BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Department of Enforcement, Complainant, vs. George M. Goritz 150 East 56th Street, Apt. 12A New York, NY 10022, Respondent.	DECISION Complaint No. C10000037 Dated: April 26, 2002

The Hearing Panel found that the respondent had participated in private securities transactions without giving written notice to and obtaining written approval from the member firms with which he was associated and distributed an offering memorandum that misrepresented his experience in the investment banking field. Held, Hearing Panel's findings and sanctions sustained.

Respondent George M. Goritz ("Goritz") appealed the January 3, 2001 decision of a Hearing Panel. The Department of Enforcement ("Enforcement") of NASD Regulation, Inc. cross-appealed the decision. After a review of the entire record in this matter, we affirm the Hearing Panel's findings and sanctions.

I. Background

Goritz was first registered as a general securities representative with an NASD member firm in 1962. From June 1993 through September 1994, Goritz was employed by NASD member firm Barclay Investments, Inc. ("Barclay") as a registered representative. He was employed by NASD member firm Highland Capital Group Inc. ("Highland") from September 1994 through October 1996. He is currently registered with another NASD member firm.

II. Factual and Procedural History

On March 17, 2000, Enforcement filed a three-cause complaint against Goritz. The first two causes charged that Goritz violated NASD Rules 2110 and 3040 by participating in private

securities transactions without giving written notice to and obtaining written approval from the member firms with which he was associated at the relevant times. The third cause charged that, in connection with the transactions that were the subject of the first two causes, Goritz distributed an Offering Memorandum that misrepresented his experience in the investment banking field, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Securities and Exchange Commission ("SEC") Rule 10b-5, and NASD Rules 2110 and 2120. Goritz filed an answer to the complaint denying the substantive charges.

According to the record below, in 1994, Goritz and two other individuals, Joseph Del Valle ("Del Valle") and Michael Carstens ("Carstens"), formed a limited partnership known as Phoenix Partners, L.P. ("Phoenix LP"). Phoenix Partners Corporation—owned by Goritz, Del Valle and Carstens—was Phoenix LP's general partner. To raise funds, Phoenix LP offered limited partnership interests to investors. According to the Offering Memorandum given to prospective investors, Phoenix LP intended to engage in both merchant banking and investment banking. The Offering Memorandum explained that Phoenix LP's investment banking activities would involve "agency based assignments" through which Phoenix LP expected to "provide traditional investment banking services to middle market private companies and public companies desiring to go private." More specifically, the Offering Memorandum stated that, among other things, Phoenix LP would offer "capital formation services." The Offering Memorandum also stated that Goritz had "33 years of investment banking experience, notably in institutional sales and capital formation," and his experience included serving as "President of G.M. Goritz & Co., an investment banking firm specializing in international capital formation and institutional sales." Goritz admitted during his investigative testimony, however, that his experience was limited to sales.

Beginning in July or August 1994, Goritz, using the Offering Memorandum, solicited a number of wealthy individuals with whom he had pre-existing relationships to purchase limited partnership interests in Phoenix LP. He succeeded in selling units to six individuals, for a total of $425,000. Goritz testified that he contacted all of these investors while he was employed at Barclay, and solicited no new investors after he moved to Highland. (The investors were not customers of Barclay or Highland.) Only one of the six investors, however, completed his purchase before Goritz moved from Barclay to Highland, and Goritz testified that he continued to contact the other five investors after he moved to Highland, encouraging them to close their purchases. All five of these investors closed their purchases of Phoenix LP limited partnership units from September 1994 through November 1994, while Goritz was associated with Highland.

Goritz testified that his manager at Barclay, John Dale ("Dale"), was aware of his activities in trying to raise funds for Phoenix LP. Dale, on the other hand, testified that he did not know that Goritz was soliciting investors for Phoenix LP while he was at Barclay. Goritz also testified that he gave Barclay written notice of his involvement in Phoenix LP in response to an August 1994 memorandum from Barclay's Chief Compliance Officer to all registered representatives requesting information about outside business activities. Although Goritz's response disclosed that he was "a partner in a newly formed investment bank, Phoenix Partners," it did not disclose that he was soliciting investors to purchase limited partnership interests. Goritz admitted that he gave Barclay no other written notice of his solicitation activities on behalf of Phoenix LP, and that he received no oral or written permission from Barclay to engage in those activities. In fact,

Goritz testified that when, in late August 1994, he asked Barclay's management whether Barclay was interested in investing in Phoenix LP, they not only declined, but they told him that he would have to leave Barclay if he wanted to continue to be involved in Phoenix LP. He left Barclay effective September 2, 1994.

Goritz became associated with Highland the same month he left Barclay. Goritz was physically located in Phoenix LP's offices while he was associated with Highland. He testified that, although he did not solicit any new investors after he joined Highland, he continued to communicate with the five investors who had agreed to purchase Phoenix LP limited partnership units but had not yet closed their purchases. He also testified that he believed Highland was aware of these activities.

In contrast, Vincent F. Pistone ("Pistone"), who was Highland's president at the time, testified that before joining Highland, Goritz said that he had sold all the Phoenix LP units he intended to sell, and had raised $425,000 to $450,000. Pistone said that he did not know Goritz was engaging in any sales-related activities for Phoenix LP while he was at Highland.[1] Raymond C. Holland, Sr. ("Holland"), who was Highland's Chairman at the time, testified that, before joining Highland, Goritz said that he had raised $425,000 to $450,000 for Phoenix LP; that he was not going to raise any more money; and that he was working on projects in which the funds he had raised would be invested.

The Hearing Panel found that Goritz had violated the NASD's rules and the securities laws as alleged in the complaint. The Hearing Panel imposed on Goritz a six-month suspension and an $82,500 fine. In addition, the Hearing Panel ordered him to pay $2,307 in costs. This appeal followed.

III. Discussion

Neither Goritz nor Enforcement contests the Hearing Panel's findings of violation. The parties' appeals instead focus entirely on various aspects of the sanctions imposed below. Nonetheless, we will briefly review the findings of violation before discussing the issues germane to sanctions.

A. Private Securities Transactions

The first two causes of the complaint charge that Goritz participated in private securities transactions in violation of Rules 2110 and 3040 while he was associated with both Barclay and Highland. Rule 2110 requires registered representatives to adhere to just and equitable principles of trade. Rule 3040 requires registered representatives who participate in any manner in a private securities transaction outside the regular course of his or her employment to provide prior written

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[1] According to Pistone, Highland was unaware that Goritz was engaged in any activities relating to the sale of Phoenix LP units while he was at Highland until the NASD notified Highland that it was conducting an investigation.

notice to the member firm at which he or she is employed and to receive the firm's prior written approval to engage in such activity.[2] As the Commission has emphasized, the reach of Rule 3040 is "very broad." Ronald J. Gogul, 52 S.E.C. 307, 310 (1995). The rule covers "an associated person who not only makes a sale but who participates 'in any manner' in the transaction." Id.

There is no dispute that the limited partnership units at issue were securities.[3] Goritz's admitted solicitation of investors while he was at Barclay plainly constituted participating "in any manner" in the resulting sales of Phoenix LP units. Although Goritz testified that he did not solicit any new investors after he became associated with Highland, he admitted that he continued to make follow-up calls to the investors he had already solicited in order to encourage them to close their purchases. Goritz himself viewed a securities sale as completed "[w]hen the check comes in." We find, therefore, that the Hearing Panel correctly concluded that Rule 3040 applied to his follow-up calls while he was at Highland, as well as his initial solicitations while at Barclay. Goritz's sale of the limited partnership units, moreover, was not within the course and scope of his employment with either Barclay or Highland.[4] In addition, Goritz received "selling

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[2] Pursuant to Rule 3040, "[n]o person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." A "private securities transaction" is "any securities transaction outside the regular course or scope of an associated person's employment with a member …." Rule 3040 requires that "[p]rior to participating in any private securities transaction, an associated person shall provide 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 …." "Selling compensation" includes "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security …." If selling compensation will be paid, the firm must approve or disapprove the associated person's participation in the transaction in writing, and if the firm approves participation, "the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member."

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 (Oct. 18, 2001).

[3] In addition to the parties' and Hearing Panel's determinations that the limited partnership units are securities, we note that the Offering Memorandum acknowledged that the limited partnership interests were governed by Regulation D, Rule 504, promulgated under the Securities Act of 1933. After reviewing the record, moreover, we concur that the units are securities.

[4] For instance, the transactions were not recorded on the firms' books and records. Moreover, the firms' names did not appear on any of the correspondence or offering documents as the entity that was providing the placement services.

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compensation"[5] for his sales of the limited partnership units.[6] Finally, Goritz failed to provide prior written notification to and obtain written approval from Barclay and Highland before engaging in such activities. In light of these facts, we uphold the Hearing Panel's findings that Goritz acted in contravention of Rules 2110 and 3040.

B. Misrepresentation in the Offer or Sale of Securities

The Hearing Panel also found that Goritz disseminated an Offering Memorandum that contained material misrepresentations, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5,[7] and NASD Rules 2110 and 2120.[8] This charge relates to the representations in the Offering Memorandum regarding Goritz's investment banking experience.

The Offering Memorandum described at length Phoenix LP's plans to market capital formation services among other investment banking services. The Offering Memorandum explained that the principals of the firm, which included Goritz, would be "directly involved in initiating and structuring each financing, conducting the necessary due diligence, the direct marketing and negotiating of terms with the institutional investors and assuring timely closing."[9]

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5 "Selling compensation" has been construed broadly to include "any item of value." William Louis Morgan, 51 S.E.C. 622, 627 (1993).

6 Here, the funds raised by Goritz went to Phoenix LP, which in turn paid him draws amounting to $72,500 in 1995. We recently upheld a finding that a respondent received selling compensation, for purposes of Rule 3040, under virtually identical circumstances. Jim Newcomb, No. C3A990050, 2000 NASD Discip. LEXIS 15, at *22 (Nov. 16, 2000) (finding that respondent had received selling compensation where issuer used proceeds from sale of notes to make loans, generated profits from the interest payments, and paid respondent a salary based on those profits), aff'd, Exchange Act Rel. No. 44945, 2001 SEC LEXIS 2172 (Oct. 18, 2001).

7 SEC Rule 10b-5 states, in pertinent part, that "[i]t shall be unlawful for any person, directly or indirectly, . . . [t]o employ any device, scheme, or artifice to defraud, [t]o make any practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." To establish a violation of Section 10(b) and Rule 10b-5, there must also be proof that the respondent used "any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange." In this case, this requirement is satisfied because, among other things, Goritz testified that he sent the Offering Memorandum to prospective investors by mail.

8 NASD Conduct Rule 2120 states that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

9 The Offering Memorandum also stated that the capital formation services Phoenix LP planned to sell would include "[d]evelop[ing] an optimum financing structure…; [p]repar[ing]all

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The Offering Memorandum went on to state that Goritz had "33 years of investment banking experience, notably in institutional sales and capital formation[,]" including serving as president of his own firm, at which he "specializ[ed] in international capital formation and institutional sales."

In his testimony during the investigation, Goritz acknowledged that he did not have relevant investment banking experience. Nevertheless, at the hearing, Goritz's counsel argued that the statements in the Offering Memorandum concerning Goritz's investment banking experience were true, not misrepresentations, based on a very broad, general definition of "investment banking." Goritz testified at the hearing that he had misunderstood the questions during the investigation, and he described certain aspects of his experience in the securities industry that he thought qualified as "investment banking" under the definition advanced by his counsel. The Hearing Panel, however, rejected Goritz's position.

The Hearing Panel noted that, in light of the representations in the Offering Memorandum, prospective investors would reasonably have understood that Goritz had "33 years of investment banking experience, notably including … capital formation" to mean that he had extensive experience in the kinds of capital formation activities that Phoenix LP intended to market. The Hearing Panel found that Goritz's expertise was strictly limited to sales and that he did not have any meaningful investment banking experience relevant to the capital formation services described in the Offering Memorandum.[10] The Hearing Panel concluded that the representations in the Offering Memorandum stating that Goritz had substantial experience in providing capital formation services was a material misrepresentation.[11]

The Hearing Panel also found that Goritz was reckless in using the Offering Memorandum to solicit investors for Phoenix LP without reviewing it and correcting the misrepresentation regarding his investment banking experience. The Hearing Panel held that Goritz violated Section 10(b) of the Exchange Act, SEC Rule 10b-5 and NASD Rules 2120 and 2110 as alleged in the third cause of the complaint. We uphold the Hearing Panel's findings, which the parties do not dispute.

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requisite offering materials needed for institutional investors to make a firm commitment; [n]egotiat[ing] conditions to obtain commitments on all material terms …; [and] [m]anag[ing] all subsequent phases of the process to assure a timely close, including due diligence sessions and the documentation process" on behalf of Phoenix LP's clients.

[10] For instance, there was no evidence that Goritz had initiated and structured financing, prepared offering materials needed by institutional investors, negotiated commitments, or managed due diligence sessions or the documentation process.

[11] The Hearing Panel found that the representation in the Offering Memorandum that Goritz had substantial relevant experience in the capital formation area was material because the representation had clear implications for Phoenix LP's potential success in marketing its services and, therefore, would have affected the desire of reasonable investors to invest in the company.

IV. Sanctions

The Hearing Panel imposed on Goritz a six-month suspension and an $82,500 fine. In addition, he was ordered to pay $2,307 in costs. The parties dispute the appropriateness of the sanctions, but for very different reasons. We will address each party's position in turn. We note as a threshold matter, however, that in determining appropriate sanctions we have reviewed and considered the parties' arguments on appeal, the NASD Sanction Guidelines ("Guidelines"), and all of the relevant facts in this case. We also are mindful of the principle that sanctions may be tailored to impress upon respondents and others in the securities industry the need to comply with the federal securities laws and the NASD's rules, as well as to deter similar misconduct in the future. See Daniel Joseph Alderman, 52 S.E.C. 366, 370 (1995), aff'd, 104 F.3d 285 (9th Cir. 1997).

A. Goritz's Request to Reduce the Fine

Goritz requests that we reduce the $82,500 fine imposed by the Hearing Panel on the ground that payment of the fine would subject him to financial hardship.[12] Goritz attached an affidavit and a balance sheet to his appellate brief purporting to show that he has a net worth of $123,479. Enforcement argues that Goritz's attachments should be excluded because Goritz (1) waived an inability-to-pay defense by failing to present such an argument before the Hearing Panel, (2) did not introduce the documents at issue to the Hearing Panel, and (3) did not file a motion to adduce additional evidence on appeal. Enforcement also argues that the attachments do not prove that Goritz has an inability to pay the fine imposed by the Hearing Panel.

In general, parties to a disciplinary action are required to present their arguments and supporting evidence to the Hearing Panel in the first instance or they are deemed to have waived them. See, e.g., Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (refusing to address issues that were not raised during earlier proceedings); NASD Notice to Members 99-86 (Oct. 1999) ("If respondents do not raise the issue of inability to pay at the time the settlement is negotiated (or in a litigated matter, during the proceedings before a Hearing Panel), they will be considered to have waived the issue, and they will not be permitted to raise the issue of inability to pay at a later time.").[13] The waiver principle promotes a number of sound

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[12] Goritz does not contest the Hearing Panel's imposition of a six-month suspension.

[13] See also Strahan v. Coxe, 127 F.3d 155, 172 (1st Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 116-17 (D.C. Cir. 1996) (argument made for first time in a post-hearing brief was waived); Wilson v. Giesen, 956 F.2d 738, 741 (7th Cir. 1992) (waived when raised for the first time in his reply brief); Ashvin R. Shah, 52 S.E.C. 1100, 1104 n.16 (1996) ("Shah did not raise this objection with the District Committee and accordingly waived it."); Mayer A. Amsel, 52 S.E.C. 761, 767 (1996) (waived where raised for the first time on appeal); Stephen Russell Boadt, 51 S.E.C. 683, 685 (1993) (same); Stuart K.

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policy considerations: namely, forcing parties to present arguments and evidence first before the trial-level panel thereby enhancing fairness to the parties and fairness to the tribunal below, as well as administrative efficiency for appellate proceedings.

Nonetheless, there are certain limited exceptions to the waiver principle. For that reason, NASD Procedural Rule 9346 provides that a party may seek "leave to introduce additional evidence not later than 30 days after the Office of Hearing Officers transmits to the National Adjudicatory Council and serves upon all Parties the index to the record . . . ." The burden that the proponent of such evidence must overcome, however, is justifiably high.[14] Under Rule 9346, the proponent must "demonstrate that there was good cause for failing to introduce it below, demonstrate why the evidence is material to the proceeding, and be filed and served." In the current proceedings, Goritz failed to (1) seek leave to introduce the additional evidence, (2) show good cause for failing to introduce it below, (3) and demonstrate the materiality of the evidence. We find that Goritz waived his "hardship" argument and has failed to show good cause both for advancing it for the first time on appeal and for admitting his affidavit and balance sheet.

Even assuming, arguendo, that Goritz's new argument and evidence were properly before us, we would not be persuaded that the monetary sanctions imposed in this case should be reduced. Goitz's affidavit and balance sheet clearly indicate that he has the ability to pay the monetary sanctions. Indeed, Goritz acknowledges repeatedly that he is not arguing that he has an inability to pay the monetary sanctions, only that doing so would cause him undue financial hardship. We decline Goritz's invitation to create a general "hardship" doctrine, and we find that the monetary sanctions imposed by the Hearing Panel are warranted in this case.

The Guidelines for private securities transaction violations recommend that adjudicators impose a fine of $5,000 to $50,000 (which may be increased by the amount of the respondent's financial benefit from the violations[15]) and consider a suspension of up to two years, or a bar in

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Patrick, 51 S.E.C. 419, 424 (1993) (same), aff'd, 19 F.3d 66 (2d Cir.), cert. denied, 115 S. Ct. 54 (1994).

[14] The SEC has observed that a party "cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action." Mayer A. Amsel, 52 S.E.C. 761, 767 (1996). As one court noted, allowing a party to suppress his misgivings while waiting to see whether the ultimate decision goes in his favor "would countenance and encourage unacceptable inefficiency in the [disciplinary] process." Marcus v. Director, 548 F.2d 1044, 1051 (D.C. Cir. 1976). Cf. Strahan v. Coxe, 127 F.3d 155, 172 (1st Cir. 1997) ("Judges are not expected to be mind readers. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.").

[15] The Guidelines state that adjudicators "may increase the recommended fine amount by adding the amount of a respondent's financial benefit. Where respondent is affiliated with the issuer or has a beneficial interest in the transaction other than a commission, the factors to be

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egregious cases. Guidelines (1998 ed.) at 15. The Guidelines list four principal considerations that are specifically applicable in determining sanctions for such a violation. Only one, the first, is applicable here: to wit, whether the respondent had a proprietary or beneficial interest in the selling enterprise.[16] That consideration clearly applies, as Goritz was one of three shareholders of the Subchapter S corporation that was the general partner of Phoenix LP.

The Guidelines also have general considerations, which are applicable to all violations. Guidelines at 8-9. In particular, we note that Goritz's violations took place over a relatively short period of time and they involved a relatively small number of investors, which are mitigating factors.[17] As discussed above, Goritz did not orally disclose all relevant information to either Barclay or Highland, which would have been mitigating, but he did not try to conceal what he was doing from NASD Regulation when it began its investigation. The Hearing Panel, moreover, found that Goritz's private securities transaction violations appeared to have been the result of negligence, and not of reckless or intentional misconduct. Goritz's misconduct, however, did involve transactions for substantial sums of money, which is an aggravating factor.[18] Taking all these factors into consideration, we concur with the Hearing Panel's determination that Goritz's private securities transaction violations were serious, calling for substantial sanctions, but not egregious.

Turning to the misrepresentation violation, the Guidelines recommend that adjudicators impose a fine of $10,000 to $100,000 and suspend the respondent for 10 days to two years, and in egregious cases consider barring the respondent. Guidelines at 80. The Guidelines state that adjudicators "may increase the recommended fine amount by adding the amount of a respondent's financial benefit. In this instance, the factors to be considered in the calculation of the financial

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considered in the calculation of financial benefit may include all sales proceeds received by the respondent directly or indirectly. . . ." Guidelines at 15 n.2.

[16] The other factors, which are not applicable here, are whether the respondent: attempted to create the impression that the member firm sanctioned the activity; sold the securities to customers of the member firm; and provided the member firm with verbal notice of all relevant factors. Guidelines at 15.

[17] The Hearing Panel found that "the purchasers appear to have been sophisticated, wealthy investors, . . . all of which tends to be mitigating." We reject the Hearing Panel's findings in this regard. In Timothy James Fergus, No. C8A990025, 2001 NASD Discip. LEXIS 3 (May 17, 2001), for instance, we stated that, "except in unusual circumstances, the level of customer sophistication is generally not a relevant factor when determining appropriate sanctions involving a violation based on a respondent's failure to provide his firm with notice of a private securities transaction." Id. at *59-60.

[18] Goritz has no prior disciplinary record and there is no evidence of customer harm (both of which could have been viewed as aggravating factors calling for more severe sanctions).

benefit may include commissions, concessions, or other profits that respondent derived in connection with the violative transactions." Id. at 80 n.2. The Guidelines list no special considerations applicable to such violations, and the general considerations apply largely as set forth above, except that the Hearing Panel found, and we agree, that the misrepresentation was the result of Goritz's recklessness. As with the private securities transaction violation, the Hearing Panel concluded, and we concur, that the misrepresentation in this case was serious, but not egregious.

The Hearing Panel determined that a substantial fine was warranted, and that it should be greater than the amount of Goritz's gains from the sale of the Phoenix LP units. Accordingly, the Hearing Panel imposed on him an $82,500 fine,[19] $72,500 of which represented disgorgement of his ill-gotten gains.[20]

The $10,000 fine is at the low end of the range recommended in the Guidelines. As to the disgorgement amount, there is no dispute that the funds that Goritz raised through his misconduct went to Phoenix Partners LP, which in turn paid Goritz $72,500 as a draw. The $72,500 in disgorgement, therefore, accurately reflects the amount of Goritz's ill-gotten gains. Goritz, moreover, does not argue, let alone prove, that the disgorgement amount fails to accurately represent his ill-gotten gains or that he has an inability to pay the total amount of the fine.[21] We affirm the Hearing Panel's imposition of an $82,500 fine against Goritz.

B. Enforcement's Request to Increase the Six-Month Suspension to a Bar

Enforcement requests that we increase the Hearing Panel's imposition of a six-month suspension to a bar. Enforcement argues that Goritz's violations for private securities transactions alone warrant a two-year suspension and that a bar is appropriate in light of Goritz's misrepresentation violation. Goritz, on the other hand, emphasizes that the Hearing Panel specifically found that the violations were not egregious, and he argues that the Hearing Panel correctly determined that a six-month suspension is remedial.

We do not agree with Enforcement's view that a bar is required in this case. Although the misrepresentation violation is serious, the Hearing Panel found, and we agree, that the gravamen of the case involved the private securities transactions violations. With regard to the latter

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[19] The Hearing Panel aggregated or "batched" the sanctions for Goritz's violations because they stemmed from the same activity. See Guidelines at 5. We agree.

[20] As the SEC has noted, "[d]isgorgement seeks solely to deprive the wrongdoer of his ill-gotten gains." Hibbard, Brown & Co., 52 S.E.C. 170, 183 n.64 (1995) (citing Hateley v. SEC, 8 F.3d 653 (9th Cir. 1993)), aff'd, 92 F.3d 1172 (3d Cir. 1996) (table format).

[21] Goritz states in his appellate brief as follows: "Respondent does not contend in this appeal that the fine was inappropriately determined. . . . Respondent has not asserted an 'inability to pay.'"

violations, we once again note that Goritz sold the securities to a limited number of investors, the activity occurred over a relatively short period of time, the investors were not customers of either Barclay or Highland, Goritz did not attempt to make it appear to the investors that the activity had the firms' imprimatur, and he did not attempt to conceal his activity from NASD Regulation when it began its investigation. As to both the private securities transactions and the misrepresentation violations, we further emphasize that the Hearing Panel found that no investors were harmed, that Goritz's actions were not egregious and that, given his overall record in the securities industry (nearly 40 years without any previous disciplinary history whatsoever) and his cooperation during Enforcement's investigation, Goritz is unlikely to repeat his misconduct after serving a six-month suspension. We find that a six-month suspension, together with the fine discussed above, is remedial and appropriate under the circumstances.

V. Conclusion

We uphold the Hearing Panel's findings, which the parties do not dispute, that Goritz violated NASD Rules 2110 and 3040 as alleged in the first and second causes of the complaint, and violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2110 and 2120 as alleged in the third cause of the complaint. We also uphold the sanctions imposed by the Hearing Panel. Accordingly, Goritz is suspended from association with any member firm in any capacity for a period of six months and fined $82,500.[22] In addition, he is ordered to pay the costs of the Hearing Panel proceeding in the amount of $2,307, which includes an administrative fee of $750 and hearing transcript costs of $1,557.

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

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[22] We note that we have considered and reject without discussion all other arguments advanced by Goritz and Enforcement.

In addition, pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanctions, after seven days' notice in writing, will summarily be revoked for non-payment.