BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Michael F. Siegel Beverly Hills, CA, Respondent.	DECISION Complaint No. C05020055 Dated: May 11, 2007

Registered representative participated in private sales of securities without notifying his member firm and made unsuitable recommendations to his four clients. Held, Hearing Panel's findings affirmed; fines affirmed; suspensions affirmed in part, modified in part. Hearing Panel's decision not to award restitution reversed; proceedings referred in part to a Subcommittee of the National Adjudicatory Council to calculate a specific restitution amount.

Appearances

For the Complainant: Mark P. Dauer, Esq., Joel R. Beck, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: George C. Freeman, III, Esq., Meredith A. Cunningham, Esq., Barrasso Usdin Kupperman Freeman & Sarver, L.L.C.

Decision

Pursuant to Procedural Rule 9311, respondent Michael F. Siegel ("Siegel") appeals an April 19, 2004 Hearing Panel decision, as supplemented by the Hearing Panel's March 16, 2006 supplemental findings of fact. The Department of Enforcement ("Enforcement") cross-appeals. The Hearing Panel found that Siegel, between November 1997 and February 1998, engaged in private securities transactions without providing his firm with prior written notice and made unsuitable recommendations to four clients. For the selling away violations, the Hearing Panel suspended Siegel for six months and fined him $20,000. For making unsuitable recommendations, the Hearing Panel suspended Siegel for six months, and fined him $10,000. The Hearing Panel ordered the suspensions to be served concurrently and assessed Siegel costs of $6,607.l5.

After a thorough review of the record, we affirm the Hearing Panel's findings. We affirm the fines and suspensions imposed, but we order that the suspensions be served consecutively instead of concurrently. We reverse the Hearing Panel's decision not to award restitution, and we order Siegel to pay full restitution to his customers, with offsets as described in this opinion. We refer the issue of the proper restitution amount to a Subcommittee of the National Adjudicatory Council ("Subcommittee") and direct it to make a recommendation to the National Adjudicatory Council ("NAC") concerning the proper restitution amount. Finally, we affirm the costs, and we impose $1,350.90 of appeal costs.

I. Background

Siegel entered the securities industry in 1981. From October 24, 1997, until June 16, 1999, Siegel was associated with Rauscher Pierce Refsnes, Inc. ("Rauscher Pierce" or the "Firm") as a general securities representative and a foreign currency options representative.[1] Siegel is currently registered as a general securities representative with another member firm. Siegel also is affiliated with Siegel Group, Inc., an investment adviser firm of which he is a direct owner.

II. Facts

This case involves Siegel's participation in sales of securities of World Environmental Technologies, Inc. ("World ET") and two of its subsidiaries, World IEQ Technologies, Inc. ("World IEQ") and World Agriculture and Marine Technologies ("World Amtech"). We first explain the nature of World ET and Siegel's involvement with these companies. We then address Siegel's participation in the sales of World ET, World IEQ, and World Amtech securities (together, "World securities") to four of his customers.

A. Siegel's Involvement with World ET

1. Siegel Joins the World ET Board of Directors

Siegel first learned of World ET at the beginning of 1997. World ET was a new company that was formed to use and create applications for "Nok-Out," a bacteria-killing, odor-neutralizing product. Tom Denmark ("Denmark"), chairman of World ET's board, and Jim Finkenkeller ("Finkenkeller"), president of World ET, were involved in forming World ET. Siegel met with Denmark and a local scientist who was working on Nok-Out. Siegel learned that several studies claimed that Nok-Out worked, and he was impressed that it had been used to clean a flood-damaged church.

Prior to October 1997, World ET asked Siegel to serve as a consultant to help World ET raise capital and to take it public, and Siegel agreed to do so. On October 22, 1997, World ET

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[1] Rauscher Pierce was succeeded by Dain Rauscher Inc. and then RBC Dain Rauscher, Inc. For purposes of simplicity, this decision refers to all of these entities as Rauscher Pierce.

sent Siegel information concerning the funds it needed to fulfill a "$200,000 commitment . . . , obtain[ ] immediate operating capital, and . . . fully fund" a "dewatering" operation, a waste remediation service that was a possible application for Nok-Out. Around this time, World ET also asked Siegel to serve on its board of directors. Siegel decided to join the World ET board to "know more of what was going on with the company" and to increase the chance that he could handle a potential initial public offering of World ET stock.

On November 24, 1997, Siegel submitted to his Firm's compliance department a written request for approval to serve as a World ET director. Responding to questions on the request form, Siegel wrote that he would not be compensated, would not conduct securities business with World ET, and did not currently recommend World securities to clients. Siegel also wrote that Rauscher Pierce could be in a position to help World ET go public. Siegel testified that, in providing such answers, he understood that he could not sell World ET securities without his Firm's approval. In a written response, the Firm's compliance department immediately approved Siegel's request but informed Siegel that he would not be permitted to effect transactions in securities of World ET, or any company which may become involved with World ET, should they become publicly traded. Shortly thereafter, Siegel became a member of World ET's board.

2. Siegel Loans Money to, and Agrees to Raise Money for, World ET

On December 6, 1997, Finkenkeller sent Siegel a draft agreement ("Agreement"), by which World ET proposed to hire Siegel to raise capital for compensation. Siegel did not sign the Agreement immediately because World securities did not have "regulatory approval[ ]," by which Siegel meant registration of World securities with the SEC. On or about January 14, 1998, Siegel loaned $22,000 to World ET so that it could pay two of its initial investors. World ET informed Siegel that his loan would be repaid from the first funds he raised after January 14, 1998, for World ET or its subsidiaries. On January 27, 1998, after World ET informed Siegel it was "within days of getting regulatory approval" of its securities, Siegel signed the Agreement. In it, Siegel agreed to use his best efforts to obtain, by March 31, 1998, a minimum of $15 million to fund World ET's development and operations. In exchange, World ET agreed to pay Siegel a combination of cash and World ET "class common stock" in amounts based on the capital he raised. In March 1998, Siegel loaned World ET an additional $20,166.01.

In September or October 1998, Siegel resigned from World ET's board, but he continued to serve as a consultant. In a letter dated October 21, 1998, World ET informed Siegel that the Agreement "remains in effect," with slightly altered terms concerning his duties, his compensation, and the repayment terms of his loans. World ET never compensated Siegel or made any payments on his loans.

B. Siegel's Participation in Sales of World ET Securities to Four Customers

During the period of his involvement with World ET, Siegel participated in sales of World securities to four of his customers, HD, LD, DL, and BL. It is undisputed that Siegel never provided his Firm with prior written notice of his participation in those sales.

1. HD and LD

HD and LD, a married couple, became Siegel's customers in 1993. HD was a lawyer and longstanding Louisiana state legislator with an expertise in state budgeting. HD's annual income was $150,000, and his net worth was between $1.5 and $2 million, excluding his home. HD and LD gave Siegel "complete authority" over a $1.5 million investment, which they wanted to generate approximately $75,000 in annual income. Siegel invested HD's and LD's $1.5 million in a combination of fixed income products, mutual funds, and so-called "chicken stocks," which Siegel described as stocks that, for 12 consecutive years, have had higher earnings and paid increased dividends. HD testified that, prior to his investment in World securities, he "[u]nequivocally" trusted Siegel.[2]

In October 1997, HD and LD followed Siegel to Rauscher Pierce. The following month, Siegel visited HD and LD to discuss their account. Siegel mentioned World ET and referred to Nok-Out as "exciting." Siegel explained that he had applied to become a member of World ET's board and was planning to invest in World ET. HD asked how he could invest in World ET. Siegel replied that HD could not invest until World ET had "develop[ed] something for the public." Siegel offered to provide HD with the name of a contact person, but HD asked Siegel to inquire about investment opportunities. Siegel agreed to do so.

Siegel contacted World ET and learned that World IEQ wanted to raise $300,000 to acquire a company that provided dewatering services. Siegel told HD about this information and advised HD to contact World ET if he wanted to pursue an investment. HD asked Siegel to obtain the necessary investment documentation. Siegel agreed to do so.

On November 24, 1997—the same day that Siegel informed the Firm he was not currently recommending World securities—Siegel delivered to HD and LD two related documents: (1) a "World IEQ Subscription Agreement"; and (2) a World IEQ Subscriber Prospective Offeree Questionnaire ("World IEQ Questionnaire"). These documents described the investment differently. The World IEQ Subscription Agreement provided that a subscriber's $300,300 investment would purchase a "120 Day Debenture" for $300,000 and 300,000 shares of World IEQ common stock for $300 (at $0.001/share). In contrast, the World IEQ Questionnaire requested a subscriber to confirm the purchase of a World IEQ "365 day Debenture" for $300,000 and 300,000 shares of "Class Common Stock" at no specified price. Neither document contained the interest rate or repayment terms for the debenture. Siegel informed HD and LD that the investment involved "a loan with an equity kicker" and that World ET suggested that HD and LD together invest $300,000. Siegel explained to HD that his Firm had not approved the World IEQ investment and that, therefore, he was not allowed to sell it. Siegel never informed HD and LD about the terms of his loans to World ET.

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[2] Consistent with the Hearing Panel's approach, our findings concerning Siegel's subsequent interactions with HD and LD are based on Siegel's testimony, undisputed facts, and documentary evidence.

On November 24, 1997, HD returned the documents to Siegel together with a $300,300 check made payable to World IEQ. HD signed his name on the documents but asked Siegel to complete the rest of the form. Siegel testified that he sent the form to World ET without further completing it because he knew he could not sell the product. Subsequently, LD asked Siegel to pay for the investment not with the check, but via a wire transfer of funds from their Rauscher Pierce account. Siegel provided to HD and LD a letter of authorization for a wire transfer, which HD and LD executed and returned to Siegel on November 28, 1997. The Firm effected the requested $300,300 wire transfer to a World IEQ bank account. Siegel retained in his files the $300,300 check that LD had issued.

Approximately one week later, Finkenkeller informed Siegel that World IEQ's dewatering project did not materialize and that HD and LD could either receive a refund or invest in World ET. Siegel informed HD of these options. HD asked for Siegel's advice, and Siegel responded, "I would rather be in the mother company if I had a choice." HD and LD opted to invest in World ET. HD and LD did not receive certificates or other documentation of their investment, nor did they ever receive any payments.[3]

2. DL and BL

DL and BL, a married couple, first met Siegel in October or November of 1997, through a referral from HD. DL was a registered nurse and a successful businesswoman who, in 1995, had owned, operated, and sold for a substantial profit a health care corporation that she had formed. BL was a state police officer. DL and BL wanted to invest $1 million in proceeds from the sale of DL's business. DL's and BL's net worth was approximately $2.5 million, and DL's annual income was approximately $300,000. Their only investing experience was in savings accounts. DL and BL were anticipating their retirements and looking to obtain a higher return than what they were earning in savings accounts and certificates of deposit. DL told Siegel that she and BL "weren't really willing to take big risks," but that they were interested in "income growth type stuff that we would always be able to get a good return on" and, "to enhance that a little bit," some technology or Internet stocks that Siegel recommended.

Siegel recommended that DL and BL invest in "chicken stocks." DL testified that Siegel also told them that he might sometimes introduce them to "start-up companies that have a higher risk," technology companies, and "investments that might not be Dow Jones 30." In late October or early November 1997, DL and BL opened a discretionary account with Siegel, who began to invest some of their money in stocks.

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[3] Subsequent events did little to clarify the investment terms. In a draft letter dated October 21, 1998, Finkenkeller "propos[ed]" to the Ds that World ET would fully return their principal by January 31, 2000, pay 10 percent interest on the unpaid balance, and issue them 300,000 shares of World ET stock over the next 15 months. HD provided undisputed testimony, however, that he never received this letter. In a letter dated February 6, 2002, Finkenkeller informed the Ds that they owned a $300,000 debenture, at 12 percent annual interest, and 60,000 shares of World ET stock. That letter contained no information about a maturity date.

DL testified that, "about a month after we opened the account," Siegel made a follow-up visit to complete some paperwork. DL further testified that, at that second meeting, Siegel told DL and BL that he wanted them to "take a look at" World ET. According to DL and BL, Siegel told them that World ET was a "ground-floor-type investment" that Siegel thought was going to be a "good investment." Siegel did not pressure them to invest, but he "promot[ed] the benefits of [Nok-Out]" and acted "very much assured that this looked like a really good deal."[4] Siegel told them that the minimum $100,000 investment might be a good amount for them to invest. BL recalled that Siegel said that "other investors" were investing "at least three times" as much as DL and BL's potential investment, which BL understood to mean that HD and Siegel had each invested at least $300,000.[5] DL and BL understood that Siegel was recommending that they invest in World ET, and they asked Siegel to obtain further information for them.

On a return visit—which DL stated occurred about one month after the previous meeting and sometime in November or December 1997—Siegel further explained World ET. DL testified that Siegel handed to them a "Siegel Group" folder, which contained Siegel's Rauscher Pierce and Siegel Group business cards and three documents concerning World ET/World Amtech. The first document described World Amtech's first-year plan to provide odor and bacteria-combating services in the swine industry, with a "[s]econdary focus" in the poultry industry. The second document summarized World Amtech's funding needs and goals for its poultry industry operations and noted that the minimum loan was $100,000. That second document also projected that repayment would commence "within 12 months of the first payment for product" used in the poultry industry; that a loan would be repaid after 19 months; that, thereafter, monthly royalties would be paid for up to 10 years; and that, by the end of this 139-month period, one who had loaned $100,000 would receive a total of $820,000. DL testified that Siegel told them they could get their money back in as little as 90 days to one year, and that there would be "lifetime returns." The third document was a World ET/World Amtech subscription agreement providing for sales of "debenture" units for $100,000 each. None of the documents specified an interest rate or a maturity date for the debenture.

Siegel encouraged DL and BL to review the materials and feel comfortable before making any decisions. DL testified that Siegel did not tell DL and BL that he was affiliated in any capacity with World ET. The Ls further testified that Siegel did not tell them to conduct their own investigation of World ET. Siegel also never disclosed that the terms of their investment would differ from the terms of his loans to World ET.

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[4] DL testified that Siegel told them that World ET would almost immediately see "lots of sales" and that distribution of the product "is going to be coast-to-coast almost immediately" and "could be global." She further testified that Siegel said that World ET's product had to "get through permitting" but that he did not expect any problems. BL testified that Siegel explained that World ET was "more risky than the chicken stocks" yet "[n]o different than any other company that you're investing money in."

[5] DL testified that Siegel stated that HD and LD had invested the same amount as Siegel and "much more than [$100,000]." The Hearing Panel found that BL's testimony on this topic was more credible than DL's testimony because it was more specific.

DL testified that, in the "following month after the [third meeting]," she and BL decided to invest in the World ET/World Amtech debenture, based on the information that Siegel provided to them. DL and BL knew that the investment involved a start-up company and was "high risk," but they considered it a "calculated risk" and "solid" because Siegel was interested in the investment.

On February 5, 1998, DL faxed to Rauscher Pierce and Siegel a request to wire transfer $100,000 to the Ls' joint bank account. On or about February 11, 1998, DL and BL delivered to Siegel a signed World ET/World Amtech Subscription Agreement and a $100,000 check payable to World ET, which Siegel, in turn, transmitted to World ET. DL testified that Siegel told them that the investment would not appear on Rauscher Pierce account statements because it involved a start-up company and was not a transaction "through" Rauscher Pierce. BL believed that Siegel had received permission from Rauscher Pierce to recommend World ET. DL and BL never received any written confirmation of their investment or payments of interest, dividends, or principal.

III. Procedural History

NASD opened an investigation into this matter in July 2002, when the Louisiana Securities Commission provided NASD with information concerning a lawsuit filed by HD and LD against Siegel. On November 26, 2002, Enforcement filed a three-cause complaint against Siegel. Causes one and two alleged that Siegel recommended and effected sales of World securities to four customers without having reasonable grounds for believing that the recommendations and sales were suitable. Cause three alleged that Siegel participated in the sale of World securities without prior written notice to and approval from his Firm. Siegel generally denied these allegations.

On April 19, 2004, a Hearing Panel found Siegel liable for the alleged violations. The Hearing Panel suspended Siegel for six months and fined him $20,000 for the selling away violations; suspended Siegel for six months and fined him $10,000 for the suitability violations; and ordered the suspensions to be served concurrently. The Hearing Panel declined to award restitution. Siegel appealed, and Enforcement cross appealed.

On July 26, 2005, the NAC issued an order remanding the proceeding to make credibility determinations and supplemental findings on a narrow set of issues concerning Siegel's interactions with DL and BL.[6] On March 16, 2006, the Hearing Panel issued supplemental findings of fact.[7] On remand, the Hearing Panel concluded that, in those situations where

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[6] The NAC did not instruct the Hearing Panel to issue supplemental findings concerning Siegel's interactions with HD and LD.

[7] On remand, the proceeding was reassigned to a new Hearing Officer because the former Hearing Officer had retired. Exercising discretion under Procedural Rule 9231(e), the new Hearing Officer provided legal advice to the Panelists and prepared the decision on their behalf, but chose not to participate in the resolution of the credibility issues.

Siegel's, DL's, and BL's testimony differed, DL's and BL's testimony was more credible than Siegel's testimony. The Hearing Panel did not alter its original findings that Siegel engaged in private securities transactions and made unsuitable recommendations to DL and BL.[8]

On appeal, Siegel does not challenge the findings that he improperly engaged in private securities transactions, but he contends that his recommendations were suitable and that the sanctions were too high. In its cross-appeal, Enforcement argues that the Hearing Panel should have ordered Siegel to serve his suspensions consecutively and to pay restitution.

IV. Discussion

A. Private Securities Transactions

Conduct Rule 3040 prohibits any person associated with a member firm from "participat[ing] in any manner in a private securities transaction" unless, prior to such participation, 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." If the associated person has received or may receive selling compensation, Rule 3040 requires the member to advise the associated person whether it approves or disapproves the person's participation. Rule 3040(e) defines a private securities transaction to mean any securities transaction "outside the regular course or scope of an associated person's employment with a member." We affirm the Hearing Panel's finding that Siegel violated Rule 3040, a violation that Siegel concedes.

The parties stipulated that the customers' investments were private securities transactions. In addition, it is undisputed that Siegel did not provide his Firm with prior written notice of his participation in the sales of World securities. As for whether Siegel's conduct amounted to "participat[ing] in any manner" in private securities transactions, the SEC has "emphasized . . . that this language should be read broadly" "not only to protect investors, but also to permit securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions." *Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *7-9 (Feb. 13, 2004). As Siegel concedes, his extensive interactions with the Ds and Ls concerning their investment in World securities clearly amounted to participating in those transactions. *See id*. at *7-8 (holding that representative participated in private securities transactions where clients did not know about investments prior to representative's introduction, representative had told customers of his own interest in investing, and representative facilitated funds transfers).

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[8] During the appeal proceedings, Enforcement and Siegel moved to admit as additional evidence, respectively, an arbitration panel order dismissing an action brought by the Ds and Ls against Siegel, and a subsequent district court order that, *inter alia*, confirmed the district court's previous vacation of the arbitration panel order. The NAC Subcommittees empanelled to consider this matter granted both motions. We adopt these rulings.

Siegel asserts that his violation was due to a misunderstanding of the breadth of the "participate in any manner" language in Rule 3040. Ignorance of the requirements of NASD rules, however, is not an excuse for violative conduct. *Gilbert M. Hair*, 51 S.E.C. 374, 378 n.12 (1993). Accordingly, we affirm the Hearing Panel's finding that Siegel violated Conduct Rules 3040 and 2110.[9]

B. Suitability

Conduct Rule 2310(a) provides that "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."[10] The suitability rule applies only to securities that a broker "recommends" to customers. *Dep't of Enforcement v. Chase*, Complaint No. C8A990081, 2001 NASD Discip. LEXIS 30, at *15 (NAC Aug. 15, 2001), *aff'd*, *James B. Chase*, Exchange Act Rel. No. 47476, 2003 SEC LEXIS 566 (Mar. 10, 2003). Siegel argues that the Hearing Panel erroneously found that he made unsuitable recommendations to his four customers to invest in World securities.

Our analysis of the suitability issues is in three parts. First, we address Siegel's challenges to the Hearing Panel's determination that DL's and BL's testimony concerning their interactions with Siegel was more credible than Siegel's testimony and Siegel's attacks on the Panel's related supplemental factual findings. We reject Siegel's arguments. We then turn to whether Siegel "recommended" World securities to his four customers. We find that he did. Finally, we address whether such recommendations were suitable. We find that they were not.

1. Credibility Determinations

On remand, the Hearing Panel found that DL's and BL's testimony about their discussions and interactions with Siegel was more credible than Siegel's testimony, where their testimony differed. We affirm these credibility determinations.

It is well established that "[c]redibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference." *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004). A credibility determination "can be overcome only where the record contains substantial evidence for doing so." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *21-22 (Jan. 22, 2003).

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[9] A violation of any Commission or NASD rule is also a violation of Conduct Rule 2110, which requires the observance of high standards of commercial honor and just and equitable principles of trade. *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

[10] Pursuant to NASD Rule 0115(a), rules such as Conduct Rule 2310 that are applicable to "members" are also applicable to persons associated with a member.

The Hearing Panel found that Siegel's testimony that he merely mentioned World securities to DL and BL and did not himself review the World securities offering materials was not credible, in light of Siegel's significant ties with World ET, his demeanor, and his financial incentives to locate investors. There is no basis for overturning this credibility determination. As the record demonstrates, Siegel had a close relationship with World ET, starting months before Siegel's initial contact with DL and BL. Siegel learned of World ET at the beginning of 1997, and he began meeting with World ET officials. As of October 1997, Siegel agreed to provide capital raising consulting services to World ET, and he was invited to join its board of directors. By November 24, 1997, Siegel had decided to accept World ET's offer, and he saw an opportunity, either for him or his Firm, to handle any future public stock offering. As of December 6, 1997—in close proximity to when Siegel introduced World securities to DL and BL—World ET offered to compensate Siegel for raising capital for World ET. Siegel's ties to World ET continued to increase, but his involvement in World ET's capital raising efforts at the time he discussed World ET with DL and BL was already significant. Viewed in this context, Siegel's testimony was strained and not credible.

Siegel argues that the Hearing Panel erroneously found that the Agreement and the repayment terms of his loans presented Siegel with incentives to recommend World securities when he discussed them with DL and BL. Indeed, these specific incentives did not arise until January 1998, after he discussed World securities with the Ls. Siegel also correctly notes that the Hearing Panel erroneously considered it "undisputed" that Siegel provided to the Ls the World ET/World Amtech materials in a Siegel Group folder accompanied by his business cards, a fact on which the Hearing Panel relied in rejecting Siegel's testimony that he never reviewed those offering materials. Siegel, in fact, disputed that he delivered the documents in that manner. Considering, however, the extent and nature of Siegel's relationship with World ET—including his clear intent, at the time he recommended World ET to DL and BL, to leverage his involvement with World ET into future business—the minor flaws in the Hearing Panel's reasoning to which Siegel points do not amount to substantial evidence for overturning the Hearing Panel's determination that Siegel's testimony was not credible.[11]

Siegel also attacks the Hearing Panel's determination that DL and BL were credible. Siegel speculates that the Panel failed to account for the "bias inherent in the Ls' testimony" stemming from their pending arbitration against Siegel. That the Hearing Panel did not in its supplemental findings expressly account for the effect of the pending arbitration on DL's and BL's testimony, however, does not mean that the Hearing Panel did not consider it. In fact, the Hearing Panel—which expressly referred to the Ls' pending arbitration against Siegel in its initial decision—was well aware of that arbitration.

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[11] Likewise, there is no basis to overturn the Hearing Panel's determination that Siegel's claim that the Agreement was contingent on both his Firm's approval and on World ET obtaining "regulatory approval" for its securities was not credible. The Agreement does not contain any such contingencies, and Siegel failed to offer a reasonable explanation for why he would have signed an Agreement if it had unstated contingencies.

Accordingly, we affirm the Hearing Panel's credibility determinations that DL and BL provided credible testimony about their interactions with Siegel, and that Siegel did not. We now turn to whether Siegel "recommended" World securities to four of his customers.

2. Recommendations

As NASD has emphasized, whether a "communication . . . constitutes a 'recommendation' remains a 'facts and circumstances' inquiry to be conducted on a case-by-case basis." *NASD Notice to Members 01-23* (Apr. 2001). NASD has articulated several principles that guide the analysis of whether a particular communication should be deemed a recommendation. For example, the content, context, and manner in which information is presented to a customer are of particular significance. *Id.* Moreover, the determination of whether a "recommendation" has been made is an objective, rather than a subjective, inquiry. *Id*.[12] In this regard, an important consideration is whether the communication—given its content, context, and manner of presentation—reasonably would be viewed as a "call to action" or a suggestion that the customer engage in a particular transaction. *Id*. The degree to which a communication reasonably "would influence an investor to trade a particular security or group of securities" may be considered in analyzing whether a communication is a "recommendation." *Id*. Furthermore, "a series of actions which may not constitute 'recommendations' when considered individually, may amount to a 'recommendation' when considered in the aggregate."[13] *Id*.

With these principles in mind, we find that Siegel recommended World securities to his four customers. Our conclusion is most strongly supported by the content of Siegel's communications with DL and BL, which amounted to a "call to action." In their first meeting, Siegel conveyed to DL and BL his expectation that he would sometimes introduce them to possible investments in "start up companies that have a higher risk." Consistent with that, about a month after they opened a discretionary account, Siegel introduced DL and BL to World ET, of which DL and BL had never heard. Acting "very much assured," Siegel told DL and BL that World securities looked like a "good investment." Siegel described the benefits of, and need for, World ET's product, and he projected that sales would be great, "immediate[ ]," and on a global scale. Siegel told DL and BL that he wanted them to "take a look at" World ET. Siegel also delivered to DL and BL the offering materials for the World ET/World Amtech debenture and suggested that $100,000 might be a good amount to invest. Furthermore, Siegel explained to DL and BL that he and HD were among the investors in World ET and that they had each invested at least $300,000. This information had a significant potential to influence DL and BL, considering

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[12] Likewise, a respondent's knowledge is not an element of a violation of Conduct Rule 2310. *Dist. Bus. Conduct Comm. v. Cruz*, Complaint No. C8A930048, 1997 NASD Discip. LEXIS 62, at *98-99 (NBCC Oct. 31, 1997).

[13] These, and other, general principles offer guidance in determining whether a communication constitutes a recommendation that would trigger application of NASD's suitability rule. However, "[n]o single factor . . . , standing alone, necessarily dictates the outcome of the analysis." *Id.*

the degree of trust they had placed in Siegel and the fact that HD was their friend.[14] In sum, by encouraging DL and BL to consider investing in World ET/World Amtech and by explaining why they should do so in ways that, viewed objectively, would be influential, Siegel recommended World securities to DL and BL.

Similarly, Siegel's communications with HD and LD consisted of a suggestion to invest in World securities and, thus, a recommendation. Siegel informed HD and LD that he was excited about World ET's product, hoped to become a World ET director, and planned to invest in World ET, effectively vouching for the company.[15] Siegel obtained and forwarded to HD and LD information about World ET investment opportunities and the subscription agreements needed to invest. Siegel even admitted that he told HD that World ET "suggested" that HD invest $300,000. And when HD and LD were offered a full refund of the World IEQ investment or, alternatively, an investment in World ET, Siegel advised HD and LD that "I would rather be in the mother company if I had a choice."[16] *Cf. Dist. Bus. Conduct Comm. v. Kienlen*, Complaint No. C3B910031, 1992 NASD Discip. LEXIS 86 (NBCC Mar. 31, 1992) (holding that broker

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[14] Siegel argues that the Hearing Panel erroneously suggested that DL and BL both testified that they were influenced by Siegel's statements that HD and LD had invested in World ET. It is not necessary to find that Siegel's communications actually influenced DL's and BL's decision to conclude that such communications constituted a recommendation, because our inquiry is objective, not subjective. In any event, the record demonstrates that these, and other, statements did influence DL's and BL's decision to invest. Although DL testified that the Ds' investment was not the reason why BL and she invested, DL and BL asserted that it "validated" their decision to invest and made them feel "a little bit more comfortable." Likewise, DL testified that they based their decision to invest on the information that Siegel gave them and the fact that Siegel had invested in the issuer.

[15] Siegel contends that this case is like *Dist. Bus. Conduct Comm. v. Putterman*, Complaint No. C05960041, 1997 NASD Discip. LEXIS 52 (NBCC Oct. 10, 1997), which held that a research analyst had not recommended a stock, despite his conveying excitement about the issuer. *Putterman* is not an appropriate analogy. *Putterman* involved whether a research analyst was required to be registered, not the suitability rule. More importantly, the content and context of Putterman's and Siegel's communications were significantly different. In *Putterman*, the communications were from a research analyst to two of the firm's customers who had limited communications with the analyst and were serviced primarily by other firm representatives. By contrast, this case involves communications from a broker to his own clients that, as explained in the text, went far beyond simply expressing excitement about World ET.

[16] The fact that Siegel told HD and LD that Rauscher Pierce had not approved his sales of World securities does not change our conclusion that he recommended World securities to them. Standing alone, such statements merely informed his customers that to invest in World ET, they needed to do so other than through Rauscher Pierce. Likewise, to the extent Siegel admonished his customers that World securities were highly risky, including his caution to HD that "I do a lot of much more risky things than my clients do," such statements did not remove his communications from the scope of the suitability rule, because there is no evidence that he informed his customers that the risk involved was too great for them to take.

recommended mutual fund to a customer, where broker suggested the mutual fund as a possible investment, described and provided literature about it, and advised that he had invested in the fund).

While the content of Siegel's communications is enough for us to conclude that Siegel recommended World securities, the context of these communications bolsters our conclusion. At the time Siegel talked to the customers, he was generally involved with World ET for the *purpose* of helping it raise money. In addition, all four customers displayed great trust in Siegel, as evidenced by their previous investments of large sums with Siegel in discretionary accounts. The trust that Siegel's customers placed in him increased the degree to which Siegel's statements influenced those customers' investment decisions. *Cf. Charles E. Marland & Co.*, 45 S.E.C. 632, 636 (1974) (rejecting broker's assertion that he tried to dissuade his customers from engaging in mutual fund switching, where many of the customers were friends of the broker and would have been unlikely to act contrary to broker's recommendation). Moreover, the fact that Siegel's customers invested in World securities, some of which were low-priced equity securities, after first hearing of them from Siegel further supports our finding that Siegel recommended them. *Cf. Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *18 (NAC Jan. 28, 1999) (holding that a broker recommended a security when his customer learned of the investment from the broker and based the decision to invest on the broker's representation that the investment was good), *aff'd, Maximo Justo Guevara*, 54 S.E.C. 655 (2000), *pet. for review denied*, 47 Fed. Appx. 198 (3d Cir. 2002); *Sales Practices Requirements for Certain Low-Priced Securities*, Exchange Act Rel. No. 27160, 1989 SEC LEXIS 1603, at *53 (Aug. 22, 1989) ("[I]n most situations in which the broker-dealer brings a [low-priced equity security] to the attention of a customer, a subsequent purchase of the security will involve an implicit or explicit recommendation by the broker-dealer.").

Siegel contends that the Hearing Panel ignored that his communications about World ET were "*outside* the context of investing, made in casual conversation with sophisticated business people, successful in their community and state wide, who were wealthy and who did not sink their retirements into World ET." Considering the extent and content of Siegel's communications with his customers about World securities, the fact that they may have occurred in casual conversations is of little consequence. The broker-customer nature of his relationships did not vanish when he engaged those customers in personal conversations.[17]

The fact that Siegel's customers were wealthy, sophisticated, and may have been investing non-retirement funds does not demonstrate that Siegel's communications were not

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[17] For this argument, Siegel cites *Billy Neighbors*, 45 S.E.C. 193 (1973), in which the SEC dismissed allegations that Mr. Neighbors, a vice-president of a broker-dealer, failed to supervise another vice-president who had sought Mr. Neighbors' advice "as a friend" concerning the propriety of a transaction and who later engaged in the sales of unregistered securities. *Neighbors*, however, is inapposite. *Neighbors* did not involve unsuitable recommendations. Moreover, the SEC was unable to conclude in *Neighbors* that a supervisory relationship giving rise to any duties even existed. In contrast, the record here demonstrates the broker-customer relationship between Siegel and the Ds and the Ls.

recommendations.[18] While customers' sophistication may sometimes affect the recommendation issue, such a contextual factor is of little import in a case like this where the content of communications, standing alone, strongly indicates that recommendations were made. In any event, the evidence strongly demonstrates that Siegel's communications influenced his four customers, notwithstanding their relative sophistication and wealth. All four customers displayed great trust in Siegel, having invested substantial amounts of money with him in discretionary accounts.[19]

Accordingly, in light of the content, context, and manner of Siegel's presentations to his four customers, we find that Siegel recommended World securities to his four customers. We now turn to whether those securities were suitable.

3. Suitability of the World ET Securities

Before recommending a transaction, Conduct Rule 2310 requires that a representative "have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." Much of the jurisprudence involving the suitability rule concerns so-called "customer-specific" suitability, which requires that a recommendation be consistent with the customer's best interests and financial situation. *NASD Notice to Members 01-23*; *see also Faber*, 2004 SEC LEXIS 277, at *23-24 & n.25 (citing cases). A less common, but no less viable, basis of liability involves "reasonable basis" suitability. Enforcement presses only the "reasonable basis" theory of liability here. Under this theory, a broker-dealer "must have an 'adequate and reasonable basis' for any recommendation that he makes." *F.J. Kaufman and Co.*, 50 S.E.C. 164, 168 (1989). In contrast to customer-specific suitability, the reasonable basis test "relates only to the particular recommendation, rather than to any particular customer." *Id.* at 168. As the SEC has explained:

> This "reasonable basis" test is subsumed within the suitability rule, because a broker cannot determine whether a recommendation is suitable

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[18] Siegel argues that the Hearing Panel's description of DL in its supplemental findings as "a nurse" grossly understated her sophistication and understanding of the World securities. The Hearing Panel's supplemental findings, however, did not retract or contradict its earlier assessment that DL (along with the other customers) was "relatively sophisticated . . . , who voluntarily chose to invest in a risky enterprise," a finding that has support in the record and that we affirm. Despite whatever business acumen DL possessed, however, she and BL were nevertheless inexperienced investors: DL had never previously invested in anything besides bank accounts and CDs, and she testified that she had no understanding of what a debenture was.

[19] The discussion above concerning the customers' sophistication and wealth pertains only to whether a recommendation was made. A customer's wealth or sophistication does not warrant a less stringent suitability standard. *See David Joseph Dambro*, 51 S.E.C. 513, 517 (1993) ("Suitability is determined by the appropriateness of the investment for the investor, not simply by whether the salesman believes that the investor can afford to lose the money invested.").

> for a particular customer unless he has a "reasonable basis" to believe that the recommendation could be suitable for at least some customers. Indeed, it is self-evident that a broker cannot determine whether a recommendation is suitable for a specific customer unless the broker understands the potential risks and rewards inherent in that recommendation.

Id. at 168 (footnotes omitted). A recommendation may lack "reasonable basis" suitability if the broker: (1) fails to understand the transaction, which can result from, among other things, a failure to conduct a reasonable investigation concerning the security;[20] or (2) recommends a security that is not suitable for any investors.[21]

Under both tests, Siegel's recommendations lacked any reasonable basis. In a damaging admission, Siegel testified that he had not read any of the World securities offering materials. Based on that testimony alone, Siegel lacked any reasonable basis for recommending the World securities because he did not have sufficient understanding of what he was recommending. Even if, as the Hearing Panel found, he did read those offering materials, Siegel still would have lacked an understanding of the risks and rewards of the World securities. Siegel essentially conceded this point when he agreed with a Hearing Panelist's assessments that the World securities offering documents were "one of the worst sets of offering documents I have ever seen in my life" and that "you can't tell what these people are investing in." Moreover, Siegel admitted that he lacked the skills to evaluate whether the projected payments in the World Amtech materials were even possible.

Furthermore, as Siegel's own testimony demonstrates, the World securities were not suitable for any investor. Siegel testified that DL's and BL's debenture was not suitable for them

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[20] *Id.* at 168 & n.18 (stating that, to perform a suitability analysis, the broker must "understand[ ] the potential risks and rewards" of the transaction and that "the making of recommendations for the purchase of a security implies that . . . , as a prerequisite, he shall have made a reasonable investigation"); *see also C. Gilman Johnston*, 42 S.E.C. 217, 219 (1964) (finding unsuitable recommendations where the representatives "did not have the requisite background" to determine whether highly speculative securities were suitable for customers); *NASD Notice to Members 04-30* (Apr. 2004) (describing reasonable basis suitability analysis as "[u]nderstanding the terms, conditions, risks, and rewards" of investment); *NASD Notice to Members 03-71* (Nov. 2003) (explaining that a member's reasonable basis suitability determination requires performing "appropriate due diligence to ensure that it understands the nature of the product, as well as the potential risks and rewards associated with the product").

[21] *See, e.g.*, *Terry Wayne White*, 50 S.E.C. 211, 212-13 (1990) (holding that representative could not determine that short term mutual fund trading was suitable for at least some customers); *F.J. Kaufman & Co.*, 50 S.E.C. at 169 (holding that there was no reasonable basis to recommend a "margined buy-write strategy" to investors, because the potential returns "were always inferior" to an alternative strategy); *Charles E. Marland & Co.*, 45 S.E.C. at 636 (holding that general pattern of mutual fund switching created a rebuttable presumption of unsuitability).

or "any investor" because it contained no maturity date and no interest rate. Likewise, Siegel conceded that a debenture with no interest rate was not suitable for HD and LD. Siegel testified that, "[h]ad I looked over the documents, yes, I probably would have been discouraged with the company right then and there. I didn't look them over. I wish I had."

Accordingly, we find that Siegel made unsuitable recommendations of World securities to his four customers, in violation of Conduct Rules 2310 and 2110.

V. Sanctions

The Hearing Panel suspended Siegel for six months and fined him $20,000 for his selling away violations, suspended him for six months and fined him $10,000 for his suitability violations, ordered the suspensions to run concurrently, and assessed costs of $6,607.15. Siegel concedes that he deserves some sanction for his selling away violations, but he argues that the sanctions imposed are excessive because they ignore mitigating factors. Enforcement, on the other hand, argues that the Hearing Panel should have ordered Siegel to serve his suspensions consecutively and to pay restitution. As explained below, we affirm the Hearing Panel's fines and suspensions, but we order Siegel to serve his two suspensions consecutively and to pay full restitution to the customers, with offsets as explained below.

A. Private Securities Transactions

The Commission has held repeatedly that engaging in private securities transactions is a serious violation. *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *14-15 (Nov. 8, 2006). Conduct Rule 3040 "protects investors from unsupervised sales and protects the member firm from liability and loss resulting from those sales." *Id*. A violation of this rule "deprives investors of a member firm's oversight and due diligence, protections they have a right to expect." *Id*.

For determining sanctions for private securities transaction violations, the NASD Sanction Guidelines ("Guidelines") provide that the first step is to assess the extent of the selling away, including the dollar amount of sales, the number of customers, and the length of time over which the activity occurred.[22] In addition, the Guidelines direct that we consider 10 other principal considerations applicable to selling away violations and the Principal Considerations In Determining Sanctions.[23]

For private securities transactions involving sales between $100,000 to $500,000, the Guidelines recommend, as a starting point, a fine between $5,000 and $50,000 and a suspension

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22 *NASD Sanction Guidelines* 15 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

23 *Id*. at 6-7, 15.

between three and six months.[24] Siegel sold $400,300 in World securities, an amount at the high end of the relevant range.

While the small number of customers involved and the short length of time over which the selling away activity occurred are not aggravating,[25] most of the other applicable considerations are aggravating. Siegel was affiliated with World ET as both a director and an employee.[26] Siegel's sales of World securities injured his customers, who were customers of his Firm.[27] Siegel's changing of his address of record with World ET (from his Rauscher Pierce address to his home address) and his failure to inform his Firm about his Agreement is consistent with an attempt to conceal his activities.[28] Siegel directly participated in these sales.[29] Moreover, Siegel ignored a warning from his Firm not to sell World securities.[30]

We agree with the Hearing Panel that Siegel's conduct did not result directly in Siegel's monetary or other gain, but the relevant consideration is whether his conduct had the "potential for monetary or other gain."[31] At all relevant times, Siegel displayed an interest in playing various roles at World ET – a director, an investor, a lender, a paid employee, a prospective stockholder, an underwriter of a future initial public offering – that gave him a personal stake in the health and success of World ET. Given these circumstances, Siegel's raising more than $400,000 for World ET carried with it the potential for monetary or other gain. Moreover, due to Siegel's signing of the Agreement in January 1998, his participation in the February 1998 sales to the Ls involved the potential to receive cash compensation and World ET securities.

While providing verbal notice of the details of a proposed private securities transaction can be mitigating,[32] Siegel testified that he told Grandbouche only that he had "clients [who]

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24 *Id*. at 15.

25 *Id*. at 15 (Principal Considerations in Determining Sanctions, Nos. 2, 3).

26 *Id*. at 15 (Principal Considerations in Determining Sanctions, No. 5). Although Siegel disclosed to HD and LD that he had applied to become a member of the World ET board of directors, he did not disclose to DL and BL that he had done so or that he had become a member of its board.

27 *Id*. at 16 (Principal Considerations in Determining Sanctions, Nos. 7, 8).

28 *Id*. at 16 (Principal Considerations in Determining Sanctions, No. 13). Scott Grandbouche ("Grandbouche"), Siegel's branch manager, testified that the Firm's operations department routinely opened and reviewed Siegel's mail before delivering it to Siegel.

29 *Id*. at 16 (Principal Considerations in Determining Sanctions, No. 11).

30 *Id*. at 16 (Principal Considerations in Determining Sanctions, No. 10).

31 *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 17).

32 *Id*. at 16 (Principal Considerations in Determining Sanctions, No. 9).

wanted to invest in World ET; they were wanting to do it on their own."[33] This was not adequate verbal notice because it did not convey the extent of Siegel's involvement in the transactions, nor any details of the proposed transaction. *Cf. Alvin Gebhart, Jr.*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *55-56 (Jan. 18, 2006) (holding that failure to provide to the firm information specific to any of the investments sold was not adequate "notice"), *appeal docketed,* No. 06-71021 (9th Cir. Feb. 27, 2006). Siegel also argues that he misunderstood the breadth of Conduct Rule 3040, in particular the prohibition against participating "in any manner" in a private securities transaction. However, a broker's ignorance of his obligations does not mitigate his violations. *Prime Investors, Inc*., 53 S.E.C. 1, 28 (1997).

In light of these factors, we think that the sanctions imposed for Siegel's private securities transactions are sufficiently remedial. Accordingly, for Siegel's violations of Conduct Rules 3040 and 2110, we suspend Siegel for six months and we fine him $20,000.

B. Suitability

For suitability violations, the Guidelines recommend a fine between $2,500 and $75,000 and a suspension between 10 business days to one year.[34] In egregious cases involving an individual respondent, the Guidelines suggest that we consider imposing a longer suspension (of up to two years) or a bar.[35] In deciding upon the appropriate sanction for suitability violations, we consider the Principal Considerations in Determining Sanctions.[36]

Siegel's suitability violations present a number of aggravating factors. Siegel attempted to conceal his sales from his employer, and his conduct directly resulted in injury to his customers. This conduct also carried the potential for monetary or other gain.[37] In contrast to the Hearing Panel, we find that Siegel's unsuitable recommendations were reckless, not negligent.[38] In support of its negligence finding, the Hearing Panel concluded that, because Siegel personally lost the more than $42,000 he loaned to World ET, he truly believed in the World securities "investment." However, Siegel's personal loans involved different terms than the securities in which his customers invested. And while Siegel may have believed that World ET was a good company, he either failed to read the World securities subscription materials or saw how obviously inadequate such investments were for any customer and recommended the investment anyway. *See Gebhart, Jr.*, 2006 SEC LEXIS 93, at *63 (holding that securities

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33 Noting that Siegel and Grandbouche disputed whether Siegel provided any verbal notice, the Hearing Panel made no credibility determination but, instead, made its decision based on Siegel's testimony alone. We do not disturb or supplement the Hearing Panel's approach.

34 *Guidelines* at 99.

35 *Id*. at 99.

36 *Id*. at 6-7, 99.

37 *Id*. at 6, 7 (Principal Considerations in Determining Sanctions, Nos. 10, 11, 17).

38 *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 13).

professionals "have a duty to investigate offerings before presenting and selling them to clients"); *White*, 50 S.E.C. at 213 (holding that representative's willingness to engage in mutual fund switching fell "far below" standards of commercial honor and just and equitable principles of trade); *Dep't of Enforcement v. Golub*, Complaint No. C10990024, 2000 NASD Discip. LEXIS 14, at *20 (NAC Nov. 17, 2000) (finding that respondent conducted no research concerning securities he recommended and acted recklessly); *Dist. Bus. Conduct Comm. v. Merz*, Complaint No. C8A960094, 1998 NASD Discip. LEXIS 40, at *38 & n.18 (NAC Nov. 11, 1998) (holding that failure to read a document central to the transaction is reckless). Siegel's recommendations of World ET securities involved an extreme departure from the standards of ordinary care, especially considering the trust that Siegel knew his customers placed in him.[39]

Siegel argues that the Hearing Panel's sanctions are higher than in other cases involving more egregious conduct. The appropriateness of sanctions, however, "depends on the facts and circumstances of each particular case." *Raghavan Sathianathan*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572, at *44-45 (Nov. 8, 2006), *appeal docketed*, No. 07-1002 (D.C. Cir. Jan. 3, 2007). Siegel also contends that, given his status as a local radio and television personality, a six-month suspension constitutes a "death penalty," due to the negative publicity he expects will result from an unfavorable decision. A respondent's prominence in his community, however, is not relevant to our determination of what sanction is appropriate.[40]

Notwithstanding our partial disagreements with the Hearing Panel's sanctions analysis, we find that the sanctions it imposed were appropriate to remedy the misconduct.[41] Accordingly,

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[39] Siegel erroneously argues that *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 517 (1st Cir. 1978), supports a conclusion that he acted with only negligence. In *Hoffman*, an underwriter approved a memorandum to be distributed to prospective investors that contained misrepresentations concerning a security. In holding that the underwriter acted only negligently, the First Circuit held that there was no evidence that the underwriter approved the memorandum with indifference. *Id.* at 517. By contrast, Siegel's conduct—whether he failed to read the offering materials or recommended a product that he knew was unsuitable—demonstrates his indifference to his customers' interests.

[40] Along the same lines, Siegel cites *Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2003 NASD Discip. LEXIS 19, at *20 (OHO Apr. 28, 2003), in which a Hearing Panel imposed a two-month suspension on the grounds that a bar was not warranted and that it would refrain from imposing any "large suspension" that would "indirectly" exclude the respondent from the industry. Although the NAC affirmed the sanctions, nothing in the NAC's *Apgar* decision endorsed the Hearing Panel's second-guessing of the Guidelines' recommended ranges of sanctions. *Dep't of Enforcement v. Apgar*, 2004 NASD Discip. LEXIS 9, at *27-29 (NAC May 18, 2004).

[41] Siegel's unsuitable recommendations were neither numerous nor made over an extended period of time. *Guidelines* at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9). We also affirm the Hearing Panel's conclusion that the customers were "comparatively sophisticated persons who knew that they were risking money on a start-up enterprise with a new product." *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 19). Although these

[Footnote continued on next page]

for Siegel's unsuitable recommendations, we affirm the imposition of a six-month suspension and a $10,000 fine.

C. Concurrent v. Consecutive Suspensions

Enforcement argues that the Hearing Panel erred in ordering that Siegel's two suspensions be served concurrently, instead of consecutively. Although we have previously imposed both consecutive and concurrent suspensions,[42] neither the Guidelines nor our prior cases offer much direct guidance concerning the circumstances that make one approach more appropriate than the other. We therefore take this opportunity to set forth some guidance for this issue, which we then apply to this case. We intend for this guidance to be considered and followed in future cases. As explained below, we modify the Hearing Panel's sanction and order Siegel to serve his two suspensions consecutively.

In deciding whether to order concurrent or consecutive suspensions, adjudicators should remain mindful that the purpose of sanctions in NASD disciplinary proceedings is to remedy misconduct. For example, in cases involving rule violations of fundamentally different natures, consecutive suspensions specifically discourage *all* types of additional misconduct at issue.

At the same time, consecutive suspensions might exceed what is needed to be remedial, depending on the facts and circumstances. For example, where a respondent's violative conduct was wholly unintentional or negligent, concurrent suspensions might be enough to alert such a respondent about his various regulatory responsibilities and deter him from again engaging in the same kinds of violative conduct. Similarly, concurrent suspensions might be appropriate to remedy multiple violations of a similar nature where such violations result from the same underlying conduct. For example, concurrent suspensions may suffice when a financial and operations principal fails to calculate properly his firm's net capital, conduct that can result in net capital, books and records, and FOCUS report violations.[43]

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principal considerations are not aggravating, they are far outweighed by the aggravating factors described in the text.

[42] *See, e.g.*, *Dep't of Enforcement v. Benz*, Complaint No. C01020014, 2004 NASD Discip. LEXIS 7 (May 11, 2004) (ordering concurrent 30-day suspensions for net capital violations and failure to respond timely violations), *aff'd, Paul Joseph Benz*, Exchange Act Rel. No. 51046, 2005 SEC LEXIS 116 (Jan. 14, 2005); *Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17, at *63-70 (NAC June 25, 2001) (ordering consecutive suspensions for various violations, including two separate 60-day suspensions for violations of advertising rules and two separate 42-day suspensions for negligent misrepresentations and omissions).

[43] The length it would take to serve consecutive suspensions also is relevant to these issues. As the *Guidelines* indicate, a two-year suspension is the recommended "upper limit" in the various Guidelines "because of the NAC's sense that, absent extraordinary circumstances, any misconduct so serious as to merit a suspension of more than two years probably should warrant a

[Footnote continued on next page]

Siegel suggests that the Guidelines principle that addresses when to "aggregate[e]" violations for sanctions purposes is relevant.[44] We agree with that, but it is important to emphasize that the touchstone of the aggregation principle is that it applies to "similar types of violations."[45] Once that standard is met, we think the considerations that would support aggregating violations would also tend to support the use of concurrent suspensions or, more frequently, the use of a single suspension to remedy all similar types of violations that are aggregated.[46]

Applying this guidance here, we find that *consecutive* suspensions are needed to remedy Siegel's misconduct. We deem it necessary to impart to Siegel that his selling away and suitability violations involve different kinds of misconduct and raise separate and serious regulatory concerns. *Cf. Dep't of Enforcement v. Hanson*, Complaint No. C8A000059, 2002 NASD Discip. LEXIS 5, at *11 (NAC Mar. 28, 2002) (stating that engaging in an unlawful private securities transaction and recommending such a sale when it was unsuitable is "more serious than either violation standing alone"). Due to their dissimilar nature, selling away and suitability violations are not the kinds of violations that are well suited for aggregation. *Cf. Guevara*, 1999 NASD Discip. LEXIS 1, at *40-44 (imposing separate sanctions for suitability and selling away violations). Therefore, to protect investors and member firms from future instances of *either* type of misconduct, we order Siegel to serve his two suspensions consecutively.

D. Restitution

Finally, Enforcement argues that the Hearing Panel erred in not awarding restitution. We order Siegel to pay full restitution to HD, LD, DL, and BL, with offsets as explained below. We refer this issue to a Subcommittee of the NAC, appointed in a manner consistent with NASD

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bar (of an individual) or expulsion (of a member firm) from the industry." *Guidelines* at 11 (Technical Matters).

[44] The aggregation principle provides, among other things, that the "range of monetary sanctions . . . may be applied in the aggregate for similar types of violations" in "appropriate" circumstances, such as: (1) if "the violative conduct was unintentional or negligent (i.e., did not involve manipulative, fraudulent or deceptive intent);" (2) "did not result in injury to public investors or, in cases involving injury to the public, if restitution was made;" or (3) "resulted from a single systemic problem or cause that has been corrected." *Guidelines* at 4 (General Principles Applicable to all Sanctions Determinations, No. 4).

[45] *Id.*

[46] The guidance set forth in this opinion concerning consecutive and concurrent suspensions should be tailored to the specific case under consideration. Adjudicators should continue to use their discretion to determine what sanction is needed to remediate the misconduct in light of the facts and circumstances that are present in each individual case.

Procedural Rule 9331, to make further fact findings and a recommendation to the NAC concerning a specific restitution amount.

Restitution is "used to restore the status quo ante where a victim otherwise would unjustly suffer loss."[47] An order of restitution "seeks to restore a respondent's victim to the position he was in prior to the transaction by returning to the victim the amount by which the victim was deprived." *Dep't of Enforcement v. Kapara*, Complaint No. C10030110, 2005 NASD Discip. LEXIS 41, at *34 (NAC May 25, 2005) (*citing Toney L. Reed*, 51 S.E.C. 1009, 1013-14 (1994)). The Guidelines provide that restitution may be ordered "when an identifiable person, member firm or other party has suffered a quantifiable loss as a result of a respondent's misconduct."[48]

Applying these principles, restitution is appropriate to remediate Siegel's misconduct. This case involves four identifiable persons who incurred losses as a direct result of Siegel's unsuitable recommendations. The SEC has indicated that restitution is "a particularly fitting sanction in cases of unsuitable recommendations." *David Joseph Dambro*, 51 S.E.C. 513, 518 (1993); *see, e.g.*, *Faber*, 2004 SEC LEXIS 277, at *28-29 (affirming restitution order for respondent's unsuitable recommendations and misrepresentations of material fact); *Belden*, 2002 NASD Discip. LEXIS 12, at *25. In addition, the record clearly identifies the amount of the customers' investments, and steps can be taken to ensure that they do not receive any windfall benefits from a restitution award, as explained below. By themselves, these circumstances support ordering Siegel to pay full restitution.

Additional factors further compel our decision to award restitution. The record amply demonstrates that HD and LD—who gave Siegel "complete authority" to handle their account—and DL and BL—who opened a discretionary account with Siegel—placed a high degree of trust in Siegel. In addition, the World securities, which Siegel recommended and in which the customers invested, were not suitable for anyone. In combination, such factors amply demonstrate the significant extent to which the customers relied on Siegel's unsuitable recommendations to their detriment and punctuate how unjust it would be not to return them to the status quo ante. We acknowledge the fact that the customers realized that World securities were risky products, a fact on which the Hearing Panel relied in declining to award restitution; however, this fact is irrelevant in this case. Siegel's failure to have any reasonable basis for recommending the securities is substantially different from the customers' willingness to buy risky securities.

In declining to award restitution, the Hearing Panel noted, among other things, that restitution is particularly appropriate "where a respondent has benefited from the misconduct,"

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[47] *Guidelines* at 4 (General Principles Applicable to All Sanction Determinations, No. 5); *see also Dep't of Enforcement v. Belden*, Complaint No. 05010012, 2002 NASD Discip. LEXIS 12, at *25 (NAC Aug. 13, 2002), *aff'd*, *Wendell D. Belden*, Exchange Act Rel. No. 47859, 2003 SEC LEXIS 1154, at 18 (May 14, 2003).

[48] *Guidelines* at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

that Siegel did not earn any commissions from his sales, and that he lost his own money in World ET.[49] Although the absence of a benefit is a relevant consideration, such a circumstance does not preclude an award of restitution. For example, the Commission upheld a restitution and rescission order where there was "no showing . . . of the extent to which [respondent] personally profited" because "equity demand[ed] that [respondent] . . . bear the loss for [his] transgressions." *Franklin N. Wolf*, 52 S.E.C. 517, 526 (1995); *see also Reed*, 51 S.E.C. at 1013-14 (explaining that restitution does not require that the respondent have profited or benefited from his actions). Indeed, the Guidelines further state that "[o]rders of restitution may exceed the amount of the respondent's ill-gotten gain."[50] Considering the degree of Siegel's recklessness in recommending products that were not suitable for any investor, the fact that Siegel earned no commissions does not swing the equities in his favor.

Although we order Siegel to pay full restitution, it is necessary to impose additional conditions to ensure that a restitution award does not convey a windfall to the injured customers. *Kapara*, 2005 NASD Discip. LEXIS 41, at *37 (citing *Dambro*, 51 S.E.C. at 519 & n.25). Specifically, "[a]s a condition of restitution, the person entitled to restitution must return or offer to return that which he received as part of the transaction, or its value, unless such thing has, among other factors, been continuously worthless or consists of money that can be credited if restitution is granted." *Id.* (*citing Restatement of Restitution* § 65 (1937)).

There are several uncertainties concerning the value that the customers may have received as part of their transactions with Siegel. First, the customers never received certificates, acknowledged subscription agreements, formal confirmations, or any other official documentation of their investments in World securities. As a result, it is not clear whether the customers ever actually received any ownership interests in World securities. Second, if the customers did receive ownership interests, there is no current information concerning whether the customers have sold their World securities. Third, if the customers continue to hold any World securities, there is no indication whether the debentures and common stock have any value today or, if Siegel's violative conduct ever ceased to be the proximate cause of the customers' losses, had any value at that point.[51]

To prevent the customers from receiving a windfall, Siegel shall be required to pay restitution of $300,300 to HD and LD and $100,000 to DL and BL, less: (1) any value that the customers have received from selling the World securities; (2) any residual value in the World securities that customers have not sold, calculated as the higher of (i) the value of such securities today or (ii) if Siegel's violative conduct ever ceased to be the proximate cause of the customers' losses, the value of such securities at that point;[52] and (3) any restitution that the customers have

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[49] *Guidelines* at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

[50] *Guidelines* at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

[51] The *Guidelines* indicate that restitution may be ordered where there is a quantifiable loss "as a result of" a respondent's misconduct. *Id.*

[52] If the customers never received an ownership interest in the World securities, we would equate that with their having received worthless securities.

recovered through other avenues.[53] *Cf. Kapara*, 2005 NASD Discip. LEXIS 41, at *37-38 & n.31 (*citing Restatement of Restitution* § 65 (1937)) (ordering restitution with offsets).

We do not think it is appropriate to issue a final restitution order while leaving so many issues unresolved. For this reason, we refer the restitution issue to a Subcommittee of the NAC to make additional findings of fact and a recommendation to the NAC regarding the specific restitution amount, calculated in a manner consistent with this opinion. If necessary, the Subcommittee shall conduct an evidentiary hearing. The Subcommittee should first explore, however, whether the parties can enter into any stipulations that would make an evidentiary hearing unnecessary.

VI. Conclusion

We find that Siegel: (1) engaged in private securities transactions, without providing his firm with prior detailed written notice, in violation of Conduct Rules 3040 and 2110; and (2) made unsuitable recommendations, in violation of Conduct Rules 2310 and 2110. We fine Siegel $20,000 and suspend him in all capacities for six months for his private securities transactions violations; fine him $10,000 and suspend him in all capacities for six months for his suitability violations; and order that Siegel serve his two suspensions consecutively. We affirm the $6,607.15 in hearing costs, and we assess $1,350.90 in appeal costs.

We also order Siegel to pay restitution of $300,300 to HD and LD and $100,000 to DL and BL, with offsets as described above in this opinion. We refer the proceeding to a NAC Subcommittee to make a recommendation to the NAC, consistent with this decision, on the restitution amount.

Solely on the issue of the restitution amount, this decision is not a final disciplinary action within the meaning of Section 19(d)(1) of the Securities and Exchange Act of 1934 ("Exchange Act"). All other aspects of this decision, however, including all findings of liability

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[53] The Hearing Panel based its decision not to award restitution, in part, on the fact that the customers were pursuing arbitration against Siegel. We are aware of no SEC or NASD authorities that support the proposition that we should refrain from exercising our authority to award restitution to customers when such customers have brought a pending arbitration matter. Notwithstanding that, we are ordering that the restitution award be offset by any restitution obtained by the customers through other avenues to ensure that the restitution order does not confer windfall benefits.

and all other sanctions, do constitute a final disciplinary action within the meaning of Section 19(d)(1) of the Exchange Act.[54]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

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[54] We also have considered and reject without discussion all other arguments advanced by Siegel and Enforcement.

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 sanction, after seven days' notice in writing, will summarily be revoked for non-payment.