

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ASHIK AKBERALI KAPASI
(CRD No. 4259968),

Respondent.

Disciplinary Proceeding
No. 2011028003001

Hearing Officer—DRS

HEARING PANEL DECISION

May 27, 2014

Respondent is barred from associating with any FINRA member firm in any capacity for providing a false response to a request for information, in violation of FINRA Rules 8210 and 2010, and for failing to respond to requests for information, in violation of FINRA Rules 8210 and 2010. Respondent is also ordered to pay hearing costs. In light of the bars, no further sanctions are imposed for Respondent's borrowing of funds from customers, in violation of NASD Rule 2370 and FINRA Rule 2010.

Appearances

For the Department of Enforcement, Complainant, Gary Carleton, Esq., and Michael M. Smith, Esq., Rockville, Maryland.

For Ashik Akberali Kapasi, Respondent, *pro se*.

DECISION

I. Introduction

Respondent Ashik Akberali Kapasi borrowed \$6,000 from two customers, an elderly married couple, provided false information to FINRA staff regarding the loan, and failed to respond to FINRA staff's Rule 8210 requests for information regarding the loan and a possible undisclosed business activity. Based on this conduct, the Department of Enforcement filed a

complaint charging Kapasi with violating NASD Rule 2370,¹ and FINRA Rules 8210² and 2010.³ Kapasi filed an answer, admitting all but two allegations in the complaint. Thereafter, Enforcement moved for summary disposition as to liability and sanctions on each cause of action and sought to bar Kapasi from associating with any FINRA member firm. In response, Kapasi conceded that there were no material facts in dispute, confirmed that he did not contest liability, but requested a hearing on sanctions to avoid a bar. The Hearing Panel granted the motion as to liability on all causes of action, but denied the motion as to sanctions, explaining that in determining sanctions, it would benefit from a fuller record developed at a hearing.⁴

A hearing limited to sanctions was held on February 26, 2014, in Houston, Texas.⁵ Enforcement sought a bar for Kapasi's misconduct, and Kapasi sought a lesser sanction based on his interpretation of several settled disciplinary actions in which sanctions of less than a bar were imposed, and based on certain circumstances he viewed as mitigative. The Hearing Panel rejected Kapasi's arguments and barred him from associating with any member firm in any capacity.

¹ NASD Rule 2370 imposes conditions on when an associated person may borrow from customers, and expressly prohibits such borrowing except under very limited circumstances.

² FINRA Rule 8210 requires FINRA members and their associated persons to cooperate with FINRA investigations by providing information when requested by FINRA staff.

³ FINRA Rule 2010 requires FINRA members and their associated persons to observe high standards of commercial honor and just and equitable principles of trade in connection with the conduct of their business.

⁴ See Order Granting, in Part, Motion for Summary Disposition (Jan. 7, 2014) and Supplemental Summary Disposition Order (Feb. 4, 2014).

⁵ The Hearing Panel consisted of a Hearing Officer and a current member of FINRA's District 6 Committee and a current member of FINRA's District 5 Committee.

II. Findings of Fact

A. Ashik Akberali Kapasi

Kapasi entered the securities industry in May 2001.⁶ From July 2004 to May 2011, Kapasi was registered with Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill Lynch” or “Firm”) as a General Securities Representative. Merrill Lynch discharged Kapasi for “engaging in outside business activities without the knowledge or consent of Merrill Lynch.”⁷ Kapasi was then registered in that same capacity with another FINRA member firm from August 2011 until February 27, 2013.⁸ Kapasi has not thereafter been registered with a FINRA member firm.⁹

B. Kapasi Borrowed \$6,000 From Customers HM and GM

HM and GM, a retired,¹⁰ married couple in their 80s, had been Merrill Lynch customers since July 2004.¹¹ Kapasi was the registered representative for their joint account from July 2004 until his termination from Merrill Lynch.¹² HM and GM relied on Kapasi for investment advice.¹³

⁶ Compl. ¶ 3; Ans. ¶ 3.

⁷ Compl. ¶ 3; Ans. ¶ 3. In his Answer, Kapasi denied that he was engaged in outside business activities without the consent of Merrill Lynch, but did not deny that he was terminated for that reason. Ans. ¶ 3. Whether Kapasi was engaged in outside business activities without the consent of Merrill Lynch was not a fact material to the summary disposition motion.

⁸ Compl. ¶ 3; Ans. ¶ 3.

⁹ Compl. ¶ 3; Ans. ¶ 3; CX-1, at 5. Nevertheless, Kapasi remains subject to FINRA’s jurisdiction for the purposes of this proceeding, pursuant to Article V, Section 4 of FINRA’s By-Laws, because: (1) the complaint was filed within two years after the effective date of termination of his registration with a FINRA member firm, namely February 27, 2013; and (2) the complaint charges him with misconduct committed while he was registered with a FINRA member, and with responding falsely and failing to respond to FINRA requests for information during the two-year period after the date upon which he ceased to be registered or associated with a FINRA member. Compl. ¶ 4; Ans. ¶ 4.

¹⁰ Tr. (Kapasi) at 133.

¹¹ Compl. ¶ 8; Ans. ¶ 8.

¹² Compl. ¶ 8; Ans. ¶ 8.

¹³ Tr. (Kapasi) at 135.

In December 2009, Kapasi borrowed \$6,000 from HM and GM.¹⁴ Kapasi testified that he needed funds to travel to Africa for a business trip¹⁵ and was experiencing financial difficulties.¹⁶ Further, he testified that as a result, while on a client review meeting with HM and GM, he “was kind of a little bit stressed out,” and HM and GM asked what was troubling him. Kapasi also testified that he explained to them that he was experiencing financial difficulties, and they asked if they could help him. This led to a discussion about a loan during which Kapasi told them he had a tanzanite stone that could serve as collateral.¹⁷ HM and GM then agreed to loan \$6,000 to Kapasi. In exchange, Kapasi provided them with the tanzanite stone¹⁸ and a hand-written contract setting forth the estimated value of the stone and the terms of the loan.¹⁹

HM provided the funds to Kapasi from the joint brokerage account at Merrill Lynch. HM did not pay the funds to Kapasi directly from that account. Instead, Kapasi testified that he instructed HM to write a check to himself from the joint brokerage account. According to Kapasi, HM then deposited the check into his (i.e. HM’s) personal checking account. After the check cleared, again at Kapasi’s direction, HM wrote a check to Kapasi from that checking account, which Kapasi then cashed.²⁰ Kapasi structured the arrangement this way to avoid detection by Merrill Lynch.²¹

¹⁴ Compl. ¶ 9; Ans. ¶ 9; Tr. (Kapasi) at 135.

¹⁵ Tr. (Kapasi) at 139.

¹⁶ Tr. (Kapasi) at 137.

¹⁷ Tr. (Kapasi) at 137–38, 151–52. Kapasi’s testimony that he needed funds to travel to Africa, was experiencing financial difficulties, and was “a little bit stressed out,” was uncorroborated and the Hearing Panel makes no findings regarding these assertions.

¹⁸ Tr. (Kapasi) at 160–61.

¹⁹ Compl. ¶ 10; Ans. ¶ 10. Kapasi testified that the loan terms were 90 days at five percent interest. Tr. (Kapasi) at 137–38, 158. *See also* Ans. ¶ 13 (stating that the period of the loan was 90 days). This testimony was uncorroborated. The Hearing Panel makes no findings regarding the exact terms of the loan because they are not material to the Hearing Panel’s decision.

²⁰ Tr. (Kapasi) at 151–53. The complaint alleged a slightly different version: at Kapasi’s instruction, HM cashed the check he had drawn on the Merrill Lynch account and gave the cash directly to Kapasi. In his answer, Kapasi

Kapasi did not seek approval from Merrill Lynch for the loan,²² and the Firm did not approve it.²³ Additionally, the Firm had written procedures prohibiting its registered representatives from borrowing funds from customers.²⁴ At the time he borrowed the funds, Kapasi knew that he was not permitted to do so.²⁵ Specifically, he was aware that the Firm prohibited borrowing funds from customers²⁶ and that FINRA’s rules prohibited it as well.²⁷ Nevertheless, he claimed that he borrowed the funds because, due to his financial situation, he was “very much stressed at the time.”²⁸

Kapasi repaid HM and GM the entire loan amount of \$6,000 and, upon repayment, took back from them the hand-written contract and the tanzanite stone.²⁹ Immediately afterward, he

admitted this allegation. Compl. ¶ 9; Ans. ¶ 9; CX-8. The record is silent as to why Kapasi admitted the allegation but then testified differently at the hearing. In any event, the difference in the versions is not material to the Hearing Panel’s determination of sanctions because, either way, to avoid detection, Kapasi instructed HM to write a check from the Merrill Lynch account payable to himself, rather than to Kapasi. Accordingly, the Hearing Panel makes no finding as to which method Kapasi directed HM to use.

²¹ Tr. (Kapasi) at 152, 154.

²² Compl. ¶ 11; Ans. ¶ 11.

²³ Compl. ¶ 12; Ans. ¶ 12.

²⁴ Compl. ¶ 7; Ans. ¶ 7; CX-11, at 5. These policies had been in effect since December 2008, CX-11, at 5, and were in effect in December 2009. Tr. (Aylward) at 47. (FINRA examiner Christina Aylward became the lead examiner on the investigation, beginning in November 2012, when the original examiner left FINRA. Tr. (Aylward) at 32–33, 35). The procedures permitted the Firm to grant limited exceptions to this prohibition in the case of loans to employees’ family members. Compl. ¶ 7; Ans. ¶ 7; CX-11, at 5. However, HM and GM were not relatives of Kapasi, Compl. ¶ 11; Ans. ¶ 11, and therefore the loan would not have satisfied the Firm’s limited exception. Compl. ¶ 11; Ans. ¶ 11.

²⁵ Tr. (Kapasi) at 138.

²⁶ Tr. (Kapasi) at 168.

²⁷ Tr. (Kapasi) at 169.

²⁸ Tr. (Kapasi) at 139. Because of the lack of corroboration, the Hearing Panel makes no finding as to Kapasi’s financial situation or whether he was “very much stressed at the time.” See footnote 17, above.

²⁹ Compl. ¶¶ 13–14; Ans. ¶¶ 13–14. The complaint alleged that Kapasi repaid the loan, but not by the date set forth in the contract. Comp. ¶ 13. In his answer, Kapasi denied this allegation and stated that he repaid the loan, with interest, before the date set forth in the contract. Ans. ¶ 13. Whether Kapasi repaid the loan before or after the due date was not a fact material to the summary disposition motion. According to Kapasi, he repaid the loan within 60 days. Tr. (Kapasi) at 142. The actual timing of the repayment was precipitated by a call from the customers’ son to Kapasi during which the son threatened to inform the Firm about the existence of the loan if Kapasi did not repay it immediately. Tr. (Kapasi) at 166–68.

destroyed the contract.³⁰ Later, when Merrill Lynch conducted an investigation, Kapasi lied to the Firm and said he had not borrowed funds from any customers.³¹

C. Kapasi's False Response to a Rule 8210 Request for Information

The FINRA staff's investigation began as a result of a Form U5 Merrill Lynch filed on Kapasi's behalf, indicating that Merrill Lynch had terminated him for engaging in an outside business activity involving the sale of tanzanite stones without the knowledge and consent of the Firm.³² During the early stages of its investigation, the staff learned from Merrill Lynch that Kapasi had borrowed \$6,000 from HM and GM.³³ Thereafter in July 2011, the staff sent Kapasi a request for information and documents relating to his alleged outside business activities and related loans.³⁴ In August 2011, Kapasi responded in full and denied borrowing any funds from clients.³⁵

Nine months later, on May 3, 2012, pursuant to Rule 8210, FINRA sent Kapasi a letter requesting that he: (1) describe the terms of any loans he received from any Merrill Lynch client (not limited to loans related to outside business activities); (2) produce documents relating or referring to the loans; (3) describe all sales of tanzanite stones to any persons; (4) produce

³⁰ Tr. (Kapasi) at 161.

³¹ Tr. (Kapasi) at 168–69; 178.

³² Tr. (Aylward) at 36. *See also* CX-3 and CX-4 (the Firm's response to a Rule 8210 request stating that the Firm had terminated Kapasi based on the results of its investigation that led it to conclude that he was engaged in an outside business activity involving the solicitation and sale of tanzanite stones to both clients and non-clients of Merrill Lynch).

³³ CX-3, at 2. Tr. (Aylward) at 43.

³⁴ CX-12.

³⁵ CX-13, at 4. The complaint did not charge Kapasi with misconduct in connection with these responses. Nevertheless, as explained below, in assessing sanctions, it is appropriate to consider the totality of a respondent's cooperation in connection with an investigation. Therefore, the Hearing Panel took into account Kapasi's responses to the July 2011 request (as well as his responses to later requests).

documents relating or referring to such sales; and (5) state whether he intended to continue to sell tanzanite stones.³⁶

Kapasi responded in writing on May 30, 2012. He provided some information and documents in response to the request that he describe all sales of tanzanite stones to any person and to the request that he state if he intended to continue selling tanzanite stones. Further, Kapasi stated that he “did not receive any loans from any client of Merrill Lynch,” and that he “did not enter into any loan agreements what so ever [*sic*] with any clients.”³⁷ These two statements were false because, in fact, Kapasi had borrowed \$6,000 from customers HM and GM in December 2009,³⁸ and had entered into a written loan agreement with them.³⁹ Kapasi knew he was deceiving FINRA in his response but did so because he did not want FINRA or the Firm to know that he had broken a rule.⁴⁰

D. Kapasi’s Failure to Respond to Requests for Information and Documents

After receiving Kapasi’s partial response to the May 3, 2012 request, the staff sent him Rule 8210 requests in July and December 2012 for additional information and documents regarding his alleged outside business activity. He partially responded to both requests and provided copies of his bank account statements.⁴¹ The bank account statements reflected a number of non-payroll related deposits of several thousand dollars each.⁴² The staff considered

³⁶ Compl. ¶ 17; Ans. ¶ 17; CX-14.

³⁷ Compl. ¶ 18; Ans. ¶ 18; CX-15, at 2.

³⁸ Compl. ¶ 19; Ans. ¶ 19.

³⁹ Compl. ¶ 10; Ans. ¶ 10.

⁴⁰ Tr. (Kapasi) at 173–75.

⁴¹ In response to the May 3, 2012 request, Kapasi did not provide the specifics of his sales of tanzanite stones. Consequently, the staff sent him another Rule 8210 request on July 17, 2012, seeking that information and also requesting that he inform the staff if he had disclosed to the Firm his intention to continue selling stones. CX-18. Kapasi responded on July 31, 2012, CX-20, but again, his response was incomplete. As Kapasi later admitted at the hearing, his response did not disclose that he had sold tanzanite stones to certain family members, including a sale that partially funded his repayment of the loan to HM and GM. Tr. (Kapasi) at 144–49. On December 19, 2012, the

these deposits a possible red flag of outside business activities and borrowing from customers.⁴³

Accordingly, the staff sent Kapasi two additional requests for information and documents in February 2013. But as detailed below, Kapasi did not respond to the additional February requests, or to two follow-up requests seeking responses to those February requests.

i. The February 2013 Requests

On February 13, 2013, pursuant to Rule 8210, FINRA staff requested that Kapasi provide documents and information related to its investigation into whether he had borrowed money from HM and GM and whether he participated in a possible undisclosed outside business activity.⁴⁴ This was the first Rule 8210 request directly seeking information about his relationship with HM and GM and whether he had received any funds from them. Kapasi's response was due by February 28, 2013.⁴⁵ On February 14, 2013, Kapasi orally informed the staff that he was potentially taking a business trip out of the country at the end of February and requested that the staff extend his time to respond to the request.⁴⁶ The staff denied the requested extension because the due date for the response was still two weeks away and there was uncertainty about whether the trip would occur.⁴⁷

staff sent Kapasi another Rule 8210 request seeking information regarding a sale of a tanzanite stone the staff suspected Kapasi had made to a Merrill Lynch customer. CX-22; Tr. (Aylward) at 59–61. Kapasi made a partial response on January 3, 2013, CX-25, which included copies of bank account statements and denied selling stones to that customer. He made an additional production to the staff on January 25, 2013, CX-28, which included additional bank account statements.

⁴² Tr. (Aylward) at 81–84; CX-28, at 4, 10.

⁴³ Tr. (Aylward) at 84–85, 89.

⁴⁴ Compl. ¶ 22; Ans. ¶ 22; CX-29.

⁴⁵ Compl. ¶ 22; Ans. ¶ 22; CX-29. The request was sent by certified mail, return receipt requested, and by first-class mail to Kapasi's last known residential address as reflected in the Central Registration Depository ("CRD Address"). Compl. ¶ 23; Ans. ¶ 23. The request was also sent to Kapasi's personal email address he provided to the staff. Compl. ¶ 23; Ans. ¶ 23.

⁴⁶ Compl. ¶ 24; Ans. ¶ 24; Tr. (Aylward) at 94–95.

⁴⁷ Compl. ¶ 25; Ans. ¶ 25; Tr. (Aylward) at 95. The staff told him, however, that if he did go on his trip, the staff would reconsider its position regarding the extension. Tr. (Aylward) at 95–96.

The next day, February 15, 2013, pursuant to Rule 8210, FINRA staff sent another letter to Kapasi requesting that he provide additional documents and information concerning his participation in a possible undisclosed outside business activity and his stated reason for requesting an extension of time to respond to the February 13, 2013 request.⁴⁸ Kapasi's response was due by March 1, 2013.⁴⁹ However, he failed to provide the requested information and documents by the deadlines.⁵⁰

On March 4, the staff contacted Kapasi by telephone. During that call, he requested, and this time the staff granted him, an extension until March 8, 2013, to respond to the February 13 and 15, 2013 requests.⁵¹ Nevertheless, Kapasi failed to provide the requested information and documents by that date.⁵² The staff communicated with Kapasi again by telephone on March 13, 2013. The staff explained to Kapasi that his responses were overdue and that he was required to respond fully and promptly and without qualification. Kapasi told the staff that he understood, and he committed to responding.⁵³ By the time of this call, however, he had already decided not to respond.⁵⁴

⁴⁸ Compl. ¶ 26; Ans. ¶ 26; CX-30. The February 15, 2013 request was sent by certified mail, return receipt requested, and by first-class mail to Kapasi's CRD Address. Compl. ¶ 28; Ans. ¶ 28. The request was also sent to Kapasi's personal email address. Compl. ¶ 28; Ans. ¶ 28. The staff sought additional information because it had concerns that Kapasi previously provided false information and wanted to follow-up and complete its analysis. Tr. (Aylward) at 97-98.

⁴⁹ Compl. ¶ 26; Ans. ¶ 26; CX-30, at 1.

⁵⁰ Compl. ¶ 30; Ans. ¶ 30; Tr. (Aylward) at 100-01, 108. While the complaint at paragraph 30 only alleges that Kapasi failed to provide the requested information, it is clear that he also did not provide the requested documents by the due dates because in his answer at paragraph 44, Kapasi admitted that he had not provided the documents.

⁵¹ Compl. ¶¶ 31-32; Ans. ¶¶ 31-32; Tr. (Aylward) at 101-02.

⁵² Compl. ¶ 33; Ans. ¶ 33. While the complaint at paragraph 33 only alleges that Kapasi failed to provide the requested information, as noted above, Kapasi admitted in his answer at paragraph 44 that he had not provided the requested documents to date.

⁵³ Tr. (Aylward) at 102-03.

⁵⁴ Tr. (Kapasi) at 190-91.

ii. The March and April 2013 Follow-Up Requests

1. March 15, 2013 Request

By letter dated March 15, 2013, titled “Second Request,” the staff reminded Kapasi of his obligation to respond to the February 13 and 15, 2013 requests, requested that he provide all responsive documents and information “as soon as possible,” and informed him that failing to do so could result in sanctions, including a bar from the securities industry.⁵⁵ On March 19, the staff spoke by telephone with Kapasi. During that call, Kapasi told the staff that he would respond by the end of the week.⁵⁶ However, he did not do so.

2. April 4, 2013 Request

On April 4, 2013, the staff sent Kapasi a letter titled “Final Notice,”⁵⁷ again informing him that the requested documents and information were past due and requiring him to respond by no later than April 12, 2013. The April 4, 2013 request also reminded Kapasi that failing to respond could result in sanctions including a bar.⁵⁸ Kapasi failed to provide the requested information and documents by the deadline, or thereafter,⁵⁹ and, until the hearing, did not explain his failure to respond.⁶⁰ At the hearing, Kapasi explained that he did not want to provide any

⁵⁵ Compl. ¶¶ 34–38; Ans. ¶¶ 34–38; CX-31. The March 15, 2013 request was sent by certified mail, return receipt requested, and by first-class mail to Kapasi’s CRD Address and to Kapasi’s personal email address. Compl. ¶ 37; Ans. ¶ 37. The request reminded Kapasi that his responses to the February 13 and February 15, 2013 requests had been due on February 28, 2013, and March 1, 2013, respectively. The March 15, 2013 request did not mention that on March 4, the staff had granted Kapasi an extension of time until March 8 to respond to the February 13 and 15, 2013 requests.

⁵⁶ Tr. (Aylward) at 106–07.

⁵⁷ CX-32.

⁵⁸ Compl. ¶¶ 39–40; Ans. ¶¶ 39–40; CX-32. The April 4, 2013 request was sent, pursuant to Rule 8210, by certified mail, return receipt requested, and by first-class mail to Kapasi’s CRD Address. Compl. ¶ 41; Ans. ¶ 41. The request was also sent to Kapasi’s personal email address. Compl. ¶ 41; Ans. ¶ 41.

⁵⁹ Compl. ¶¶ 43–44; Ans. ¶¶ 43–44; Tr. (Aylward) at 109.

⁶⁰ Tr. (Aylward) at 112.

information to FINRA about the loan from GM and HM because he knew that if he provided that information, he might be found to have violated FINRA rules.⁶¹

ii. Impact of Kapasi's Failure to Respond

During the investigation, Kapasi never explained the deposits on the account statements or produced any documents relating to them. Nor did he produce any additional account statements that the staff requested to determine if the pattern continued into the future.⁶² As a result of Kapasi's failure to respond to the February 13 and 15, 2013 requests, the staff could not determine whether Kapasi had engaged in other violative acts (evidenced by the deposits on his bank account statements).⁶³ Consequently, the staff was unable to finish its investigation into either his outside business activities,⁶⁴ or his borrowing from customers. While Kapasi denied at the hearing that he had borrowed money from any customers other than HM and GM,⁶⁵ his failure to cooperate prevented the staff from testing that assertion.⁶⁶

III. Conclusions of Law

A. Kapasi Violated NASD Rule 2370 and FINRA Rule 2010 by Borrowing Funds from Customers HM and GM (First Cause of Action)

NASD Rule 2370 imposes conditions on when an associated person may borrow from customers,⁶⁷ and expressly prohibits such borrowing except under very limited circumstances not

⁶¹ Tr. (Kapasi) at 181–82.

⁶² Tr. (Aylward) at 110.

⁶³ Tr. (Aylward) at 110.

⁶⁴ Tr. (Aylward) at 111.

⁶⁵ Tr. (Kapasi) at 149.

⁶⁶ Tr. (Aylward) at 111.

⁶⁷ *Dep't of Enforcement v. North Woodward*, No. 2010021303301, 2012 FINRA Discip. LEXIS 32, *21 (OHO Mar. 29, 2012), *appeal docketed*, (April 23, 2012).

applicable here.⁶⁸ As the National Adjudicatory Council (“NAC”) has explained, this Rule “prohibits a registered representative from borrowing funds from a customer unless the registered representative’s firm has a written procedure allowing such loans and the lending agreement satisfies certain conditions.”⁶⁹ It is undisputed that at the time Kapasi borrowed \$6,000 from customers HM and GM, Merrill Lynch’s procedures generally forbade its registered representatives from borrowing funds from customers. The procedures permitted the Firm to grant limited exceptions to this prohibition on loans for employees’ family members. However, HM and GM were not related to Kapasi, and, moreover, Kapasi neither sought nor obtained Merrill Lynch’s approval for his loan.

Accordingly, because there was no genuine issue as to any material fact, and because Enforcement had shown, as a matter of law, that Kapasi violated NASD Rule 2370, Enforcement was entitled to summary disposition regarding that charge. Additionally, because a violation of an NASD rule is inconsistent with just and equitable principles of trade, accepting a loan in violation of NASD Rule 2370 also constitutes a violation of FINRA Rule 2010.⁷⁰ Therefore, Enforcement was entitled to summary disposition on that charge as well.

⁶⁸ *Dep’t of Enforcement v. Selewach*, No. 2006005005301, 2008 FINRA Discip. LEXIS 5, at *28 (OHO Feb. 20, 2008). NASD Rule 2370 was superseded by FINRA Rule 3240, effective June 14, 2010. *See* FINRA Regulatory Notice 10-21 (Apr. 2010). *See also* Exchange Act Rel. No. 61537 (Feb. 18, 2010), 75 FR 8772 (Feb. 25, 2010) (Order Approving Proposed Rule Change; File No. SR-FINRA-2009-95). NASD Rule 2370 is applicable here because Kapasi’s conduct occurred before June 14, 2010.

⁶⁹ *Dep’t of Enforcement v. Mullins*, Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61 at *39 n.21 (NAC Feb. 24, 2011) (explaining that, for example, “if a firm has a written procedure permitting a loan from a customer, and if the lending arrangement is based on a personal relationship between the registered representative and customer such that the loan would not have been solicited, offered, or given had the customer and the representative not maintained a relationship outside of the broker/customer relationship, a registered representative may borrow funds from a customer if the firm pre-approves such loan in writing. *See* NASD Rules 2370(a) and 2370(b)(1)”).

⁷⁰ *See John Edward Mullins*, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464, at *44 n.45 (Feb. 10, 2012) (holding that accepting a loan in violation of NASD Rule 2370 also violates NASD Rule 2110). Effective December 15, 2008, FINRA Rule 2010 superseded NASD Rule 2110. The language of the rule remains unchanged. *See* SR-FINRA-2008-028, Exchange Act Rel. No. 58643, 2008 SEC LEXIS 2279 (Sept. 25, 2008). FINRA Rule 2010 is applicable to this case because Kapasi’s conduct occurred after December 15, 2008.

B. Kapasi Violated FINRA Rules 8210 and 2010 by Providing a False Response to a Rule 8210 Request (Second Cause of Action)

Rule 8210 requires FINRA members and their associated persons to cooperate with FINRA investigations by providing information when requested by FINRA staff. Pursuant to Rule 8210, FINRA may require an associated person “to provide information orally, in writing, or electronically . . .” in connection with any investigation,⁷¹ and no person shall fail to provide requested information.⁷² “The duty of members and their associated persons to cooperate with FINRA investigations and respond fully to Rule 8210 requests is unequivocal.”⁷³ As the Securities and Exchange Commission wrote recently in *Houston*:

We have stressed the importance of Rule 8210 in connection with NASD’s “obligation to police the activities of its members and associated persons.” “Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.” Failure to respond to Rule 8210 requests “impedes NASD’s ability to detect misconduct that threatens investors and markets.” It is therefore “critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations.”⁷⁴

Providing false or misleading information to FINRA in connection with an examination or investigation “subverts [FINRA’s] ability to carry out its regulatory functions”⁷⁵ and violates Rule 8210.⁷⁶ Further, it is well established that a violation of the duty to cooperate and provide

⁷¹ Rule 8210(a)(1).

⁷² Rule 8210(c).

⁷³ *Dep’t of Enforcement v. Palmeri*, No. 2007010580702, 2013 FINRA Discip. LEXIS 2, *11 (NAC Feb. 15, 2013) citing *Dep’t of Enforcement v. Fawcett*, No. C9A040024, 2007 NASD Discip. LEXIS 2, at *12 (NAC Jan. 8, 2007). See also *Dep’t of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *17 (Feb. 25, 2014) quoting *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000) (finding that registration imposes an unequivocal duty to cooperate with NASD investigations).

⁷⁴ *Kent M. Houston*, Exchange Act Rel. No. 71589, 2014 SEC LEXIS 614, at *22 (Feb. 20, 2014) [footnotes omitted].

⁷⁵ *Dep’t of Enforcement v. Rogala*, No. C8A030089, 2005 NASD Discip. LEXIS 44, at *22 (NAC Oct. 11, 2005).

⁷⁶ *Palmeri*, 2013 FINRA Discip. LEXIS 2, at *11 (NAC Feb. 15, 2013) (citing *Dep’t of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *32 (NAC Oct. 10, 2007), *aff’d*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008)).

information pursuant to FINRA Rule 8210 is also a violation of FINRA Rule 2010.⁷⁷ Providing false and misleading information is inconsistent with just and equitable principles of trade and independently violates FINRA Rule 2010.⁷⁸

The undisputed facts established that in his May 30, 2012 written response to the staff's May 3, 2012 request, Kapasi provided false and misleading information. FINRA staff asked him to describe the terms of any loan he received from any Merrill Lynch client and he falsely responded that he had not received any such loans or entered into any such loan agreements. Therefore, as a matter of law, Enforcement proved that Kapasi violated Rules 8210 and 2010, and summary disposition was warranted on the Second Cause of Action.

C. Kapasi Violated FINRA Rules 8210 and 2010 by Failing to Respond to Requests for Information and Documents (Third Cause of Action)

The undisputed facts established that in its February 13 and 15, 2013 requests, FINRA staff sought information and documents from Kapasi, and he did not provide any of the requested information or documents (even after the staff sent him follow-up requests on March 15 and April 4, 2013, seeking responses to the February requests). Also, Kapasi spoke with the staff about the requests and committed to complying with them. He sought and received an extension of time to respond, and the staff reminded him both in writing and orally that he was obligated to

⁷⁷ *CMG Inst. Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009). *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, *22 n.9 (NAC Feb. 25, 2014) (“A violation of FINRA rules, such as FINRA Rule 8210, ‘constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of . . . [FINRA] Rule 2010.’”); *see also Plunkett*, Exchange Act Rel. No. 69766, 2013 SEC LEXIS 1699, *36 n.58 (June 14, 2013) (“A violation of FINRA rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010.”)

⁷⁸ *Palmeri*, 2013 FINRA Discip. LEXIS 2, at *11–12 (NAC Feb. 15, 2013) (citing *Dep't of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *33 n.26 (NAC Oct. 10, 2007), *aff'd*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008)).

respond and of the consequences for failing to do so.⁷⁹ Based on these undisputed facts, Enforcement was entitled to summary disposition as a matter of law on its charge in the Third Cause of Action that Kapasi violated Rules 8210 and 2010 by failing to provide information and documents in response to Rule 8210 requests.⁸⁰

IV. Sanctions

A. Kapasi is Barred for Violating FINRA Rules 8210 and 2010 by Providing a False Response to a Rule 8210 Request and by Failing to Respond to Requests for Information and Documents

1. Application of Relevant Sanction Guidelines and Considerations

According to the FINRA Sanction Guidelines (“Guidelines”), if an individual does not respond in any manner to a request for information, a bar should be standard. If an individual provides a partial but incomplete response a bar should still be standard, unless the person can demonstrate that the information provided substantially complied with all aspects of the requests. Further, where mitigation exists, adjudicators should consider a suspension for up to two years. Additionally, the Guidelines contain certain principal considerations in determining sanctions for a partial but incomplete response: (1) the importance of the information requested but not provided (as viewed from FINRA’s perspective), and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondent thoroughly explained valid reasons(s) for deficiencies in the response.⁸¹

⁷⁹ Kapasi had actual knowledge of the February 13, 2013 request, as evidenced by his oral request for an extension. He is also deemed to have received the February 13 and 15, March 15, and April 4, 2013 requests, as they were sent to his CRD Address. *See* FINRA Rule 8210(d).

⁸⁰ The March 15, 2013 request did not state explicitly that it was issued pursuant Rule 8210. Nevertheless, in the context of the earlier requests, it is clear that the staff sent the March 15 request pursuant to that rule.

⁸¹ FINRA Sanction Guidelines 33 (2013), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf>.

Kapasi responded untruthfully to the May 3, 2012 request. (As discussed below, for sanctions purposes, the Hearing Panel treated this as the equivalent of a failure to respond). Additionally, he failed to respond to the February 13 and 15, 2013 requests for documents and information, even after the staff sent him follow-up requests on March 15, and April 4, 2013. However, Kapasi did provide some information and documents⁸² in connection with the other Rule 8210 requests issued in connection with the investigation.⁸³ As a result, the Hearing Panel concluded that in sanctioning Kapasi for violating Rules 8210 and 2010, it should apply the Guidelines for a partial, rather than complete, failure to respond.⁸⁴

Applying those provisions, the Hearing Panel concluded as follows: First, Kapasi did not demonstrate that the information and documents he provided substantially complied with all aspects of the requests. Not only did he substantially fail to comply with the requests, but his response to the May 3, 2012 request contained false and misleading statements. Untruthful responses can be as harmful as a complete failure to respond.⁸⁵ The SEC has concluded that “[b]ecause of the risk of harm to investors and the markets posed by such misconduct, . . . the failure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry.”⁸⁶ The SEC reached this conclusion because “supplying false information to [FINRA] during an investigation . . . ‘mislead[s] [FINRA] and can conceal wrongdoing’ and thereby ‘subvert[s] [FINRA’s] ability to

⁸² By contrast, in *Houston*, 2014 SEC LEXIS 614, at *10–11, the respondent “appears to have complied with [two Rule 8210 requests for information and documents] to NASD’s satisfaction” before partially responding to a later one.

⁸³ Namely, the July 12, 2011, May 3, July 17, and December 19, 2012 requests.

⁸⁴ See *Plunkett*, 2013 SEC LEXIS 1699, at *55–56 citing *Kent M. Houston*, Exchange Act Rel. No. 66014, 2011 SEC LEXIS 4491, at *25 & 27 (Dec. 20, 2011).

⁸⁵ Cf. *Dep’t of Enforcement v. Walker*, No. C10970141, 2000 NASD Discip. LEXIS 2, at *31 (NAC Apr. 20, 2000) (finding the respondent’s “untruthful responses to be as harmful as a complete failure to respond” and treating them as such for sanctions purposes).

⁸⁶ See *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008).

perform its regulatory function and protect the public interest.’’⁸⁷ This was the case here, as Kapasi specifically attempted to conceal from the staff the fact that he had borrowed funds from HM and GM, in violation of his Firm’s policies, and NASD and FINRA rules, and thereby undermined the staff’s investigation into this misconduct.

Second, while Kapasi did provide some responsive information and documents, the information requested by the staff, but not produced, was important. Kapasi’s failure to comply prevented the staff from completing its investigation and learning the full scope of his misconduct (including whether he had engaged in improper outside business activities and had accepted loans from other customers).

Third, Kapasi’s failure to respond fully to the May 3, 2012 request concerning the specifics of his sales necessitated a follow-up request in July 2012, to which he also responded incompletely.

Finally, Kapasi failed to provide valid reasons for the deficiencies in the responses. Worse, as detailed below with respect to his failure to provide information, Kapasi’s explanations and mitigation arguments demonstrate that he acted intentionally, without remorse,⁸⁸ and with no appreciation for either the seriousness of his misconduct or the obligations of a registered person to comply with Rule 8210 requests. In their totality, they further support the Hearing Panel’s conclusion that Kapasi is not fit to remain in the securities industry and should be barred.

⁸⁷ See *Ortiz*, 2008 SEC LEXIS 2401, at *32 (quoting *Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728 (Apr. 1, 2005), *aff’d*, 444 F.3d 1208 (10th Cir. 2006)).

⁸⁸ *Cf.* Guidelines 6 (Principal Consideration in Determining Sanction No. 2) (identifying as a factor whether the respondent accepted responsibility for his misconduct before detection).

2. Kapasi's Explanations and Mitigation Arguments

At the hearing, Kapasi explained that he did not want either FINRA or the Firm to learn about the loan because he knew it violated Firm procedures and NASD and FINRA rules. It was for this reason that he responded untruthfully and failed to provide information and documents regarding the loan. Accordingly, Kapasi made an intentional decision to deceive FINRA staff and this is an aggravating factor in assessing sanctions.⁸⁹

Kapasi also explained, more generally, why he did not comply with the February 13 and 15, 2013 requests (and the two follow-up requests). Demonstrating defiance, rather than contrition, he characterized the investigation as “worse than an IRS audit,”⁹⁰ and the charges as “overly magnified”⁹¹ and “too magnified.”⁹² He testified that he believed he should not have to comply with the requests unless FINRA explained to him why it needed the information,⁹³ and he objected to the staff’s failure to provide that explanation to him. Further, he testified that he would only respond to Rule 8210 requests if they sought relevant information and, in this case, he concluded that not all the information sought by FINRA was relevant.⁹⁴ He explained that, ultimately, he decided not to comply because “at some point I thought that . . . there was too much going on in this investigation, which FINRA did not give me enough reasons, why they

⁸⁹ See Guidelines 7 (Principal Consideration in Determining Sanction No. 13) (identifying as a factor whether the misconduct was the result of an intentional act, recklessness, or negligence).

⁹⁰ Tr. (Kapasi) at 200.

⁹¹ Tr. (Kapasi) at 31.

⁹² Tr. (Kapasi) at 198.

⁹³ Tr. (Kapasi) at 200.

⁹⁴ Tr. (Kapasi) at 194–96.

wanted these documents.”⁹⁵ Finally, he stated that even now, he would not provide the information sought by the Rule 8210 requests.⁹⁶

These explanations demonstrate that Kapasi does not appreciate that he had an unequivocal obligation to comply with the Rule 8210 requests. As the SEC recently re-confirmed, “Rule 8210(a) has no requirement that [FINRA] explain its reasons for making the information request or justify its relevance.”⁹⁷ As a result, “an associated person may not ‘second guess’ [FINRA’s] requests for information, or ‘take it upon [himself] to determine whether information is material to [a FINRA] investigation of [his] conduct.”⁹⁸ Further, Kapasi’s explanations demonstrate a lack of remorse and that he acted intentionally in failing to respond to the Rule 8210 requests.

Kapasi also asserted a number of arguments in mitigation. Each lacked merit. First, he emphasized, repeatedly, that he had not harmed anyone, specifically pointing out that he did not steal money from a customer; did not forge any documents; and had not done anything that, in his view, would affect anyone.⁹⁹ It is not mitigative, however, that Kapasi did not harm a customer by failing to respond to Rule 8210 requests or by responding untruthfully. Indeed, the Guidelines specifically state that lack of customer harm does not mitigate a Rule 8210

⁹⁵ Tr. (Kapasi) at 200. He did recognize, however, that FINRA was not obligated to provide him with the reasons it was seeking the documents. Tr. (Kapasi) at 203.

⁹⁶ Tr. (Kapasi) at 194, 196.

⁹⁷ *Houston*, 2014 SEC LEXIS 614, at *16 quoting *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *26 (Jan. 30, 2009); *Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007), *aff’d*, 316 F. App’x 865 (11th Cir. 2008).

⁹⁸ *Houston*, 2014 SEC LEXIS 614, at *16 quoting *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *21 & *26 (citation omitted); *Charles C. Fawcett, IV*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *18–19 (Nov. 8, 2007) (“ . . . [r]ecipients of requests under Rule 8210 . . . may not refuse such request on the grounds of relevance or otherwise set conditions on their compliance, and [FINRA] is not required to justify its information request in order to obtain compliance from members and their associated persons.”)

⁹⁹ Tr. (Kapasi) 194–96. *See also* Tr. (Kapasi) at 198 (testifying that the charges are “too magnified because I did not hurt a customer.”); Tr. (Kapasi) at 238, 240 (arguing that he should not be barred because he has not caused harm to anybody or hurt or damaged anyone).

violation.¹⁰⁰ As explained by the NAC, “[i]t is rare that a respondent’s obstruction . . . would directly result in financial harm to a customer. The harm in such instances, as here, is to the self-regulatory process and to investors’ confidence in that process.”¹⁰¹ Moreover, Kapasi’s failure to cooperate impeded the staff’s ability to determine the scope of any harm to customers through lending and outside business activities.¹⁰² Kapasi’s lack of customer harm argument reveals that, even now, he fails to appreciate the seriousness of his misconduct.

Second, Kapasi argues that a bar is too severe a sanction when compared to certain settled FINRA cases.¹⁰³ The SEC, however, has “‘repeatedly observed that comparisons to sanctions in settled cases are inappropriate’ because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement Moreover, the appropriate sanction in any case ‘depends on the particular facts and circumstances presented.’”¹⁰⁴

Third, Kapasi contends that his lack of prior complaints and “past misconduct” should be considered mitigating.¹⁰⁵ He is incorrect. As the SEC noted, “FINRA has repeatedly held that lack of disciplinary history is not mitigating for purposes of sanctions because an associated

¹⁰⁰ Guidelines 33 n.2.

¹⁰¹ *Dep’t of Enforcement v. Asensio Brokerage Services, Inc.*, No. CAF030067, 2006 NASD Discip. LEXIS 20, *51–52 (NAC July 28, 2006) quoting *Dep’t of Enforcement v. Dieffenbach*, No. C06020003, 2004 NASD Discip. LEXIS 10, at *40 (NAC July 30, 2004), *aff’d in relevant part, Michael A. Rooms*, Exchange Act Rel. No. 51467 2005 SEC LEXIS 728 (Apr. 1, 2005), *aff’d*, 444 F.3d 1208 (10th Cir. 2006).

¹⁰² *Kent Houston*, 2014 SEC LEXIS 614, at *34–35 citing *Paz Sec. Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *17–20 (Apr. 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) (finding lack of evidence of customer harm not to be mitigating where “NASD was prevented from determining whether Applicants engaged in . . . potentially harmful conduct . . . because Applicants did not answer its information requests.”).

¹⁰³ See RX-2.

¹⁰⁴ *Kent Houston*, 2014 SEC LEXIS 614, at *33; see also *Dennis S. Kaminski*, Exchange Act Rel. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011) (“[W]e consistently have held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases.”).

¹⁰⁵ Tr. (Kapasi) at 239–40.

person should not be rewarded for acting in accordance with his duties as a securities professional.”¹⁰⁶

Fourth, Respondent asked that the Hearing Panel take into consideration that because he has not worked in the industry “for a full year,” this time away from the industry “should suffice as an appropriate and reasonable punishment for [his] mistakes.”¹⁰⁷ The Hearing Panel did not accord this argument any weight, as any economic distress Kapasi may have experienced is a result of his own misconduct.¹⁰⁸ In any event, the NAC has held that “[b]eing no longer registered or employed in the securities industry. . . is not mitigating.”¹⁰⁹

Finally, Kapasi made an emotional distress argument based on the September 11, 2001 terrorist attacks. He claimed that since the attacks, he has suffered from depression, experienced “post-traumatic syndrome,” and had been to counseling for about a year. He stated that after the attacks he has had depressed moments and is on permanent medication. Further, he testified that when he becomes worried, it sometimes affects his decisions.¹¹⁰ Raising this issue for the first time at the hearing,¹¹¹ Kapasi failed to present any corroborating evidence of this purported affliction or that it affected his decision to respond untruthfully and to fail to respond to Rule

¹⁰⁶ *Houston*, 2014 SEC LEXIS 614, at *30; *Dep’t of Enforcement v. Craig*, No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *24 (NAC Dec. 27, 2007) (rejecting argument that absence of disciplinary history and prior customer complaints deserved mitigation), *aff’d*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008).

¹⁰⁷ Tr. (Kapasi) at 31; *see also* Tr. (Kapasi) at 238–39 (stating that he has been unemployed since March 2013).

¹⁰⁸ *See Houston*, 2014 SEC LEXIS 614, at *35–36 (rejecting applicant’s argument that he had suffered enough as a result of the disciplinary proceeding because for two years he had been unable “to practice [his] trade.”); *Craig*, 2008 SEC LEXIS 2844, at *28 (“We also do not consider mitigating the economic disadvantages [respondent] alleges he suffered because they are a result of his misconduct.”).

¹⁰⁹ *Dep’t of Market Regulation v. Lane*, No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *95 (NAC Dec. 26, 2013), *appeal docketed*, SEC Admin. No. 3-15701 (Jan. 27, 2014).

¹¹⁰ Tr. (Kapasi) at 191, 197.

¹¹¹ Tr. (Kapasi) at 197.

8210 requests.¹¹² Therefore, the Hearing Panel did not find that Kapasi's misconduct resulted from or was influenced by any emotional distress or psychological disorder.

3. Conclusion

Based on the foregoing application of the Guidelines, and taking into account the aggravating evidence and the lack of mitigation, the Hearing Panel concluded that Kapasi should be barred for responding untruthfully to the May 3, 2012 request and, additionally, should also be barred for failing to respond to the February 13 and 15, 2013 requests and the two follow-up requests (March 15 and April 4, 2013).

B. In Light of the Bars Imposed for Violating FINRA Rules 8210 and 2010, No Further Sanctions are Imposed for Kapasi's Violation of NASD Rule 2370 and FINRA Rule 2010 by Borrowing Funds from Customers

The Guidelines do not specifically address violations of NASD Rule 2370. However, NASD Notice to Members provides guidance on Rule 2370's importance:

Loans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct. NASD has brought disciplinary action against registered persons who have violated just and equitable principles of trade by taking unfair advantage of their customers by inducing them to lend money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers.¹¹³

Additionally, according to the General Principles Applicable to All Sanction Determinations, adjudicators should impose sanctions that are designed to deter future misconduct and improve overall business standards.¹¹⁴ Also, the Principal Considerations in

¹¹² See *Paz Securities, Inc.*, Exchange Act Rel. No. 52693, 2005 SEC LEXIS 2802, *21 (Oct. 28, 2005) (in sustaining bar for failing to respond, SEC found that the individual applicant had not provided evidence substantiating "his claim of depression so severe that he could not respond in any manner to NASD's multiple requests for information" and noting that it had previously "found that unsubstantiated personal problems do not excuse an applicant's failure to respond."), *aff'd*, 494 F.3d 1059 (D.C. Cir. 2007). See also *District Bus. Conduct Comm. v. Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *14 (NBCC Jan. 16, 1998) (no indication that misconduct resulted from or was exacerbated by personal or work-related stress).

¹¹³ NASD Notice to Members 03-62, October 2003.

¹¹⁴ Guidelines 2 (General Principles Applicable to All Sanction Determinations, No. 1).

Determining Sanctions applicable to all violations direct adjudicators to consider, among other things, whether: (1) the respondent attempted to conceal his misconduct;¹¹⁵ (2) whether respondent's misconduct was intentional;¹¹⁶ (3) whether the misconduct resulted in the potential for monetary gain;¹¹⁷ and (4) the size of the transaction.¹¹⁸

All are aggravating factors in this case. The Firm's written procedures prohibited Kapasi from borrowing from customers, except under circumstances not applicable here. Nevertheless, with full knowledge that he was violating both this procedure and NASD and FINRA rules, Kapasi borrowed \$6,000 from two elderly customers who relied on him for advice. He borrowed these funds without seeking or obtaining the Firm's prior approval. He then tried to avoid detection by instructing HM not to pay him directly from his (i.e. HM's) Firm account, by destroying the loan contract, and by lying to the Firm when it investigated his misconduct.

In mitigation, Kapasi argued that at the time he borrowed the funds from HM and GM, he was under financial stress. However, similar to Respondent's claim of depression discussed above, other than his uncorroborated testimony, he provided no proof of his financial circumstances, or that they played any role in his decision to borrow funds from his customers.¹¹⁹ As a result, the Hearing Panel accorded no weight to this proffered mitigation.

In consideration of all these factors and circumstances, the Hearing Panel determined that a suspension of 18 months and a fine of \$15,000 would be an appropriately remedial sanction for Kapasi's violation of NASD Rule 2370 and FINRA Rule 2010. However, in light of the bars

¹¹⁵ Guidelines 6 (Principal Considerations in Determining Sanctions, No. 10).

¹¹⁶ Guidelines 6 (Principal Considerations in Determining Sanctions, No. 13).

¹¹⁷ Guidelines 6 (Principal Considerations in Determining Sanctions, No. 17).

¹¹⁸ Guidelines 6 (Principal Considerations in Determining Sanctions, No. 18).

¹¹⁹ See *Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *14 (no indication that misconduct resulted from or was exacerbated by personal or work-related stress).

imposed for violating FINRA Rules 8210 and 2010, the Hearing Panel imposes no further sanctions.

V. Order

Respondent Ashik Akberali Kapasi is barred from associating with any member firm in any capacity for violating FINRA Rules 8210 and 2010 by providing a false response to a Rule 8210 Request and, additionally, is barred for violating FINRA Rules 8210 and 2010 by failing to respond to requests for information and documents. Kapasi is also ordered to pay the costs of the hearing in the amount of \$2,784.29, which includes a \$750 administrative fee and the cost of the hearing transcript. The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter. The bars shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding. In light of the bars, no further sanctions are imposed for Kapasi's violation of NASD Rule 2370 and FINRA Rule 2010 by borrowing funds from customers.¹²⁰

David R. Sonnenberg
Hearing Officer
For the Hearing Panel

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¹²⁰ The Hearing Panel considered and rejected without discussion all other arguments by the parties.