that included the guarantee of a 6% return. CX-95 pp. 2-3. On September 27, 2005, Respondent returned MS's draft letter with the guarantee of a 6% return included. CX-98. On the same day, MS told Respondent that Banco Santander accepted the language of the letter, which included the guarantee of a 6% return. CX-100, Tr. 843-45. Again, on September 28, 2006, MS sent Respondent draft correspondence containing the guarantee of a 6% return. Later the same day, Respondent prepared and signed three letters all containing the same guarantee. CX-30b p. 77; Tr. 847-48. On October 3, 2005, MS's e-mail to Respondent continued to refer to a guarantee of a 6% return. CX-113.

Because the guarantee of a 6% return is referenced in numerous one-page documents seen or signed by Respondent, the Panel did not find it credible that he inadvertently included it

in the letters. But even if it were inadvertent, his failure to note and delete the language was extremely reckless.[15]

IV. Violation

Rule 2110 requires members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade."[16] The Rule articulates broad ethical principles to promote the "professionalization of the securities industry." Timothy L. Burkes, 51 S.E.C. 356 (1993), aff'd, 29 F.3d 630 (9th Cir. 1994); Dep't of Enforcement v. Shvarts, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000). Rule 2110 applies to all business-related misconduct. The focus is "whether the misconduct reflects on an associated person's ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public." Dep't of Enforcement v. Davenport, No. C05010017, 2003 NASD Discip. LEXIS 4, at *9 (NAC May 7, 2003).

Here, over the course of three months, Respondent prepared, signed, and sent six letters on Merrill letterhead that vouched for a customer, touted an implausible offshore trading scheme, and guaranteed a return of funds, and in some cases, a 6% return. The letters exposed Merrill to a potential liability of more than $1 billion and could easily have misled the recipients into believing that MS's scheme had some validity. Respondent did not disclose MS's e-mails or the text of the letters to his supervisors, and Respondent failed to submit any of the letters for required supervisory approval, which would have been denied.

Customer letters and associated e-mails that contain language such as that used here should raise numerous red flags of possible fraud for even the most inexperienced broker.

[15] Moreover, if Respondent had faxed, or even read letters containing the 6% guarantee to his supervisors, it is not credible that they would have approved them.

[16] Rule 0115 extends the obligations of Conduct Rule 2110 to associated persons, as well as members.

Respondent, who had vast experience in international transactions involving hundreds of millions of dollars, should certainly have known better than to comply with MS's requests. Yet in his testimony, Respondent repeatedly claimed that he did not read or notice the alarming details provided by MS as to the "secret offshore trading program" that would generate guaranteed profits of 15-25% per week, or the portions of the letters guaranteeing a return of assets exceeding $1 billion, along with a 6% guaranteed return. At best, Respondent's conduct was reckless.

Respondent also improperly blamed Merrill, claiming that Merrill did not have adequate correspondence review procedures and did not provide Respondent with adequate training as a new supervisor. However, Respondent was not acting in a supervisory capacity with respect to the letters in question, and he knew that he needed prior approval to send them, but did not get it.

In addition, Respondent was not forthcoming with his supervisors. It would have been easy for him to forward MS's e-mails and the proposed draft text that he wished to sign on Merrill's behalf to his supervisors. Yet the few e-mails that he did send his supervisors were on narrow issues that did not give them a picture of MS's far-fetched scheme, or alert them to Merrill's potential exposure.

For these reasons, the Hearing Panel finds that Respondent acted unethically and violated Rule 2110.

V. Sanctions

There are no directly applicable FINRA Sanction Guidelines ("Guidelines"), but the Panel concludes that the Sanction Guidelines for falsification of documents provide a helpful reference. For falsification of documents, the Guidelines recommend a fine of $5,000 to $100,000 and a suspension of up to two years or, in egregious cases, a bar. Guidelines at p. 39

(2007 ed.).[17] Enforcement argues that Respondent's misconduct was egregious and that he should be barred.

In determining appropriate sanctions for the falsification of documents, the Guidelines direct the Adjudicator to consider the nature of the falsified documents and whether the respondent had a good-faith, but mistaken belief of express or implied authority. Here, the unauthorized documents were significant because, among other things, they gave the aura of credibility to an implausible and possibly fraudulent scheme, which could have misled the recipients and exposed Merrill to a potential liability of over $1 billion. Moreover, Respondent had no good-faith but mistaken belief that he had authority to sign the letters, because he knew that he needed prior supervisory approval and but did not obtain it.

In addition, Respondent's misconduct was not an isolated incident. It involved six letters sent over three and a half months, during which time he received numerous e-mails that should have raised red flags. Respondent has not acknowledged his wrongdoing. Instead, he blamed Merrill's supervisory procedures, claimed to be a model employee, and offered testimony at the hearing that the Panel found not to be credible.

The absence of actual customer harm is not mitigating, given the serious risk of harm in this case. After weighing the evidence, the Panel finds that Respondent's conduct was egregious and warrants a bar.

VI. Conclusion

Respondent is barred from associating with any FINRA member in any capacity for sending correspondence on firm letterhead that contained misleading and unwarranted statements

[17] http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf.

and exposed his employer to liability without his employer's approval, in violation of Rule 2110.[18]

The bar shall become effective immediately if this Hearing Panel Decision becomes the final disciplinary action of FINRA.

HEARING PANEL

_____

By: Sara Nelson Bloom
Hearing Officer

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Sylvia M. Scott, Esq. *(via facsimile and first-class mail)*
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David R. Sonnenberg, Esq. *(via electronic and first-class mail)*
Mark P. Dauer, Esq. *(via electronic and first-class mail)*

[18] The Hearing Panel has considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views expressed herein.