BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

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| In the Matter of<br><br>Department of Enforcement,<br><br>Complainant,<br><br>vs.<br><br>Mark H. Love<br>Scottsdale, AZ,<br><br>Respondent. | DECISION<br><br>Complaint No. C3A010009<br><br>Dated: May 19, 2003 |

**Hearing Panel held that registered representative violated NASD Rules 2110 and 3040 by participating in private securities transactions without giving prior written notice to the member firm with which he was associated. Held, findings affirmed and sanctions modified.**

**Appearances**

For the Complainant Department of Enforcement: Jacqueline D. Whelan, Esq., Rory Flynn, Esq., Leo F. Orenstein, Esq., of NASD Department of Enforcement.

For the Respondent Mark H. Love: Judah Best, Esq., of Debevoise & Plimpton.

**DECISION**

Respondent Mark H. Love ("Love") appealed a Hearing Panel decision dated November 20, 2001. The Hearing Panel held that Love violated NASD Conduct Rules 2110 and 3040 by participating in private securities transactions without giving prior written notice to the member firm with which he was associated. After a thorough review of the record in this matter, we affirm the findings but modify the sanctions.

## I. BACKGROUND

### A. Love's Employment History

Love has been in the securities industry since 1984. He was associated with PaineWebber Inc. ("PaineWebber" or "the Firm") as a general securities representative from

1988 to 1995. Love is currently associated with another member as a general securities representative.

**B. Procedural History**

On January 4, 2001, the Department of Enforcement ("Enforcement") filed a complaint alleging that Love had violated NASD Rules 2110 and 3040 by participating in private securities transactions without giving prior written notice to the member firm with which he then was associated. The complaint also charged another respondent with misconduct. On February 13, 2001, Love filed an answer to the complaint denying the substantive charges and a motion asking that the charges against him be severed from those against the other respondent. On March 5, 2001, the Chief Hearing Officer granted Love's motion to sever.

On March 20, 2001, Enforcement filed an amended complaint that included only the charges against Love. The amended complaint alleged the same misconduct that was alleged in the original complaint. On April 20, 2001, Love filed an answer denying the substantive charges and requesting a hearing.

On September 10, 2001, a Hearing Panel from the Office of Hearing Officers held a hearing. On November 20, 2001, the Hearing Panel issued its decision, finding that Love had engaged in the misconduct alleged in the complaint and imposing a 90-day suspension, $25,000 fine and $1,879.52 in costs. This appeal followed.

**C. Factual Background**

Central to the allegations of misconduct is Love's relationship with an unregistered individual named Bryan Foster ("Foster") and Foster's business entity, Summit West Partners. Love acknowledged that, as alleged in the complaint and amended complaint, he put several of his clients in touch with Foster, with whom the clients invested money. Love learned about Foster in 1993, when another PaineWebber registered representative, Thomas Zirbel ("Zirbel"), told Love that Foster was both a longtime friend of Zirbel's and a former PaineWebber employee. Zirbel told Love that Foster had a business investing in initial public offerings ("IPOs") and engaging in day trading. Zirbel told Love that Foster was making a lot of money for his clients.

Love first contacted Foster in an effort to sell securities to him. In December 1993, Foster opened a PaineWebber account in the name of Garman Art Supply ("Garman"). Foster effected a few transactions in the Garman account in late 1993 and early 1994, and Love earned commissions on those transactions. In 1995 and 1996, Love made personal loans to Foster. Foster repaid some of the loans with substantial interest, but eventually defaulted.

In 1994, Love referred several of his customers to Foster, including customers WJ Sr. and WJ Jr. (father and son), customers DJ and EJ (husband and wife), and customers PR and RR (husband and wife). The parties stipulated that Love told each of the customers how to contact Foster to invest in his IPO trading program. According to Love, he referred the customers to Foster because they independently told him that they wanted investments that would bring a greater rate of return than they were getting through their managed accounts and because they particularly wished to invest in IPOs.[1] Love stated that he was unable to obtain any significant IPO allocations for his customers through PaineWebber and Foster's operation was the only vehicle he knew of through which customers could invest in IPOs.

Love said that he told his customers that a co-worker of his at PaineWebber (Zirbel) knew Foster well and was considering going to work for him. Love claimed that he specifically told the clients that "if the money leaves and goes to Foster, that's their responsibility because it's not something [Love] could check out." Love expected the customers to do their own due diligence with respect to Foster's operation. He explained that he believed that "they would put

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[1] Enforcement offered very little evidence of the customers' recollections of the referrals to Foster. No customers testified at the hearing before the Hearing Panel. There was no evidence from customers PR and RR. With respect to customer DJ, the record included only a brief NASD questionnaire that customer DJ filled out in 1998 in which he stated that he first became aware of Summit West Partners after he asked Love how to earn better returns. He stated that Love told him that Foster was a "one-man operation trading stocks daily with pooled funds with the ability to make small amounts on multiple daily trades leading to higher returns."

The record included no evidence from customer WJ Jr., but it did contain a transcript of an NASD staff interview with customer WJ Sr. Customer WJ Sr. was 95 years old when the interview was conducted, in April 1998, and he died before the hearing. At the interview, customer WJ Sr. said that Love had initiated the investment by calling customer WJ Jr. and suggesting that customers WJ Sr. and WJ Jr. invest through Foster, who specialized in investing in IPOs and was very successful at it. According to customer WJ Sr., Love said that Foster had made a lot of money and had a very good reputation. Customer WJ Sr. also stated that Love had indicated that he had known Foster for years and that Foster was seeking to raise one half million dollars to expand his business.

However, no evidence corroborated WJ Sr.'s testimony that Love first approached WJ Jr. about investing in Foster's operation. Love claimed that he discussed Foster with WJ Sr. and WJ Jr. only after they told him that they needed money to pay for renovations to a house, that they had previously invested in IPOs through a broker in Canada, and that they wanted Love to obtain IPO investments for them. According to Love, this led him to bring up Foster, the only vehicle he was aware of through which they could invest in IPOs.

WJ Sr. also claimed in his interview that Love initially represented that he was planning to invest with Foster. According to WJ Sr., Love proposed that if WJ Jr. and WJ Sr. invested $400,000, he (Love) would invest $100,000. According to WJ Sr., when he later learned that Love had not invested, he called Love to ask why he had not invested and Love told him that he could not do so because of a conflict of interest. Love admitted that he had told WJ Sr. that he (Love) would look into whether he could invest with Foster and that he later told WJ Sr. that he (Love) "could not do that style of investment." Love said that when he spoke about investing his own money, he was not trying to entice WJ Sr. to invest with Foster.

[Foster] through the same types of questions that they asked the other money managers that they were working with."  Love admitted that he did not inform PaineWebber that he intended to tell (or had told) a number of his customers about Foster's operation.

In 1994, these customers invested substantial sums of money with Foster, entering into Partnership Agreements and investing in Foster's entity, Summit West Partners.  Customers WJ Sr. and WJ Jr. jointly invested $365,850.18 by liquidating their PaineWebber accounts. Customers DJ and EJ, who had PaineWebber accounts worth several million dollars, invested $100,000, which was transferred from one of their PaineWebber accounts.  Customers PR and RR, who also had PaineWebber accounts worth several million dollars, invested $225,000, some of which came from their PaineWebber accounts.

The Partnership Agreements indicated that the investments involved general partnership interests and that the investors would contribute money to an account that Foster would manage, with the investors receiving half of the profits and losses.  The Agreements stated that the purpose of the partnership was to fund a securities trading operation, that Foster would have full discretion to trade in the account, and that management of the partnership would be Foster's exclusive responsibility.  The Agreements also provided that the customers' partnership interests were transferable and that Foster could sell additional partnership interests.

The customers initially believed that their investments with Foster were performing well, based on statements they received from Summit West Partners.  The customers, however, occasionally found it difficult to withdraw funds.  When the customers encountered difficulties with Foster and Summit West Partners, they called upon Love to intercede with Foster on their behalf, and he did so.

Ultimately, Foster's business collapsed and the customers lost most or all of their investments.  Customers DJ and EJ did not seek recovery from Foster, Love, or PaineWebber. Customers WJ Sr. and WJ Jr. and PR and RR filed arbitration claims against PaineWebber, which PaineWebber settled, apparently over Love's objection.  PaineWebber, in turn, filed a claim against Love, who also settled.

According to NASD staff, Enforcement began its investigation in the spring of 1997 after receiving a referral from the Federal Bureau of Investigation ("FBI") concerning another representative who had been involved with Foster.  The investigation eventually expanded to include Zirbel and then Love, as well as other representatives.

## II. DISCUSSION

As discussed above, the Hearing Panel found that Love had violated NASD rules as alleged in the complaint and amended complaint.  Love contests the Hearing Panel's findings of violation and, alternatively, the sanctions imposed.  Love also raises certain arguments regarding the fairness of the proceedings, which we address first.

**A. <u>Fairness of the Proceedings</u>**

Love raises two distinct arguments regarding the fairness of the proceedings. First, he claims that this case should be dismissed based on Enforcement's alleged unfair delay in bringing this action. Second, Love argues that the Hearing Panel decision should be vacated because his previous counsel allegedly had a conflict of interest and thus provided him ineffective assistance of counsel. We will discuss each contention in turn.

***1. Alleged Unfair Delay in the Proceedings***

We first consider Love's argument that this matter should be dismissed because Enforcement's alleged delay in bringing these proceedings was inherently unfair. This "fairness" claim, which Love raised for the first time on appeal, is based on certain language in the Securities Exchange Act of 1934 ("Exchange Act"), as interpreted by the Securities and Exchange Commission ("SEC") in *Jeffrey Ainley Hayden*, Exchange Act Rel. No. 42772, 2000 SEC LEXIS 946 (May 11, 2000).[2] The Exchange Act requires that self-regulatory organization ("SRO") rules "provide a *fair* procedure for the disciplining of members and persons associated with members[.]" Section 15A(b)(8) of the Exchange Act, 15 U.S.C. §78o-3(b)(8) (emphasis added). For many years, the SEC's interpretations of the Exchange Act's fairness language focused primarily on whether an SRO had followed its internal procedures and whether those procedures were fair.[3] In *Hayden*, the SEC for the first time dismissed an SRO disciplinary action on fairness grounds because of the age of the case.

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2 Love did not raise a defense specifically alleging unfair delay based on the SEC's *Hayden* decision during the Hearing Panel proceedings, even though *Hayden* had been decided long before the hearing began. (Love asserted generalized statute of limitations and laches defenses in his answer to the complaint, but he did not thereafter pursue those defenses or raise a *Hayden* defense below.) He thus arguably waived the *Hayden* defense. *See, e.g., Canady v. SEC*, 230 F.3d 362, 363-65 (D.C. Cir. 2000) (upholding SEC's finding that respondent had waived statute of limitations defense); *Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343-44 (D.C. Cir. 1997) (finding waiver of limitation defense where not pleaded in answer to the complaint); *Ashvin R. Shah*, 52 S.E.C. 1100, 1104 n.16 ("Shah did not raise this objection with the District Committee and accordingly waived it."), *aff'd*, 132 F.3d 36 (7th Cir. 1997) (table format); *Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (finding waiver where argument first raised on appeal and emphasizing that "a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action"). Nonetheless, we find that it is appropriate to consider this important issue. In part, we have determined to consider Love's untimely *Hayden* argument because we issued our decision in *Department of Enforcement v. Morgan Stanley DW Inc.*, Complaint No. CAF000045, 2002 NASD Discip. LEXIS 11 (NAC July 29, 2002), after the hearing in the instant matter. As discussed below, our *Morgan Stanley* decision clarified this area of the law.

3 *See Scattered Corp.*, 53 S.E.C. 948, 958 (1998) (noting that the usual cases involving "fairness" analyses "have focused on the fairness of the SRO's internal procedures, including

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In *Hayden*, the SEC mentioned four different time periods in reviewing whether the New York Stock Exchange ("NYSE") proceeding at issue was fair: (1) the time between the first alleged occurrence of misconduct and the date that the NYSE filed the complaint (thirteen years and nine months); (2) the time between the last alleged occurrence of misconduct and the date that the NYSE filed the complaint (six years and seven months); (3) the time between the date that the NYSE received notice of the alleged misconduct and the date that the NYSE filed the complaint (five years); and (4) the time between the date that the NYSE commenced its investigation and the date that the NYSE filed the complaint (three years and six months). *Hayden*, 2000 SEC LEXIS 946, at *5. The SEC dismissed the action because "the delay in the underlying proceedings was inherently unfair," even though it did not find "as a factual matter" that "Hayden's ability to mount an adequate defense was impaired by the Exchange's delay." *Id*. at *6.

Subsequently, in *William D. Hirsh*, Exchange Act Rel. No. 43691, 2000 SEC LEXIS 2703 (Dec. 8, 2000), the SEC confirmed the holding in *Hayden* that an extreme delay in bringing an action can result in dismissal based on fairness grounds. In *Hirsh*, however, the SEC emphasized that no statute of limitations applies to SRO proceedings. *Id*. at *18. In addition, the SEC in *Hirsh* refused to dismiss the NYSE cause of action at issue.[4] In *Hirsh*, the SEC's decision focused almost entirely on the period between the time when the NYSE received notice of the misconduct and the time when it filed the complaint.[5] The SEC stated, "We do not believe that the factors discussed in *Hayden* necessarily require the dismissal of the charges [in question]. Once the [NYSE] was notified of [the misconduct] only 20 months elapsed before the charges were filed." *Id.* at *18-19.

In *Department of Enforcement v. Morgan Stanley DW Inc*., Complaint No. CAF000045, 2002 NASD Discip. LEXIS 11 (NAC July 29, 2002), we were faced for the first time with the issue of whether and to what extent delay in bringing an action runs afoul of the Exchange Act's fairness requirement. In that case, we upheld the Hearing Panel's dismissal of the action, but we differed from the Hearing Panel regarding the proper analysis that should be applied. We held that the Hearing Panel had improperly relied exclusively on a calculation of three of the four periods mentioned in *Hayden* and *Hirsh*, foreclosing even the possibility that other factors might

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organization structure as it affects the fairness and impartiality of the course of the proceeding"); *U.S. Associates, Inc*., 51 S.E.C. 805 (1993) (performing a "fairness" analysis and finding that NASD had failed to follow its own procedural rules).

4 In *Hirsh,* the NYSE found that the respondent had effected unauthorized, unsuitable and excessive trades in the accounts of two customers. *Id*. at *1-3. On appeal to the SEC, the respondent argued that the complaint as to one of the customers was time-barred. *Id*. at *3.

5 The period between notice of the conduct and the filing of the complaint is the only period that the SEC mentions in the *Hirsh* decision's discussion section. The other periods can be gleaned only from a close reading of the facts in *Hirsh.*

be relevant and omitting any discussion of the fourth time period that the SEC had referenced. We noted that, in essence, the Hearing Panel had interpreted *Hayden* and *Hirsh* as creating a three-pronged, quasi statute of limitations. Although we agreed that the time periods referenced in *Hayden* and *Hirsh* were important components of the SEC's "fairness" analysis, we did not believe that the SEC intended to create a mechanical test based solely on those time periods, irrespective of other factors.

Neither *Hayden* nor *Hirsh* set forth a specific test that adjudicators must use when "fairness" issues are raised. Indeed, beyond referencing four time periods and noting that the respondent in *Hayden* had not proved that he had been prejudiced by the delay, the SEC offered very little guidance. Our review of case law, however, indicated that "fairness" is an equitable notion that requires an analysis of the facts and circumstances of the particular case.[6] We thus concluded that, in addition to the four time-periods referenced in *Hayden* and *Hirsh*, adjudicators should consider traditional equitable principles in determining whether a particular proceeding is fair under the circumstances.[7] The two equitable principles that we specifically discussed, which was not a comprehensive list, were the "unclean hands" doctrine and whether the proponent of the defense had been harmed by the delay. Proof of harm is not required to show inherent unfairness caused by delay, but we can consider it in assessing the totality of the circumstances.[8]

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6 We explained that "[c]ourts have consistently noted that 'fairness' concepts—whether in the context of constitutional, statutory or common law claims or defenses—are rooted in equity and require consideration of the facts and circumstances of each case." *Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at *22.

7 Love argues that *Morgan Stanley* was wrongly decided. According to Love, *Hayden* only requires a comparison of the four time periods and does not permit adjudicators to consider equitable notions. We decline Love's invitation to overturn our recent precedent. Love's argument, like the Hearing Panel decision in *Morgan Stanley*, would create a rather odd statute of limitations based on four periods that were tied to the specific facts of *Hayden*. We find it hard to imagine that the SEC intended in *Hayden* to create limitations periods of (1) thirteen years and nine months, (2) six years and seven months, (3) five years, and (4) three years and six months. Fortunately, we need not guess at whether the SEC intended to create a four-pronged, quasi statute of limitations. In *Hirsh*, the SEC emphasized that no statute of limitations applies to SRO proceedings. *Hirsh*, 2000 SEC LEXIS 2703, at *18. In addition, we explained in *Morgan Stanley* that the courts, in various contexts, consistently had interpreted the terms "fair" and "fairness" to be equitable notions requiring consideration of the facts and circumstances of the particular case. Nothing in the Exchange Act's legislative history, moreover, suggests that Congress had intended to give the term "fair" some unusual meaning.

8 In *Hayden*, the SEC stated:

> Without further inquiry, we cannot find, as a factual matter, that Hayden's ability to mount an adequate defense was impaired by the [NYSE's] delay. However, the [NYSE] does have a statutory

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Under the facts of the case, we found that the *Morgan Stanley* respondents were not precluded by the "unclean hands" doctrine from seeking relief and that they had been harmed by Enforcement's unreasonable delay in bringing the action. In addition, Enforcement had exceeded three of the four time periods referenced in *Hayden* and *Hirsh*, including the most significant period identified in *Hirsh*, the period between Enforcement's discovery of the misconduct and the filing of the complaint. Based on the totality of circumstances, including the length of delay and harm to the respondents, we dismissed the action as being inherently unfair.

In the instant case, Love argues that the delay in the NASD proceedings against him also was unfair and requires dismissal of this action. We disagree. As an initial matter, the periods of delay are shorter in the current case than those in *Morgan Stanley* and are shorter than three of the four periods in *Hayden*,[9] as demonstrated by the following chart.

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> obligation to ensure the fairness and integrity of its disciplinary proceedings. We believe that the delay in the underlying proceeding was inherently unfair.

*Hayden*, 2000 SEC LEXIS 946, at *6. In *Morgan Stanley*, we explained that the SEC's statement did not indicate that a showing of prejudice is always irrelevant. We found that "the SEC intended only to relieve respondents of the heavy burden of making a threshold showing of prejudice. In other words, such a showing can benefit the respondent but a lack of such proof is not fatal to a respondent's 'fairness' claim." *Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at *32.

Thus, in contrast to a "laches" claim, whether the proponent of a fairness defense has proven that he or she has been harmed by the delay is not a dispositive factor. *Compare Daniel Richard Howard*, Exchange Act Rel. No. 46269, 2002 SEC LEXIS 1909, at *13 (July 26, 2002) ("[F]or Howard to succeed on a claim of laches, he must show both a lack of diligence by the NASD and prejudice resulting from the NASD's delay."); *Larry Ira Klein*, 52 S.E.C. 1030, 1038 (1996) ("A successful laches defense requires the applicant to show both a lack of diligence by the party against whom the defense is asserted and prejudice to the applicant."), *with Morgan Stanley*, *supra*, at *32.

[9] The period between the start of the investigation and the filing of the complaint is the same in this case as the period in *Hayden* (three years and six months). At four years and ten months, the period in *Morgan Stanley* was longer than both the instant case and *Hayden*.

| Case | First misconduct to filing of complaint | Last misconduct to filing of complaint | SRO discovery to filing of complaint | Start of investigation to filing of complaint |
|---|---|---|---|---|
| **Hirsh** (not unfair) | 12/89 - 11/98 (8 yrs, 11 mos) | 11/90 - 11/98 (8 yrs) | 3/97 – 11/98 (1 yr, 8 mos) | 11/97 - 11/98 (1 yr) |
| **Hayden** (unfair delay) | 2/82 - 11/96 (13 yrs, 9 mos) | 4/90 - 11/96 (6 yrs, 7 mos) | 11/91 - 11/96 (5 yrs) | 5/93 - 11/96 (3 yrs, 6 mos) |
| **Morgan Stanley** (unfair delay) | 11/92 - 11/00 (8 yrs) | 11/93 - 11/00 (7 yrs) | 1/95 – 11/00 (5 yrs, 10 mos) | 1/96 - 11/00 (4 yrs, 10 mos) |
| **Love** | 3/94 - 1/01 (6 yrs, 10 mos) | 8/94 - 1/01 (6 yrs, 5 mos) | 5/97 - 1/01 (3 yrs, 8 mos) | 7/97 - 1/01 (3 yrs, 6 mos) |

In calculating the time periods, we find that Enforcement became aware of Love's conduct in May of 1997. Paula Weisz, an NASD Supervisor of Examiners, testified under oath at the hearing below that Enforcement first became aware of Love's activities in the spring of 1997. In addition, after Love raised the *Hayden* defense for the first time on appeal, Enforcement submitted Weisz's sworn affidavit[10] clarifying that, based on her review of the

10 We reject Love's contention that we should not rely on Weisz's statements because they are hearsay. In this regard, we note that formal rules of evidence do not apply to NASD proceedings, and the SEC has emphasized that "hearsay may be admitted into evidence and, in appropriate cases, may form the basis for findings of fact." *John Montelbano*, 2003 SEC LEXIS 153, at *22; *see also Dillon Secs., Inc*., 51 S.E.C. 142, 150 (1992) (emphasizing that hearsay evidence is admissible in SRO proceedings and it can even "constitute the sole basis for findings of fact"). In this case, we find that Weisz's testimony and affidavit are probative and reliable and our consideration of them is appropriate. Weisz's statements are probative on the issue of Enforcement's discovery of Love's conduct. In addition, Weisz's statements have certain guarantees of reliability. Love has not argued, let alone provided convincing evidence, that Weisz's statements were motivated by bias or an ill motive. Weisz's statements were not contradicted by any direct testimony. Weisz's statements also were made under oath and are consistent with one another. In addition, she was subject to cross-examination during the hearing below. Regarding her affidavit, moreover, we note that the SEC has routinely upheld the use of affidavits to support findings in SRO disciplinary proceedings. *See Harry Gliksman*, Exchange Act Rel. No. 42255, 1999 SEC LEXIS 2685, at *15-16 (Dec. 20, 1999) (finding customer's

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investigative file, the FBI had informed Enforcement of Foster's activities in February or March of 1997 and that Enforcement learned of Love's possible connection to Foster in May of 1997.[11]

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affidavit to be probative, reliable and admissible), *aff'd*, Nos 00-70141 and 00-70258, 2001 U.S. App. LEXIS 25479 (9th Cir. Nov. 26, 2001); *Carlton Wade Fleming, Jr.*, 52 S.E.C. 408, 411-12 (1995) (finding affidavit probative and reliable); *Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992) (holding that written declaration was admissible).

[11] In addition to his hearsay argument, discussed *supra* note 10, Love moved to strike the Weisz affidavit because Enforcement had not separately filed a motion for leave to adduce additional evidence. We deny Love's motion to strike. Although we agree that parties to disciplinary actions normally must follow the proper procedures for raising new arguments or adducing additional evidence, we have made limited exceptions in the past, as we do here for both Love and Enforcement. With regard to Love, we find that it is appropriate to consider his *Hayden* argument even though he failed to raise it below and arguably waived it. *See supra* note 2. However, because Love raised the *Hayden* issue for the first time on appeal, we further find that good cause exists for Enforcement's failure to have adduced this evidence below. *Cf. Laurie Jones Canady*, Exchange Act Rel. No. 41713, 1999 SEC LEXIS 1563, at *3-4 (Aug. 6, 1999) (stating that a party claiming the statute of limitations defense must give adequate notice of that claim in order to permit the other side to frame legal arguments and establish relevant facts; the petitioner's failure to raise the claim deprived the SEC Enforcement Division of such notice and opportunity to develop its factual and legal defenses to the claim), *aff'd*, *Canady v. SEC*, 230 F.3d 362 (D.C. Cir. 2000). Moreover, the additional evidence is clearly probative of a material issue, namely, the sequence of events leading to Enforcement's discovery of Love's conduct.

We also reject Love's request to depose Weisz. Weisz was already subject to cross-examination during the hearing below, where her testimony was consistent with, albeit less specific than, the information contained in her subsequent affidavit. Love has not provided good cause for seeking to depose Weisz and he is "not entitled to go on a fishing expedition in the hope that something might turn up to aid his defense." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *41 (Jan. 22, 2003) (citations omitted). Indeed, the federal courts have emphasized in an analogous context that "to obtain the right to an evidentiary hearing, [a defendant's] challenge must 'be more than conclusory and must be supported by more than a mere desire to cross examine.'" *United States v. $1.5 Million Letter of Credit*, No. 90 Civ. 4450, 1992 U.S. Dist. LEXIS 11837, at *22 (S.D.N.Y. Aug. 6, 1992) (quoting *Franks v. Delaware*, 438 U.S. 154 1978)); *see also United States v. Lewis*, 40 F.3d 1325, 1332 (1st Cir. 1994) (holding that a defendant has neither an absolute nor a presumptive right to insist that a court take testimony on every motion without alleging "facts that are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented").

Finally, even if we refused to consider the affidavit and viewed Enforcement as having received notice of the conduct in March of 1997 (the beginning of spring), all of the periods in

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We reject, as mere conjecture, Love's contention on appeal that the FBI might have privately informed NASD of Foster's indictment around the time that it occurred, in February 1996, and that this information might have led to NASD's discovery of Love's misconduct soon thereafter. Love's claim is completely unsubstantiated and we reject it.

Similarly, we reject Love's contention that Enforcement knew or should have known about Love's conduct at an earlier time because of possible publicity that might have occurred in Montana when Foster was indicted in 1996. Love cites our decision in *Morgan Stanley* as support for his position. Love's argument fails for two reasons. First, we did not state in *Morgan Stanley* that publicity alone would be sufficient to put NASD on notice of misconduct for purposes of a *Hayden* analysis.[12] Second, there is no evidence that Foster's indictment in Montana generated any significant publicity, let alone the type of publicity that might have come to the attention of Enforcement staff in Denver, Colorado, where this investigation originated. Once again, we reject Love's attempt to broaden the periods of delay with unsupported and legally insignificant claims.

We also find that each time period ended with the filing of the original complaint (not, as Love argues, with the filing of the amended complaint severing the allegations against Love from those against another respondent). There is no basis in law for using an amended complaint to determine the timeliness of the filing of an action where, as here, the allegations and facts are virtually identical in both complaints. Under such circumstances, the amended complaint relates back to the original complaint. *Cf. Palomino v. Stanton*, No. C-96-2984 FMS, 1998 U.S. Dist.

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the current case still would be shorter than those in *Morgan Stanley* and three of the four time periods here still would be shorter than those in *Hayden*, including the time between discovery of the conduct and the filing of the complaint, which the SEC's decision in *Hirsh* focused on (here, three years and ten months using March as the discovery date versus five years in *Hayden* and five years and ten months in *Morgan Stanley*). The only period in this case that would exceed *Hayden*—regardless of whether March or May of 1997 is used as the date for NASD's discovery of the misconduct and regardless of whether March or July of 1997 is used as the start of the investigation—is the period from the start of the investigation to the filing of the complaint.

[12] Unlike the present case, there was substantial evidence in *Morgan Stanley* indicating that NASD knew or should have known about the misconduct much earlier than when the New York Attorney General's office ("NYAG") provided its case file to Enforcement. Contrary to Love's assertions, however, the strongest evidence was not that there were media reports of the conduct, but rather that NASD had itself actually received customer complaints and other notices of the conduct in question long before the NYAG provided Enforcement with its case file. However, we held that we did not need to decide whether Enforcement knew or should have known of the misconduct at an earlier time because even using the later date at which Enforcement claimed that it learned of the misconduct, it had still exceeded the time periods referenced in *Hayden*. *See Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at *18 n.11.

LEXIS 5656, at *6 (N.D. Cal. April 22, 1998) ("[A]n amended complaint relates back to the original complaint and avoids the bar of the statute of limitations if recovery is sought in both pleadings on the same general set of facts.").[13] Furthermore, Love was the party who requested the severance that led to the filing of the amended complaint.

In addition to the fact that all of the periods of delay are shorter here than they were in *Morgan Stanley* (and three of the four periods in *Hayden)*, the current action is distinguishable from *Morgan Stanley* for a number of reasons. Unlike the respondents in *Morgan Stanley*, Love has not shown that he was harmed by the delay.[14] In this regard, we reject Love's assertion that he was somehow harmed because customer WJ Sr. died between the time of the conduct and the filing of the complaint and because customer PR was allegedly suffering from the effects of advanced age at the time of the hearing. The Hearing Panel below based its decision on facts that Love does not dispute. Indeed, the Hearing Panel's decision primarily relied on stipulated facts.[15]

To the extent that prior customer statements conflicted with Love's testimony, the Hearing Panel accepted Love's version of events. The Hearing Panel, for instance, accepted Love's testimony over contradictory statements made by customer WJ Sr. in his on-the-record testimony. Customer WJ Sr. stated that Love had initiated the conversation about investing with Foster. Love, on the other hand, testified that he had provided Foster's name only in response to questions from customers and that he had not initiated such conversations. The Hearing Panel accepted Love's version. We also reject Love's claim that the delay prejudiced him because he

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[13] *See also* FED. R. CIV. P. 15(c) (providing that "an amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings"); *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992) (finding that common scheme to defraud investors by misrepresenting company's earnings allowed for relation back under FED. R. CIV. P. 15(c)(2)).

[14] The fact that Love has not been prejudiced by the delay does not end our inquiry into whether the proceeding was fair. It is one of many factors that an adjudicator may properly consider, as we do here. *See supra* note 8 and accompanying discussion.

[15] In *Morgan Stanley*, there was no such agreement among the parties regarding the core facts. Indeed, Enforcement had not, at the time of the appeal, even identified, let alone deposed, any of the customers that were central to the case and had not deposed most of the key Morgan Stanley witnesses. *See Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at*36. In addition, documents potentially important to the respondents' defenses that were stored in the World Trade Center were destroyed due to no fault on the part of the respondents. *Id.* at *36 & n.28.

was unable "to recapture and convey to the Hearing Panel the remorse he felt and testified to in 1997 at his investigative interview."[16]

In addition, we noted in *Morgan Stanley* that, at the time when Enforcement claimed that it had received notice of the conduct at issue, the NYAG's office provided Enforcement with a fully developed case file detailing the respondents' alleged misconduct. We stated, "In the instant matter, we find that it is unfair for the respondents to be faced with the specter of litigating nearly decade-old claims. This is especially true because Enforcement was aware early on of the nature of the allegedly wrongful conduct." *Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at *37.[17] There is no evidence in the record suggesting that Enforcement received the

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[16] Love argues that his on-the-record testimony in 1997 evidences that he was much more contrite during that interview than he was during the hearing in 2001 and that his inability to convey his remorse during the latter proceeding was a direct result of Enforcement's delay in bringing this action. As a factual matter, we do not agree with Love that he was more contrite during his earlier testimony. Love quotes two passages from his 1997 on-the-record testimony as support for his position: "You know, morally it's a situation where I know these people and I didn't want to see anybody get hurt like that. So, yes, I feel bad morally." However, after the two statements quoted in his brief, Love continued during his 1997 on-the-record interview as follows:

> Business wise, you know, they pretty much knew what they were getting into as far as we were being told. . . . I personally lost a lot of money and lost a lot of things as this thing has come down. I mean it's a career type of thing for me. I enjoy what I do. I don't need this. So, yes, I feel bad, but business wise they were big [boys] . . . they're all pretty serious, knowledgeable people and had lawyers and accountants and everybody else that would verify things. So, business wise, they're on their own.

After reviewing the record, including Love's 1997 on-the-record testimony and his 2001 hearing testimony, we are unable to conclude that Love's testimony or state of mind was markedly different during the two periods. However, even assuming, *arguendo*, that Love's prior testimony strongly evidenced that he was more contrite at that time, we fail to see how Enforcement is to blame for his subsequent testimony for purposes of a "fairness" analysis. In any event, Love's argument, which is related to the Hearing Panel's imposition of what he considers to be overly harsh sanctions, is rendered moot by our determination that more lenient sanctions are warranted in this case, as we discuss *infra*.

[17] In *Morgan Stanley*, the NYAG provided Enforcement with the results of a completed investigation file, including ten deposition transcripts and more than 1,600 documents, all specifically related to the conduct in question. *See Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at*7.

same type of detailed information from the FBI in this case. To the contrary, the evidence indicates that the FBI did not specifically mention Love as a possible target of its investigation, let alone detail his involvement with Foster for NASD investigators.[18]

In summary, Love has not shown that Enforcement's alleged delay in bringing this action made the proceedings unfair. This case is clearly distinguishable from both *Hayden* and *Morgan Stanley*. All of the periods of delay here were shorter than those in *Morgan Stanley* and three of the four periods were shorter than those in *Hayden.* Enforcement's actions also did not cause Love to be prejudiced. Indeed, the Hearing Panel decision below relied almost entirely on facts that Love does not contradict. Finally, unlike in *Morgan Stanley*, Enforcement was not provided a detailed report of the alleged misconduct when it learned of the activity in question. Under these circumstances, we reject Love's assertion that fairness requires the dismissal of this action.[19]

### 2. *Alleged Ineffective Assistance of Counsel*

On appeal, Love alleges that the Hearing Panel decision should be vacated because his former counsel, who represented him during the hearing below, had a conflict of interest and thus provided him ineffective assistance of counsel. We reject Love's argument. First, the Constitution does not apply to NASD proceedings. *See Sheen Financial Resources, Inc.*, 52 S.E.C. 185, 192 (1995) ("[R]espondents in NASD disciplinary proceedings do not have either a constitutional or a statutory right to the assistance of counsel.").[20] Second, even if it did, the right to effective assistance of counsel applies only to criminal proceedings, not to civil

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18 According to Weisz, the FBI informally advised NASD in February or March 1997 that Foster had been convicted of fraud and that a registered representative from Montana may have participated in the scheme. Enforcement learned of Love's possible involvement in May of 1997 during an on-the-record interview of another registered representative.

19 Love also claims that Enforcement's alleged unfair delay somehow violated his constitutional right under the Fifth Amendment to due process. We reject Love's claim in this regard for the same reasons that we reject his "fairness" argument. Moreover, NASD is a private, not-for-profit corporation. The Fifth and Fourteenth Amendments to the United States Constitution protect individuals only against violations of constitutional rights by the government, not by private actors. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). The courts have specifically held that NASD, in performing its statutory mandate and central role, is not a government actor. *See, e.g., Jones v. SEC*, 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because NASD is not a government agency), *cert. denied*, 523 U.S. 1072 (1998); *Datek Secs. v. NASD*, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims regarding a disciplinary proceeding because NASD is not a state actor).

20 *See also supra* note 19.

proceedings. *See Bell v. Eastman Kodak Co.*, 214 F.3d 798, 802 (7th Cir. 2000) (rejecting ineffective assistance of counsel claim based on counsel's conflict of interest because ineffective assistance claims are not available in civil proceedings); *Sundra Escott-Russell*, Exchange Act Rel. No. 43363, 2000 SEC LEXIS 2053, at *16 n.18 (Sept. 27, 2000) ("There is no right to counsel in NASD proceedings because that right 'does not come into play until the initiation of criminal proceedings.'") (citations omitted).[21] Finally, although NASD rules permit the participation of counsel in disciplinary proceedings, they do not afford a right to representation. *See Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 559, 1995 SEC LEXIS 3454, at *14 (1995) (stating that NASD rules permit participation of counsel but do not afford any right to representation), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996). In brief, because there is no right to counsel in these civil proceedings, Love's claim of ineffective assistance of counsel necessarily must fail.[22]

### B. <u>Substantive Findings</u>

The Hearing Panel found that Love violated Conduct Rules 2110 and 3040. For the reasons discussed below, we concur.

Rule 2110 requires registered representatives to adhere to just and equitable principles of trade. Rule 3040 prohibits any person associated with a member firm from "participat[ing] in any manner in a private securities transaction," unless, prior to participating in the transaction, the associated person provides "written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction." The rule defines a private securities transaction as "any securities transaction outside the regular course or scope of an associated person's employment with a member."

Rule 3040 also provides that if the associated person has received or may receive compensation for participating in a private securities transaction, the member firm must advise the associated person, in writing, whether the member approves or disapproves the person's participation. If the firm approves participation, it must record the transaction on the firm's books and records and supervise the associated person's participation "as if the transaction were

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[21] In any event, Love has not shown that an actual conflict of interest negatively influenced his lawyer's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980) (holding that, when argued on appeal, a defendant must demonstrate that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance").

[22] A party's exclusive remedy in such circumstances is to initiate a separate malpractice lawsuit against the attorney who is alleged to have failed to provide effective representation in the civil proceeding. *See Bell*, 214 F.3d at 802.

executed on behalf of the member."[23] Finally, Rule 3040 provides that even if the person will not receive compensation, the firm may "require the person to adhere to specified conditions in connection with his participation in the transaction."

Love concedes that the Summit West Partners investments were securities and that his activities in connection with those investments were outside the regular course of his employment with PaineWebber.[24] He also admits he did not give PaineWebber any written notice of his activities in connection with those investments. He argues, however, that he did not "participate in any manner" in the sale of the Summit West Partners investments to his customers. We disagree.

As the SEC has stated on numerous occasions, "selling away is a serious violation, and Rule 3040 is designed not only to protect investors from unmonitored sales, but also to protect securities firms from exposure to loss and litigation in connection with sales made by persons associated with them." *Jim Newcomb*, Exchange Act Rel. No. 44945, 2001 SEC LEXIS 2172, at *19 (Oct. 18, 2001).[25] We have interpreted the phrase "participate in any manner" broadly to

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23 In this case, Enforcement does not contend and the Hearing Panel did not find that Love received, or might have received, compensation for his customers' investments in Summit West Partners, and Love denied receiving or expecting any compensation. Enforcement did not contend that the commissions or the returns on the loans that Love made to Foster amounted to compensation in connection with the transactions under Rule 3040, and Love actually lost the management fees he would otherwise have earned on the money that the customers transferred from their PaineWebber accounts to Summit West Partners.

24 After reviewing the record and performing an independent analysis, we concur with the parties and the Hearing Panel that the Summit West Partners investments were securities.

25 As the SEC further explained in *Anthony J. Amato*, 45 S.E.C. 282, 285 (1973):

> The regulatory scheme under the Exchange Act, in which the NASD is assigned a vital role, imposes on broker/dealer entities and NASD member firms the responsibility to exercise appropriate supervision over their personnel for the protection of investors. Where employees effect transactions for customers outside of the normal channels and without disclosure to the employer, the public is deprived of protection which it is entitled to expect. Moreover, the employer may also thus be exposed to risks to which it should not be exposed. Thus, such conduct is not only potentially harmful to public investors, but inconsistent with the obligation of an employee to serve his employer faithfully . . . . There is always a possibility in these situations that some improper conduct may be involved or that the employer's interests may be adversely affected.

[Footnote continued on next page]

further the important purposes of Rule 3040. Indeed, both the SEC and we have found that even very limited involvement by an associated person is sufficient to trigger the requirement that the person give written notice to his or her employer. *See, e.g.*, *Charles A. Roth*, 50 S.E.C. 1147, 1150 (1992) ("We have previously held that a registered representative who merely introduces clients seeking to purchase control of a company to company management, and later receives a finder's fee when the transaction is consummated, participates in a securities transaction."), *aff'd* 22 F.3d 1108 (D.C. Cir.), *cert denied*, 513 U.S. 1015 (1994); *Keith L. Mohn*, Exchange Act Rel. No. 42144, 1999 SEC LEXIS 2442, at *12-19 (Nov. 16, 1999) (upholding NASD finding of Rule 3040 violation where representative did not receive compensation, but, among other things, admitted he brought the limited partnership investment to the customers' attention; completed portions of the subscription documents for the customers; and determined the suitability of the limited partnership as an investment for the customers).[26]

This broad interpretation of the phrase "participation in any manner" also is appropriate in light of the unique relationship of trust between a broker and customer. The broad construction of the phrase implicitly recognizes that a customer may give special weight to a broker's involvement in an investment transaction, which a customer may perceive as having the broker's imprimatur.

Here, Love, in response to his customers' general inquiries about IPOs and possible investments with greater rates of return, brought up Foster and Summit West Partners. Love did not claim that the customers were even aware of the existence of Foster and Summit West Partners until then. Love, moreover, did more than simply mention Foster's name. He told the customers about Foster's former employment with PaineWebber and of Zirbel's acquaintance with and favorable opinion of Foster. Love also acknowledges that he expressed to customer WJ Sr. his own desire to invest with Foster. As the Hearing Panel found, Love could not distance himself from the customers' decision to invest merely by telling them that they were on their own and would have to do their own due diligence investigation. Love admitted that his customers "trust[ed] [him]" and that "if [he] told them [to make a particular investment] they would

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[con't]

> At the least, the employer should be enabled to make that determination.

[26] *See also Gilbert M. Hair*, 51 S.E.C. 374, 378 (1993) (finding violation where representative referred customer to a firm that sold the customer a note, and received a commission on the sale); *James L. Owsley*, 51 S.E.C. 524, 532 (1993) (finding violation where representative arranged meeting between a customer and an individual who sold the customer stock in his company, and received a finder's fee); *District Bus. Cond. Comm. v. Gluckman*, Complaint No. C02960042, 1998 NASD Discip. LEXIS 8, at *14 (NAC Jan. 23, 1998) (finding violation of Rule 3040 where representative "referred the customers to [the seller], typed the agreements, and received a five percent fee for the transactions"), *aff'd*, *Stephen J. Gluckman*, Exchange Act Rel. No. 41628, 1999 SEC LEXIS 1395 (July 20, 1999).

probably do that because of the relationship [he had] with them." In addition, Love admits that when the customers encountered problems with Foster, they called Love and asked him to intercede with Foster on their behalf, which he did. This indicates that both the customers and Love behaved as though he bore some responsibility for their investments.

Love's involvement in these investments raises precisely the concerns that Rule 3040 seeks to address.[27] The customers, following the lead of their registered representative, invested in securities without any of the protections normally afforded to those who invest through member firms. Because Love did not give PaineWebber prior notice of his involvement, the Firm had no opportunity to impose conditions that might have protected the customers. The Firm, of course, was subjected to customer claims that it might have avoided if Love had given prior notice.

Accordingly, we affirm the Hearing Panel's finding that Love participated in these securities transactions within the meaning of Rule 3040.[28] Because Love admitted that he did not give written notice describing the proposed transactions and his proposed role to PaineWebber prior to participating, he violated Rule 3040, and by violating that rule, he also violated Rule 2110.[29]

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[27] Of course, it makes no difference, for purposes of determining whether Love violated Rule 3040, that he did not receive compensation. The express language of the rule makes clear that a registered representative is required to provide his or her firm notice of the activity regardless of whether he or she expects to receive compensation. *See* Rule 3040(b)-(d). *See also Owsley*, 51 S.E.C. at 532 ("[W]hether or not Nelson received a finder's fee is irrelevant. The rule requires prior written notice even though the associated person does not receive compensation.").

[28] We reject Love's contention that such an interpretation violates his right to free speech under the First Amendment or that Rule 3040 is void for vagueness. As we discussed above, the Constitution does not apply to NASD disciplinary proceedings. Even if it did, the speech at issue constitutes commercial speech and Rule 3040 is designed to achieve NASD's substantial interest in ensuring that investors and member firms are protected by NASD's rules when an associated person participates in a securities transaction. In addition, the SEC has specifically rejected vagueness challenges under similar circumstances. *See Roth*, 50 S.E.C. at 1151 n.10 (rejecting vagueness challenge to NASD rule).

[29] *See John P. Goldsworthy*, Exchange Act Rel. No. 45926, 2002 SEC LEXIS 1279, at *30 (May 15, 2002) ("It is a 'longstanding and judicially-recognized policy that a violation of another Commission or NASD rule or regulation, including Conduct Rule 3040, constitutes a violation of Conduct Rule 2110.'") (quoting *Stephen J. Gluckman*, Exchange Act Rel. No. 41628, 1999 SEC LEXIS 1395, at *22 & n.31 (July 20, 1999)).

### C. Sanctions

The Sanction Guidelines for private securities transaction violations recommend that adjudicators impose a fine of $5,000 to $50,000 and a suspension for 10 days to one year or, in egregious cases, a longer suspension or a bar. NASD Sanction Guidelines at 19 (2001 ed.) The Guidelines list as principal considerations: (1) whether the respondent had a proprietary or beneficial interest in or was otherwise affiliated with the issuer; (2) whether the respondent attempted to create the impression that his employer sanctioned the activity; (3) whether the respondent sold away to customers of his employer; (4) whether the respondent gave his employer oral notice of his participation; and (5) whether the respondent sold the investment after he had been told or warned by his employer not to do so. The only one of these that applies is that the investors were PaineWebber customers, which is an aggravating factor.[30]

The Hearing Panel ordered that Love be suspended for 90 days, fined $25,000 and required to pay costs of $1,879.52. In imposing these sanctions, the Hearing Panel rejected Love's argument that minimal sanctions should be imposed. Although we are sympathetic to the Hearing Panel's views, we believe that more lenient sanctions are warranted under the circumstances of this case.

This case is distinguishable from recent reported NASD decisions involving harsher sanctions for private securities transactions in two important respects. First, Enforcement does not claim that Love received or expected to receive compensation for his participation in the

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[30] Love claims for the first time on appeal that his branch manager at PaineWebber might have been aware of the activities in question. To support his position, Love, on appeal, submitted an affidavit of a former assistant. (We granted Love leave to adduce this additional evidence on appeal for purposes of our consideration of sanctions.) The former assistant stated that she believes that the branch manager was "aware that these customers were transferring funds from their PaineWebber accounts, that they were all customers of Mr. Love, and that the purpose of the transfer was to assist customers who wished to do securities transactions away from the firm." Even assuming, for purposes of argument, that the affidavit is accurate (which is not at all clear in light of some of the qualifying language used in the affidavit), we fail to see how such evidence proves that Love provided verbal notice to his employer of his participation in the transactions. For instance, the branch manager might have been aware that Love's customers were transferring funds out of PaineWebber for outside investments without the branch manager having had any knowledge of Love's actual involvement in those transactions. Love did not assert, moreover, that he had verbally advised his branch manager of his involvement with the Foster/Summit West transactions in his on-the-record testimony, in his answer to the complaint or at any time during the proceedings below, including during his testimony before the Hearing Panel. In fact, Love does not claim on appeal that he provided verbal notice of his activities to PaineWebber. On appeal, Love simply claims that "the branch manager who approved the transfer of these customer funds knew that the customers were committing funds to investments outside the firm." We do not find Love's claim, even if true, to be mitigating for purposes of sanctions.

transactions. Second, Love's involvement in these investments, while sufficient to trigger the notice requirement, was considerably less than that of respondents in other cases. We find that these circumstances reduce the level of sanctions needed to accomplish NASD's remedial goals.

We do not find, however, that minimal sanctions should be imposed. As noted above, the investors at issue were PaineWebber customers, which is an aggregating factor. Love's misconduct, moreover, harmed several of his customers and his firm. *See* NASD Sanction Guidelines at 9-10 (2001 ed.) ("Principal Considerations In Determining Sanctions").

We therefore vacate the Hearing Panel's imposition of a suspension of 90 days and impose on Love a suspension of 30 business days in all capacities. We uphold the Hearing Panel's imposition of a $25,000 fine and $1,879.52 in costs.

## III. CONCLUSION

After reviewing the record in this matter and considering the parties' arguments, we uphold the Hearing Panel's findings that Love violated Rules 2110 and 3040 by participating in private securities transactions without providing his member firm with prior written notice of such activities. In so finding, we reject Love's claim that this case should be dismissed because Enforcement's alleged unfair delay in bringing the action. We also reject Love's arguments that various constitutional provisions require dismissal. We do, however, agree with Love that the sanctions imposed by the Hearing Panel were unduly harsh under the circumstances of this case. Accordingly, we vacate the Hearing Panel's imposition of a suspension of 90 days and impose on Love a suspension of 30 business days in all capacities. We uphold the Hearing Panel's imposition of a $25,000 fine and $1,879.52 in costs.[31]

On Behalf of the National Adjudicatory Council,

______________________________________

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

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[31] Pursuant to NASD Procedural Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanctions, after seven days' notice in writing, will summarily be revoked for non-payment.

We note, as well, that we have considered and reject without discussion all other arguments advanced by Love and Enforcement.