BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kevin P. Calandro Dallas, Texas, and James W. Browne Dallas, Texas, Respondents.	DECISION Complaint No. C05050015 Dated: December 14, 2007

Respondents participated in private securities transactions without prior written notice to, and written approval from, their member firms. Held, Hearing Panel's findings modified and sanctions affirmed.

Appearances

For the Complainant: Gregory R. Firehock, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For Kevin P. Calandro: E. Steven Watson, Esq.

For James W. Browne: Christopher J. Bebel, Esq.

Decision

Pursuant to NASD Rule 9311, Kevin P. Calandro ("Calandro") and James W. Browne ("Browne") appeal an August 1, 2006 Extended Hearing Panel decision. The Hearing Panel found that Calandro and Browne violated NASD Rules 3040 and 2110 by participating in the offer and sale of a start-up company's stock to investors for compensation without prior written notice to, and prior written approval from, their employers. The Hearing Panel suspended Calandro in all capacities for three months and fined him $5,000, suspended Browne in all capacities for six months and fined him $25,000, and ordered that they pay, jointly and severally, $9,930.30 in costs. After reviewing the record, we affirm the Hearing Panel's findings that Calandro and Browne violated NASD Rules 3040 and 2110, although we modify certain findings of the Hearing Panel. We affirm the sanctions imposed by the Hearing Panel.[1]

I. Introduction

Both Calandro and Browne admitted engaging in extensive business networking activities over the course of several years on behalf of e2 Communications, Inc. ("e2 Communications"), a start-up technology company. Such activities included introducing potential investors, suppliers, customers and employees to e2 Communications over a period of time during which e2 Communications raised capital in six rounds of private securities offerings. They engaged in such activities with the expectation that e2 Communications would eventually be floated in a public offering, that their employers would underwrite the public offering and/or be placement agents for private offerings, and that they would be personally rewarded for their efforts in facilitating any securities offering. Indeed, Calandro and Browne eventually received shares from e2 Communications in connection with their activities. Neither Calandro nor Browne provided their employers with prior written notice of their activities pursuant to NASD Rule 3040 ("Rule 3040"). e2 Communications eventually was forced into bankruptcy, and an e2 Communications investor commenced an arbitration against Browne and his employer in connection with the e2 Communications offerings.

This case differs somewhat from previous selling away cases given the passage of time between respondents' introduction of certain individuals to e2 Communications, the individuals' purchase of e2 Communications securities, and respondents' eventual receipt of selling compensation. Nonetheless we find that under the facts and circumstances of this case respondents' activities triggered the disclosure requirements of Rule 3040.

Rule 3040 proscribes participation in any manner in a private securities transaction without written disclosure to and approval of a member firm. Respondents engaged in a course of conduct on behalf of e2 Communications with the expectation that the individuals they

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[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

introduced to e2 Communications would likely become investors and that Calandro and Browne would eventually be compensated for their efforts. Calandro's and Browne's activities were extensive, outside of the scope of their employment, and occurred without written notification to and the express authorization of their member firms. Consequently, and as described in detail herein, we find that Calandro and Browne violated Rule 3040 and NASD Rule 2110 ("Rule 2110").

II. Background

A. Respondents' Employment History

Calandro entered the securities industry in 1985. From May 1994 until January 1995, Calandro was registered as a general securities representative with Kidder, Peabody & Co. Incorporated ("Kidder Peabody"). PaineWebber Incorporated, n/k/a UBS Financial Services, Inc. ("PaineWebber") subsequently acquired Kidder Peabody, and Calandro was registered as a general securities representative with PaineWebber until September 2000. From September 2000 until October 2002 Calandro was registered as a general securities representative with Lehman Brothers Inc. ("Lehman Brothers"). Calandro is currently registered as a general securities representative with another member firm.

Browne entered the industry in 1983, and first became registered as a general securities representative in 1983. In 1987 Browne joined Kidder Peabody as a general securities representative, where he eventually met Calandro. Browne remained at Kidder Peabody and later PaineWebber until September 2000. From September 2000 until August 2003, Browne was registered with Lehman Brothers. Browne is currently registered as a general securities representative with another member firm.

B. Procedural History

The Department of Enforcement ("Enforcement") filed a three-cause complaint against Calandro and Browne on April 25, 2005, and filed a bill of particulars supplementing the complaint on June 15, 2005. Cause one alleged that Browne participated in the offer and sale of e2 Communications preferred stock to 24 investors for compensation without providing prior written notice to, and receiving prior written approval from, PaineWebber. Cause two alleged that Browne participated in the offer and sale of e2 Communications common and preferred stock to a single investor for compensation without providing prior written notice to, and receiving prior written approval from, PaineWebber and Lehman Brothers. Cause three of the complaint alleged that Calandro participated in the offer and sale of e2 Communications preferred stock to nine investors for compensation without providing prior written notice to, and receiving prior written approval from, PaineWebber. Calandro and Browne generally denied these allegations and filed a number of pre-hearing motions with the Hearing Officer.[2]

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[2] We address these motions in Section V, *infra*.

Over the course of seven days in January and February 2006, an Extended Hearing Panel conducted a hearing on this matter. Enforcement called six witnesses. Calandro and Browne called three witnesses and each testified on his own behalf. In a decision dated August 1, 2006, the Hearing Panel found that: (1) Calandro violated Rules 3040 and 2110 by participating in the offer and sale of e2 Communications preferred stock to six investors for compensation; (2) Browne violated Rules 3040 and 2110 by participating in the offer and sale of e2 Communications preferred stock to nine investors for compensation; and (3) Browne violated Rules 3040 and 2110 by participating in the offer and sale of e2 Communications common and preferred stock to a single investor and to the partnership that he controlled. For this misconduct, the Hearing Panel suspended Calandro for three months and fined him $5,000, and suspended Browne for six months and fined him $25,000. The Hearing Panel further ordered that Calandro and Browne jointly and severally pay costs totaling $9,930.30.

Both Calandro and Browne appealed the Hearing Panel's decision, although only Browne requested oral argument pursuant to NASD Rule 9341. Browne subsequently withdrew his request for oral argument before the subcommittee of the National Adjudicatory Council empanelled to hear this matter. Thus, we have considered this case solely on the basis of the written record.

III. Facts

A. Respondents' Team Arrangement

Shortly after Calandro joined Kidder Peabody in 1994, he met Browne and the two agreed to work as a team sharing revenues under a joint account executive number. Calandro and Browne's arrangement continued at PaineWebber. Customer JLF was one of Calandro and Browne's first customers. JLF was an entrepreneur and president of a technology company, which he eventually sold. JLF deposited approximately $20 million of the proceeds from this sale into his investment account with Calandro and Browne.

B. Background of e2 Communications

JLF formed e2 Communications[3] in 1997 to develop and sell software designed to help companies market their products over the Internet. Like most start-up companies, e2 Communications needed capital. Between 1998 and 2000, e2 Communications completed six private securities offerings.[4] Three of these offerings—the common stock offering, the Series B Preferred offering, and the Series C Preferred offering—are relevant to this case.

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[3] Prior to April or May 2000, e2 Communications was known as e2 Software Corporation.

[4] During this period, e2 Communications completed three private placements of common stock and three private placements of preferred stock (Series A Preferred, Series B Preferred, and Series C Preferred).

C. Respondents' Involvement with e2 Communications

As a result of their working relationship, in late 1997 JLF asked Browne to review the then-current version of e2 Communications' business plan. Browne was impressed with the plan and asked his close friend and customer, IB, to review the plan.[5] IB was a known technology and marketing expert and had served in various senior management positions at IBM. IB shared Browne's optimistic view of e2 Communications.[6] Calandro's and Browne's networking activities on behalf of e2 Communications intensified in May 1998 when they invited several of their PaineWebber customers to attend a golf tournament. On that occasion, they introduced IB, BMB[7] and BG[8] to JLF. Browne described himself as an "internal cheerleader" for e2 Communications within PaineWebber (and later, Lehman Brothers) based on his promotion of e2 Communications to investment bankers at both firms.

In or around May 1998, Calandro and Browne discussed personally investing in e2 Communications' common stock offering with their supervisor at PaineWebber, Phillip Charles Eldemire ("Eldemire"), and Browne, in fact, obtained PaineWebber's written approval to invest in the common stock in June 1998. Browne, however, did not purchase the shares in his own name. Instead, Browne's wife purchased 88,890 shares of e2 Communications common stock (half in May 1998 and the remainder in January 1999) for a total purchase price of $100,000. Calandro's wife purchased 13,500 common shares for $15,187.50. During Eldemire's discussions with Browne, Eldemire warned Browne that "he could not sell for e2 in any way."

During this same June 1998 time period, Calandro and Browne discussed e2 Communications with a number of individuals with the potential to be investors, customers, suppliers, or employees of e2 Communications. Calandro disclosed to some of them that he and his wife had invested in e2 Communications. A number of these individuals purchased e2 Communications common shares (for themselves or for entities they controlled), including the following: (1) JC, Calandro's brother; (2) the Ciokajlo Living Trust, which was controlled by

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[5] Browne also sent e2 Communications' business plan to PaineWebber's investment banking department.

[6] IB served as an e2 Communications advisory director and eventually as a full member of e2 Communications' board of directors. IB also purchased Series B Preferred shares.

[7] BMB was a successful venture capitalist with substantial experience as both an investor and an officer of various start-up companies. BMB was appointed to e2 Communications' board of directors in 1999. In addition, BMB's venture fund was the sole purchaser of Series A Preferred shares.

[8] BG was a large reseller of Hewlett Packard computers, office equipment, and software. Although the record shows that IB and BMB were first introduced to JLF at the golf tournament, the record is unclear as to whether Calandro and Browne first introduced BG to JLF at the tournament or several months prior to the golf tournament.

LC, Calandro's stepfather and customer; and (3) BG, a joint customer of Calandro and Browne. Similarly, a number of potential investors, customers, suppliers, and employees who Browne introduced to JLF or e2 Communications purchased common shares in or around June 1998 and/or early 1999, including the following: (a) RAB, Browne's father and customer; (b) JRC, a friend and customer; (c) BCM, a customer of Browne's; and (d) BG. Browne mentioned to certain of these individuals that he and his wife had invested in e2 Communications and also passed the names of certain of these individuals to e2 Communications.

In April 1999, Browne began serving as an advisory director of e2 Communications.[9] Several months later, Eldemire, Browne's supervisor, warned Browne that "he could not do private placements without PaineWebber approval. [Browne] said he was discussing with the investment bankers and was trying to get PaineWebber to do the placement. I told him that he could not sell nonregistered securities." Not until November 1999 did Browne seek PaineWebber's approval to serve as an e2 Communications advisory director. Browne's application indicated that he would not receive any director's fees. In December 1999, PaineWebber authorized Browne to serve as an e2 Communications director (instead of as an advisory director as requested by Browne) subject to the following restrictions:

> (1) You will be holding this position in an individual capacity only and not as a representative, designee or deputy of PaineWebber . . .; (2) Your involvement in this activity will be conducted outside the normal hours of business with PaineWebber, and away from PaineWebber premises; (3) In any activity connected with this venture, it must be made clear that your activities are in no way related to your duties at PaineWebber; (4) PaineWebber stationery is not to be used in connection with the above activities . . .; (6) You will not discuss the investment merits of this entity with any PaineWebber client or PaineWebber Financial Advisor . . .; (8) Should the scope of your duties, responsibilities,

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[9] Browne asserts that e2 Communications' board of directors did not appoint him as an advisory director until September 2000 based upon e2 Communications' board minutes and an insurance policy listing September 25, 2000, as the date on which Browne became an advisory director. However, a preponderance of evidence in the record indicates that Browne's service as an e2 Communications advisory director began in April 1999. For example, a Unanimous Written Consent in Lieu of a Special Meeting of the Board of Directors dated April 15, 1999, states that Browne's term as an advisory director began in April 1999. In connection therewith, the record contains a Stock Option Agreement signed by JLF and Browne dated April 15, 1999, which granted Browne an option to purchase 25,000 shares of e2 Communications common stock at a price of $3.375 per share. Corroborating the April 1999 start-date is a statement by Browne in his written disclosure of outside directorships to Lehman Brothers dated September 22, 2000, and a separate statement in his responses to FINRA's requests for information, that his term as an e2 Communications advisory director began in April 1999. The Series B Preferred private placement memorandum, dated October 11, 1999, also lists Browne as an advisory director. Further, Browne argues that the shares he received from e2 Communications in March 2000 (discussed below) were in recognition of his services as an advisory director.

involvement, or compensation change other than nominally, PaineWebber policy requires you to again seek the approval of the Central Division for that outside business activity.

At the time of Browne's application to PaineWebber to serve as an e2 Communications advisory director, e2 Communications was in the process of soliciting existing shareholders to invest in its next private offering, the Series B Preferred offering. e2 Communications completed the Series B Preferred offering in March 2000. Three individuals who Calandro introduced to e2 Communications in 1998 (and who purchased common shares) purchased the Series B Preferred shares: JC (through the Calandro Living Trust); the Ciokajlo Living Trust; and BG. In addition, Calandro introduced two additional individuals to e2 Communications who purchased Series B Preferred shares (although these two additional individuals did not purchase e2 Communications common shares):[10] the Taylor/Good Partnership and AL, Calandro's best friend and customer. A principal of the Taylor/Good Partnership and Calandro would occasionally talk about e2 Communications, and Calandro informed him that Calandro's wife had invested in e2 Communications and that e2 Communications would probably need additional capital. In addition, Calandro had similar conversations with AL. In total, Calandro introduced five individuals to e2 Communications who purchased Series B Preferred shares for approximately $271,500.[11]

Similarly, four individuals who Browne introduced to e2 Communications in 1998 (and who purchased common shares) purchased Series B Preferred shares: RAB, JRC, BG, and BCM. In addition, five additional individuals who Browne introduced to e2 Communications purchased Series B Preferred shares (although these five additional individuals did not purchase common shares): (a) SCF, Browne's father-in-law; (b) IB; (c) MHK, a real estate broker originally introduced by Browne to assist e2 Communications in finding office space; (d) WGV, a regional manager at another member firm who Browne had contacted on behalf of e2 Communications to obtain information regarding investment banking services; and (e) SKS.[12] In total, Browne introduced nine individuals to e2 Communications who purchased Series B Preferred shares for a total of approximately $398,500.

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[10] The record is unclear when exactly Calandro and Browne introduced e2 Communications to most of the individuals who did not purchase e2 Communications common stock.

[11] The Hearing Panel also attributed to Calandro an additional $204,000 of Series B Preferred shares purchased by a trust managed by RC junior, Calandro's brother-in-law. The record, however, indicates that Calandro discussed e2 Communications with RC senior, his father-in-law, and not RC junior, his brother-in-law. Because the record does not support a finding that Calandro had any conversations with or played any role in RC junior's purchase of Series B Preferred shares on behalf of the trust, we do not include this transaction in our analysis.

[12] At the hearing, Browne testified that Browne's father initially referred SKS to e2 Communications, and thus a prior statement to FINRA that he referred SKS to e2 Communications was incorrect. Browne, however, did not refute his statement that he later requested that e2 Communications contact SKS.

D. Respondents' Receipt of e2 Communications Shares

In a Unanimous Written Consent in Lieu of a Special Meeting of the Board of Directors dated March 11, 2000 (the "Unanimous Written Consent"), e2 Communications' board of directors at the time (JLF and BMB) authorized the issuance of 3,137 shares of common stock to Calandro and 10,177 shares of common stock to Browne in connection with the Series B Preferred stock offering. The Unanimous Written Consent provides, in pertinent part, as follows:

> [I]n connection with the private placement of 750,000 shares of Series B Convertible Preferred Stock, the Company agreed to pay finders' fees in connection with the placement of a portion of such shares . . . [and] is obligated to pay finders' fees to J. Wade Browne and Kevin Calandro[.] Messrs. Browne and Calandro have requested that the Company discharge is [sic] obligations to them by paying their finders' fees in shares of common stock . . . [and] Mr. Browne has requested that the shares of Common Stock to be issued to him instead be issued to his wife Priscilla F. Browne.

On April 11, 2000, e2 Communications' counsel sent BMB a copy of the Unanimous Written Consent for his signature, with a cover letter stating that the Unanimous Written Consent concerned the issuance of shares to Calandro and Browne in connection with the payment of finders' fees. BMB executed and returned the Unanimous Written Consent, and shortly thereafter Calandro received a stock certificate representing 3,137 shares of e2 Communications common stock[13] and Browne's wife received a stock certificate representing 10,177 shares of e2 Communications common stock.

E. Browne's Involvement with the Series C Preferred Offering and Purchases of Common Stock

In the latter part of 2000, e2 Communications commenced its Series C Preferred offering. Avenue A, Inc. ("Avenue A"), a public company specializing in the integration of Internet media planning, buying and analytics, agreed to purchase $2.5 million of Series C Preferred shares, and agreed to purchase an additional $2.5 million of Series C Preferred shares if certain conditions were met.[14] In connection with Avenue A's conditional obligation to purchase additional e2 Communications shares, e2 Communications sought to attract other investors to the Series C Preferred offering. Despite a downturn in the market since the Series B Preferred offering, e2 Communications hoped to avoid selling Series C Preferred shares at a price lower than the Series B Preferred shares. To accomplish this objective, e2 Communications sought an agreement with

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[13] After receiving the shares, Calandro requested that e2 Communications transfer his shares to his wife's name. In addition, an email from e2 Communications' CFO dated May 31, 2000, states that Calandro received 3,137 e2 Communications common shares and Browne 10,177 e2 Communications common shares as payment for the Series B Preferred offering.

[14] These conditions were never satisfied, and Avenue A did not purchase the additional shares.

the wife of e2 Communications' former president (JYA) whereby she would agree to sell her e2 Communications common shares at a price expected to be lower than the offering price of the Series C Preferred shares. Browne explained that the agreement would be "a document [e2 Communications] could show to prospective investors that they were trying to sell . . . preferred C . . . to say that, if you buy our preferred C, [JYA] is willing to sell common stock at a lower price. So if you buy the preferred C, you can . . . buy some of her stock too. Then your average price will be lower."

Beginning in February 2000, at JLF's request, Browne negotiated a series of agreements between JYA and e2 Communications pursuant to which JYA agreed to sell her e2 Communications common stock at prices lower than the offering price for the Series C Preferred shares. The agreements stated that Browne would be "expending considerable efforts in locating a purchaser for these shares." Browne corresponded with JYA's husband in connection with the agreements on several occasions.

SKF and a limited partnership he managed, CBI Eastchase, L.P. ("CBI"), purchased a total of $300,000 of common shares from JYA, and CBI purchased $300,000 of Series C Preferred shares from e2 Communications.[15] A friend of IB's originally introduced SKF to e2 Communications, and SKF purchased Series B Preferred shares in 2000 prior to SKF's and CBI's purchases of Series C Preferred shares and common shares from JYA. At the request of IB and JLF, Browne became involved with SKF's and CBI's purchase of common shares from JYA and Series C Preferred shares from e2 Communications. Browne facilitated these investments in e2 Communications by playing an administrative role in connection with these purchases. For example, Browne sent wiring instructions (which were contained within an older e2 Communications subscription agreement) for CBI's investment in the Series C Preferred shares, provided SKF with the address for e2 Communications' corporate counsel, and provided payment instructions regarding SKF's and CBI's purchase of common shares from JYA.

F. Browne's Receipt of Additional e2 Communications Shares

In June or July 2000, JLF made a verbal promise to Browne that he would receive five percent of the total amount of e2 Communications' next private placement. In early March 2001, after the Series C Preferred offering (i.e., the first private placement subsequent to JLF's promise), JLF sent Browne an email asking Browne to provide JLF with the total amount of capital that Browne had helped e2 Communications raise. The subject line of the email was "payment for services." Browne responded by stating that to date he had helped raise approximately $13.2 million of the $21.5 million raised by e2 Communications. Browne further stated that he had received options on April 15, 1999, for his role as an advisory director, and 10,177 shares in 2000, and requested that the certificate for the 10,177 shares be "canceled and reissued as part of this deal. . . . In summary, my compensation for the last 3.5 years of supporting e2 has been $71,137.23 in $2.33 stock and 75,000 options. Our agreement, as I remember it, was 5% of the 7MM preferred C whether I raised it or not plus 5% on [JYA's] shares."

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[15] Browne also purchased $250,000 of Series C Preferred shares.

Several days after this exchange, e2 Communications' board of directors (which now consisted of JLF, BMB, IB, and three other directors) conducted a telephonic board meeting. The minutes of this board meeting reflect that there was a discussion of the issuance of common shares to Browne "with respect to the services rendered in connection with the financing of the Company." As payment for Browne's services to e2 Communications, the board authorized the issuance of 150,000 shares of e2 Communications common stock to Browne. e2 Communications issued Browne the 150,000 shares on or about March 28, 2001.

G. Disclosures to Firms

1. Browne's Disclosures to PaineWebber and Lehman Brothers

Browne submitted to PaineWebber an application to serve as an e2 Communications advisory director dated November 8, 1999. The application did not describe Browne's involvement with any of e2 Communications' private securities offerings and was the only form that Browne submitted to PaineWebber with respect to e2 Communications.

In September 2000, Browne executed Lehman Brothers' new hire disclosure form in which he disclosed that he had been serving as an e2 Communications advisory director since April 1999 and his receipt of options to purchase 25,000 shares (which, as the result of a three-for-one stock split, had increased to 75,000) as compensation for this role. Browne, however, did not disclose his receipt of 10,177 shares of common stock, nor his agreement with JLF that he would receive five percent of the next offering as compensation for his services.[16] Further, in a disclosure of Browne's private investments which he filed with Lehman Brothers in August 2002, Browne did not disclose his or his wife's investments in e2 Communications or receipt of e2 Communications shares.

2. Calandro's Disclosure to PaineWebber

Calandro did not disclose his involvement in e2 Communications to PaineWebber in his annual certification of compliance dated January 19, 2000. Calandro left PaineWebber prior to completing the form for 2000. In his response to FINRA's requests for information pursuant to

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[16] In response to a request for information from FINRA, Lehman Brothers initially disclosed that its records showed that Browne made the appropriate disclosures regarding e2 Communications when he was first hired, although the underlying documentation was destroyed on September 11, 2001. However, in May 2003 Lehman Brothers sent FINRA Browne's new hire disclosure form and stated that although it had previously believed such documents were destroyed Lehman Brothers recently relocated them. Browne testified that Lehman Brothers obtained this "recently relocated" form from him and that he did not have copies of each and every disclosure form he submitted to Lehman Brothers. Other than this statement, however, there is no evidence in the record that Browne made any additional written disclosures to Lehman Brothers.

NASD Rule 8210, Calandro responded "not applicable" when asked whether he notified PaineWebber and Lehman Brothers, in writing, of his involvement with e2 Communications.

H. e2 Communications' Bankruptcy Filing and Subsequent Investor Arbitration Against Browne and PaineWebber

By 2001, e2 Communications was experiencing financial difficulties, and the board of directors began to fractionalize over the best course of action going forward. An attempt to remove JLF as president of e2 Communications in April 2001 failed. Browne sided with those board members and shareholders seeking JLF's removal, which caused acrimony between JLF and Browne. Ultimately, certain employees of e2 Communications filed an involuntary petition for relief against e2 Communications under Chapter 11 of the U.S. Bankruptcy Code. Browne played an active role in the bankruptcy case. He hired and paid at least a portion of the legal fees for certain shareholder plan proponents and attended numerous hearings. As of early 2006, e2 Communications shareholders had received more than $1 million in distributions from e2 Communications' bankruptcy estate.[17]

In or around June 2002, a customer of Browne's (at both PaineWebber and Lehman Brothers) filed a complaint with FINRA against Browne and PaineWebber regarding the sale of e2 Communications stock. The complaint alleged, among other things, that Browne had solicited the customer to purchase e2 Communications stock and that the stock was an unsuitable investment. FINRA ultimately determined not to pursue enforcement action on the customer complaint. The customer, however, pursued an arbitration claim against Browne and PaineWebber with respect to his investment in e2 Communications, and in connection therewith, counsel for PaineWebber alerted FINRA staff that the firm had come into possession of documents indicating that Browne may have been involved with e2 Communications. FINRA's investigation of Calandro and Browne commenced shortly thereafter, and PaineWebber eventually settled the customer arbitration.

IV. Discussion

Rule 3040(b) requires that an associated person, prior to participating in any manner in a private securities transaction, provide his or her member firm with the following information, in writing: (1) a detailed description of the proposed transaction; (2) the associated person's proposed role in the transaction; and (3) whether the associated person has received or may

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[17] The Hearing Panel decision states that all shareholders participating in the litigation trust formed in e2 Communications' bankruptcy case recovered more than their initial investments. However, the testimony cited by the Hearing Panel in support of this statement appears to relate to sums advanced by a handful of shareholders to fund the litigation trust—not to the shareholders' original investments in e2 Communications. Indeed, while e2 Communications' bankruptcy attorney testified that shareholders had received more than $1 million in distributions from e2 Communications' bankruptcy estate, e2 Communications had raised more than $20 million from investors during its existence.

receive selling compensation in connection with the transaction. "Rule 3040 serves 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 *9 (Feb. 13, 2004). "Violation of this rule deprives investors of a member firm's oversight and due diligence, protections they have a right to expect." *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *15 (Nov. 8, 2006).

A "private securities transaction" is any securities transaction outside the regular scope of an associated person's employment, including new offerings of securities which are not registered with the Commission. *See* Rule 3040(e)(1). "Participation in any manner" in a private securities transaction under Rule 3040 has been broadly defined, and is "not limited merely to solicitation of an investment." *See Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23 (Jan. 6, 2006), *aff'd*, 2006 U.S. App. LEXIS 30982 (2d Cir. Dec. 12, 2006); *Love*, 2004 SEC LEXIS 318, at *7 ("We have emphasized previously that [the phrase participate in any manner] should be read broadly."). Indeed, the Commission has found that the notice requirements set forth in Rule 3040 are triggered "when the associated person's role in a transaction was limited to a client introduction and to eventual receipt of a finder's or referral fee." *John P. Goldsworthy*, 55 S.E.C. 817, 835 (2002); *Gilbert M. Hair*, 51 S.E.C. 374, 378 (1993); *Charles A. Roth*, 50 S.E.C. 1147, 1150-51 (1992); *Terry R. Wamganz*, 48 S.E.C. 257, 258-59 (1985).

If an associated person has received or may eventually receive selling compensation, the member firm must advise the associated person in writing whether it approves or disapproves the person's participation in the transaction. *See* Rule 3040(c). 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, including, though not limited to, commissions; finder's fees; securities or rights to acquire securities; rights of participation in profits, tax benefits, or dissolution proceeds, as a general partner or otherwise; or expense reimbursements." Rule 3040(e)(2). "NASD made this definition [of selling compensation] broad in scope and intended it to include any item of value received." *Goldsworthy*, 55 S.E.C. at 834 n.40 (internal quotations omitted). In cases where no selling compensation has been or may be received, the firm must acknowledge the associated person's notice in writing. *See* Rule 3040(d).

We apply these standards first to the allegation that Calandro and Browne failed to provide their firms with prior written notice of their participation in the Series B Preferred offering and their receipt of compensation in connection therewith. We then apply these standards to the allegation that Browne participated in the offer and sale of e2 Communications common shares and Series C Preferred shares to SKF and CBI for compensation without providing prior written notice to, and receiving prior written approval from, PaineWebber and

Lehman Brothers.[18]

A. Calandro and Browne Violated Rule 3040 in Connection with the Series B Preferred Offering

There is no dispute that Calandro and Browne introduced individuals to e2 Communications, that some of those individuals invested in e2 Communications, and that Calandro and Browne received shares of e2 Communications common stock. Calandro and Browne, however, argue generally that their involvement with e2 Communications did not constitute participation in a private securities transaction, and thus the disclosure requirements of Rule 3040 were not triggered by their conduct. Further, they argue that they introduced individuals to e2 Communications for purposes other than investing in the company, that they did not receive selling compensation, and Browne contends that his conduct was within the regular course of his employment.[19] We address each of these arguments below.

1. Respondents Participated in Private Securities Transactions

While we acknowledge that this case presents somewhat unusual facts given the passage of time between the introductions of certain individuals to e2 Communications, their purchase of Series B Preferred shares and respondents' receipt of e2 Communications common shares, we find that respondents violated Rule 3040 by failing to give prior written notice to their member firms and failing to obtain their firms' written approval prior to engaging in such activities. Calandro's and Browne's extensive activities on behalf of e2 Communications, which included investor introductions and the eventual receipt of compensation from e2 Communications in connection with such introductions, occurred over a period of several years. Respondents were aware or should have been aware that e2 Communications, as a start-up technology company, would have ongoing capital needs and would likely initiate a number of rounds of private placements.[20] Similarly, it was foreseeable that their course of conduct over a period of years of

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[18] The standard of proof that Enforcement must satisfy in order to prove that respondents violated Rule 3040 is a preponderance of the evidence. *See Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in FINRA disciplinary proceeding).

[19] Other than Browne's assertion that he provided written notice to PaineWebber in the form of his November 1999 application to serve as an e2 Communications advisory director, neither respondent contends that he provided his firm with prior written notice of his activities.

[20] We reject respondents' argument that there was no expectation of future private offerings when the introductions were made. e2 Communications, as a small start-up technology company, initiated six rounds of private offerings during the period that respondents were involved with e2 Communications. Indeed, shortly after e2 Communications' initial "founders" common stock round in 1997, e2 Communications changed its business model and initiated another common stock round in May 1998. Further, e2 Communications re-solicited existing e2 Communications shareholders in late 1998 to purchase additional common shares. Moreover,

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networking on behalf of e2 Communications would likely lead to at least some of the introduced individuals investing in e2 Communications and to e2 Communications eventually recognizing their efforts with some form of compensation. As set forth above, it is well-established that the mere introduction of a party and the eventual receipt of selling compensation are sufficient to trigger Rule 3040, and we find that both conditions were satisfied with respect to Calandro's and Browne's activity in connection with the Series B Preferred round. *See Goldsworthy*, 55 S.E.C. at 835.

Indeed, the purpose of Rule 3040—to protect investors by ensuring that member firms supervise the activities of their employees—was frustrated in this case. PaineWebber ultimately made a financial settlement with a customer who filed a claim in FINRA arbitration in connection with his investment in e2 Communications. Further, e2 Communications' bankruptcy subjected all of its shareholders to losses. Calandro's and Browne's networking activities on behalf of e2 Communications over the course of several years, as well as their receipt of e2 Communications common shares as compensation for those activities, were not supervised by their employers because, without Rule 3040 notice, the employers had no opportunity or reason to do so. The fact that Calandro and Browne's managers were generally aware of their activities in connection with e2 Communications, and may, in the case of PaineWebber, have even given the appearance of assent to certain of such activities, did not excuse respondents from compliance with Rule 3040's disclosure and approval requirements. *See Joseph J. Vastano, Jr.*, Exchange Act Rel. No. 50219, 2004 SEC LEXIS 1806, at *14 (Aug. 19, 2004) (holding that oral notice is insufficient to satisfy requirements of Rule 3040).

Calandro and Browne argue that because they did not solicit the investors to purchase shares of e2 Communications, they did not "participate in any manner" in private securities transactions under Rule 3040. In support of this argument, respondents submitted affidavits from a number of investors to the effect that they were not solicited by Calandro or Browne. Respondents, however, read the prohibition contained in Rule 3040 too narrowly, as the activities proscribed by Rule 3040 are not limited to solicitation. *See Abbondante*, 2006 SEC LEXIS 23, at *28; *cf. Dist. Bus. Conduct Comm. v. Stephenson*, Complaint No. SF-1346, 1991 NASD Discip. LEXIS 44 (NASD Board of Governors Mar. 20, 1991) (holding that respondent's unremunerated action in assisting a sick colleague in completing transaction by assisting colleague's customer with paperwork constituted selling away).[21] Further, respondents cite to

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Calandro later informed the Taylor/Good Partnership that he was "sure a company that size is always going to need some more capital," and testified that he probably told AL that e2 Communications would need more money.

[21] Additionally, Calandro and Browne argue that the Hearing Panel was inconsistent in its findings that Browne did not violate Rule 3040 in connection with his discussions regarding e2 Communications with Eldemire and certain other brokers at PaineWebber, while similar conduct in connection with nine investors in the case of Browne and five investors in the case of Calandro did violate Rule 3040. We find no such inconsistency, and agree with the Hearing

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the Commission's decision in *Love* for the proposition that brokers who do nothing more than refer customers to another investment opportunity do not violate Rule 3040. *See Love*, 2004 SEC LEXIS 318, at *10. Here, however, respondents did substantially more than refer customers to e2 Communications. Calandro and Browne informed potential investors that they had personally invested in e2 Communications, provided contact information, generally networked for and provided consulting services to e2 Communications over an extended period of time, and received selling compensation from e2 Communications for their efforts. The Commission has repeatedly emphasized that the phrase "participates 'in any manner'" should be read broadly. *Id.* at *7. Calandro and Browne's activities on behalf of e2 Communications therefore constituted participation in private securities transactions under Rule 3040.

Respondents also argue that certain of the e2 Communications shareholders attributed to them were solicited directly by e2 Communications in the fall of 1999. However, an associated person cannot avoid liability under Rule 3040 simply because the investor's decision to invest resulted from representations made by another party. *See Goldsworthy*, 55 S.E.C. at 835. Further, respondents' argument ignores the fact that they introduced these individuals to e2 Communications. It is common knowledge that start-ups often seek funding from their advisors, suppliers, consultants, and other individuals involved with the company, and under the facts and circumstances Calandro and Browne should have known that their introductions would lead to investments in e2 Communications.

2. Respondents Received Selling Compensation

Respondents also argue that the common shares they received in 2000 were not selling compensation, and thus they did not violate Rule 3040. We disagree. First, Rule 3040 requires prior written disclosure to firms even if there is no receipt of compensation or expectation of compensation. *See Abbondante*, 2006 SEC LEXIS 23, at *31. Second, the record demonstrates that Calandro and Browne received selling compensation in connection with the introduction of investors to e2 Communications and their investments in e2 Communications. Rule 3040(e)(2) expressly states that securities are a form of selling compensation for purposes of the rule, and it is undisputed that Calandro received 3,137 shares of e2 Communications common stock and that Browne's wife (as proxy for Browne) received 10,177 shares of e2 Communications common stock. The Unanimous Written Consent unambiguously states that these shares were finders' fees earned by Calandro and Browne in connection with the Series B offering, and that Browne had requested that the shares be issued in his wife's name.

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Panel that Browne's discussions of e2 Communications with his co-workers and fellow brokers at PaineWebber did not require disclosure pursuant to Rule 3040.

A letter written by BMB in March 2003 reinforces that the shares were compensation for Calandro's and Browne's efforts with regard to the Series B Preferred offering.[22] This letter detailed BMB's receipt and review of the Unanimous Written Consent and contemporaneous discussions with Browne and JLF regarding the document and related spreadsheets. The letter further stated that "the Company decided to issue the larger amount of stock due to [Browne's] contribution as a whole to the Company and I signed the consent."

Calandro and Browne argue that the Unanimous Written Consent and BMB's March 2003 letter should not be relied upon in light of BMB's testimony that he did not read many of the corporate documents that e2 Communications sent him, and that although he noticed the reference to finders' fees in the Unanimous Written Consent, he determined that the language was inconsequential and that changing the document's language would be too costly. Further, BMB explained that his March 2003 letter was written very quickly to get Browne something he could show to his attorney in connection with the arbitration, that he confused time periods and events, and that he did not even read the letter before it was sent. The Hearing Panel did not find BMB's testimony to be credible, and we find no reason in the record to disagree with the Hearing Panel's assessment. *See Dep't of Mkt. Regulation v. Sciascia*, Complaint No. CMS040069, 2006 NASD Discip. LEXIS 22, at *18 (NASD NAC Aug. 7, 2006) (holding that credibility determinations of the initial fact-finder are entitled to considerable weight and deference and should be overturned only if there is substantial evidence for doing so).

Alternatively, Calandro argues that the shares were a gift and/or compensation for his general networking on behalf of e2 Communications, and Browne argues that the shares were in recognition of his services as an advisory director, and not selling compensation as defined in Rule 3040(e). Further, both Calandro and Browne testified that they had no expectation that they would receive these shares for their efforts on behalf of e2 Communications and had never previously discussed compensation with e2 Communications prior to receiving the shares. The options received by Browne in 1999 from e2 Communications, however, were in recognition of his services as an advisory director. Further, respondents' assertion that they had no expectation of compensation despite engaging in extensive and sustained activities on behalf and for the benefit of e2 Communications defies logic, and the documentary evidence in the record does not support respondents' characterization of the facts. For example, the Unanimous Written Consent states that Calandro and Browne "have requested that the Company discharge its obligations to them by paying their finders' fees in shares of common stock" and that "Mr. Browne has requested that the shares of Common Stock to be issued to him instead be issued to his wife[.]"[23]

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[22] The letter was addressed to the attorney representing both PaineWebber and Browne in the customer arbitration and was intended to alleviate his concerns that the continued representation of both parties presented a conflict of interest.

[23] Similarly, and with respect to the Series C Preferred offering, the evidence showed that Browne had an expectation that e2 Communications would compensate him for his efforts. For example, in June or July 2000 JLF verbally promised Browne that he would receive five percent of the total amount of e2 Communications' next private placement. Browne referenced this promise in March 2001 when he sought payment for his services to e2 Communications.

The Hearing Panel found that respondents' claims were not credible. In the absence of substantial countervailing evidence in the record to overturn the Hearing Panel's credibility determination, we find that such arguments are without merit. *Id.*

Respondents also argue that because the shares were restricted and had no ready market value, they were not required to disclose receipt of them to their member firms. Similarly, Browne argues that because his shares were eventually canceled, his receipt of e2 Communications shares is moot. The fact that shares are restricted or subsequently canceled does not affect the disclosure obligations under Rule 3040.[24] Indeed, the definition of selling compensation in Rule 3040 has been broadly construed. *See Goldsworthy*, 55 S.E.C. at 834 n.40 (holding that the definition of selling compensation is "broad in scope and intended to include any item of value"). And, even if subsequent cancellation of shares is relevant, the record indicates that Browne's shares were canceled after the bankruptcy proceeding and well after the events at issue in this case had occurred.

3. Transactions Were Outside Regular Course of Browne's Employment

In addition to the foregoing arguments, Browne raises various arguments based on the fact that he served as an e2 Communications advisory director.[25] For example, Browne argues that raising capital was one of his responsibilities as an e2 Communications advisory director, and thus his activities with respect to e2 Communications were within the regular course of his employment with PaineWebber and Lehman Brothers. Further, Browne argues that PaineWebber's December 1999 memorandum authorized him to engage in fund raising activities and effectively expanded the scope of his employment with PaineWebber.[26]

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[24] In support of their argument that the shares were not selling compensation, Calandro and Browne argue that they did not receive an IRS Form 1099 from e2 Communications after they received the shares and that they consulted IRS regulations to determine their reporting obligations. We do not find these facts to be relevant. Rule 3040(e) defines selling compensation without regard to whether the source of such compensation issues the recipient a tax form and without regard to the IRS's definition of compensation.

[25] Calandro argues that his activities constituted general business networking and, in support, points to PaineWebber's authorization of Browne to serve as an e2 Communications director. Calandro, however, does not explain how or why his activities fell within the regular scope of his employment, how his activities with e2 Communications were not proscribed by PaineWebber's general policies, or why the PaineWebber authorization for Browne to serve as an e2 Communications advisory director applies to him.

[26] Browne points to PaineWebber's authorization dated June 5, 1998, permitting Browne to personally invest in e2 Communications, as evidence that PaineWebber greatly expanded his duties when it issued the December 1999 memo and thus authorized his activities with e2 Communications in December 1999. The June 1998 memorandum and the December 1999 memorandum, however, addressed two completely different issues, and comparison of the two to demonstrate an expanded job description is therefore improper. Moreover, the express language

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We reject these arguments. First, Browne commenced the activities at issue well in advance of obtaining PaineWebber's authorization to serve as an advisory director, and Browne's supervisor warned him on two separate occasions that he could not sell unregistered securities or participate in private placements for e2 Communications without prior firm approval. Second, the language of the December 1999 memorandum indicates that Browne's activities as an advisory director did not fall within his regular course or scope of employment at PaineWebber. For example, the memo explicitly provided that Browne would be holding this position in an individual capacity only and not as a representative of PaineWebber, and required that Browne conduct this activity outside of the normal hours of business with PaineWebber. Further, the memo required Browne to seek PaineWebber's approval if his compensation materially changed. In addition, neither the document giving rise to PaineWebber's December 1999 memorandum (Browne's November 1999 application) nor any subsequent document provided PaineWebber or Lehman Brothers with any of the specific details regarding his activities with e2 Communications as required by Rule 3040. *See Keyes*, 2006 SEC 2631, at *27 (holding that Rule 3040 requires that representatives provide firm with identification of the investors, the amount of money to be invested, representative's proposed role in transactions, and receipt or potential receipt of selling compensation).[27] Finally, there is no evidence in the record that the transactions in question were recorded on the firms' books and records, and Browne testified that he never used PaineWebber email or stationery in connection with e2 Communications in compliance with the December 1999 authorization. *See Dep't of Enforcement v. Goritz*, Complaint No. C10000037, 2002 NASD Discip. LEXIS 7, at *10 n.4 (NASD NAC Apr. 26, 2002) (holding that the fact that transactions were not on firms' books and records and that firms' names did not appear on any of the correspondence or offering documents indicates that transactions were not within the ordinary course and scope of respondent's employment).

Consequently, we find that Calandro and Browne engaged in private securities transactions in connection with the Series B Preferred offering without providing their firms with prior written notification, in violation of Rules 3040 and 2110.[28]

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of the December 1999 authorization indicates that Browne's role as advisory director was outside of the regular course of his employment at PaineWebber.

[27] Notwithstanding Browne's arguments to the contrary, we do not attach any significance to the fact that PaineWebber authorized Browne to serve as a full director rather than an advisory director. Under either scenario, Rule 3040 prohibited Browne from participating in private securities transactions without providing specific prior written notice to his firm.

[28] A violation of Rule 3040 is also a violation of Rule 2110. *See Abbondante*, 2006 SEC LEXIS 23, at *36. In addition, NASD Rule 0115(a) imposes upon associated persons all duties and obligations of members.

B. Browne Violated Rule 3040 in Connection with his Activities Related to SKF's and CBI's Purchases of Series C Preferred and Common Shares

We also sustain the Hearing Panel's finding that Browne violated Rule 3040 in connection with his activities related to SKF's and CBI's purchases of Series C Preferred shares from e2 Communications and common stock from JYA.[29] Browne communicated with JYA's husband in connection with agreements for the sale of JYA's common stock. These agreements were important not only for investments by SKF and CBI but for the Series C Preferred offering generally. The agreements recite that Browne negotiated the terms of the sales and would be expending considerable effort locating purchasers. Although Browne characterized his activities as those of a contact person and go-between acting only at the direction of JLF and IB, the undisputed facts are that Browne assisted with these transactions by forwarding documents and information to JYA and SKF. Browne also facilitated SKF's and CBI's purchases of common stock from JYA and Series C Preferred stock from e2 Communications.

In return, Browne received 150,000 shares as payment for his "services rendered in connection with the financing of the Company," in accordance with the oral promise JLF made to Browne in June or July 2000 and consistent with the email exchange between Browne and JLF in early March 2001.[30] Browne's efforts on behalf of e2 Communications in connection with the agreements with JYA, his administrative role with respect to SKF's and CBI's purchases of Series C Preferred shares and common stock from JYA, and his receipt of common stock from e2 Communications in connection therewith, constitutes participation in any manner in private securities transactions which is prohibited by Rule 3040. *See Dep't of Enforcement v. Ryerson*, Complaint No. C9B040033, 2006 NASD Discip. LEXIS 17, at *22 (NASD NAC Aug. 3, 2006) (holding that where "an associated or registered person becomes involved by facilitating the mechanics of transactions, such participation fits within the broad range of behavior prohibited by the rule") (internal quotations omitted).

Browne argues that an accounting issue required that someone other than e2 Communications or an e2 Communications officer execute the agreements with JYA. However, even accepting the accuracy of Browne's testimony, the reason for Browne's participation in the execution of the agreements is irrelevant. It is the fact of his participation that establishes the Rule 3040 violation. Likewise, the fact that SKF was independently involved with e2

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[29] The Hearing Panel stated that "Browne took an active and substantial role in the Series C Preferred Stock Offering." While we disagree with the Hearing Panel's characterization of Browne's role in the Series C Preferred offering as "active and substantial," as set forth herein we nonetheless agree that his activities constituted participation in private securities transactions in violation of Rule 3040.

[30] Browne dismissed his response to JLF's "payment for services" email as "facetious." The Hearing Panel, however, did not find Browne's testimony to be credible. We find no reason in the record to disagree with the Hearing Panel.

Communications and was initially introduced to e2 Communications by someone other than Browne does not diminish the fact that Browne participated in these transactions.[31]

Finally, Browne argues that the inaccuracy of the information he forwarded to SKF demonstrates that he hindered, rather than facilitated, these transactions. Additionally, Browne argues that the relevant agreements with JYA expired prior to SKF's purchase of common shares, that no party purchased shares from JYA at the prices stated in the agreements, and that he never paid the stated consideration for such agreements. Browne's arguments miss the mark. Even if the agreements expired and certain of their terms were never effectuated, Browne's actions evidence his continued efforts to assist e2 Communications in raising capital. Similarly, despite the fact that the information forwarded by Browne was inaccurate and the wiring instructions were ultimately unnecessary because SKF and CBI paid via check, these activities evidence Browne's efforts to raise capital for e2 Communications. And despite Browne's alleged hindrance of SKF's transactions, Browne received 150,000 shares of e2 Communications common stock as compensation (in addition to the 10,177 shares of common stock he had received in connection with the Series B Preferred offering). Consequently, we find that Browne violated Rule 3040.

V. Procedural Issues

Calandro and Browne raised numerous procedural issues below, and continue to raise such issues on appeal.

A. General Arguments

Browne argues that Enforcement never alleged that Browne participated in any transactions involving CBI, only transactions involving SKF. Thus, Browne argues that the charges and findings with respect to the Series C Preferred offering and sale of JYA's common shares should be dismissed. Such argument is disingenuous. Browne, in connection with his activities related to facilitating SKF's and CBI's purchase of e2 Communications common and Series C Preferred shares, and as an active participant in e2 Communications' bankruptcy case, knew that a reference to SKF also included the limited partnership that he managed, CBI. In

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[31] Browne further argues that the stock purchase agreement prohibited the payment of any compensation in connection with the Series C Preferred offering. The language referenced by Browne, however, appears to be boilerplate. Regardless of whether e2 Communications was in fact prohibited by its own documents to issue the 150,000 common shares to Browne, the preponderance of the evidence in the record demonstrates that Browne received selling compensation in connection with the issuance of e2 Communications securities and failed to disclose his activities in connection with e2 Communications' stock offerings, in violation of Rule 3040. In addition, to the extent that Browne makes arguments that he did not violate Rule 3040 in connection with the Series C Preferred offering and purchase of e2 Communications common stock that mirror those Browne raises in connection with his participation in the Series B Preferred offering, we reject those arguments.

fact, Browne was copied on communications from SKF specifically stating that CBI would be purchasing some of the shares and that certain of the shares should be issued in CBI's name.[32] NASD Rule 9212 requires that the complaint specify the respondent's alleged misconduct in reasonable detail, including which rule or statutory provision respondent allegedly violated. Based upon the foregoing, we find that Browne clearly had adequate notice of the alleged violations. *See Fox & Co. Invs., Inc*., Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *32 n.34 (Oct. 28, 2005) (holding that adequate notice is provided when the subject of FINRA's decision "understood th[e] issue and [was] afforded [a] full opportunity to litigate it at the hearing") (citing cases).

Similarly, Browne argues that Enforcement originally alleged that respondents solicited "DG" in connection with two separate investments in e2 Communications, and because the two references were actually references to BG (a/k/a DBG) and his father, DPG, this was a "blatant due process violation[.]"[33] We disagree. Browne realized that Enforcement's two separate references to "DG" were in fact references to BG and his father, who share the same first and last names. For example, in Browne's May 2003 responses to FINRA's Rule 8210 requests, Browne states that one of the parties listed on the exhibit attached to the complaint (known as Exhibit A) was BG, and Browne attached an affidavit from BG stating that Browne had not solicited him in connection with e2 Communications. Browne later obtained a separate affidavit from DPG. Indeed, at the hearing Browne testified that he realized that BG and DPG were the parties referenced on Exhibit A. Thus, Browne was on notice of the identity of these parties. We therefore find that Browne was given specific notice of the charges brought against him and had a more than adequate opportunity to defend such charges. *See* 15 U.S.C. § 78o-3(h)(1) (providing that FINRA, in a disciplinary proceeding, "shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record"); *KPMG Peat Marwick*, 55 S.E.C. 1, 4 (2001) (holding that "[a]s long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient").[34]

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[32] At the end of the hearing, Enforcement moved to conform the evidence pursuant to NASD Rule 9212(b) to take its oversight in the complaint into account. Neither the Hearing Officer nor the Hearing Panel in its decision appears to have expressly ruled upon Enforcement's motion, although the Hearing Panel implicitly granted the motion by its references to both SKF and CBI in its decision.

[33] Because FINRA is not a governmental actor, constitutional and common law due process requirements do not apply. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating that it is a well-settled principle that FINRA is not a governmental actor); *Sundra Escott-Russell*, 54 S.E.C. 867, 874 n.15 (2000) (analyzing respondent's argument that she was denied due process under Section 15A(h)(1) of the Securities Exchange Act of 1934).

[34] The Hearing Panel's decision inaccurately states that Browne admitted that he was involved with introducing customers "DB and BG," whereas Browne admitted that he was involved with introducing only BG. The Hearing Panel, however, correctly did not attribute any

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Further, Calandro and Browne argue that Enforcement did not diligently investigate the facts of this case because, for example, Enforcement interviewed few if any of the investors which it tied to Calandro and Browne. We reject respondents' argument. *See Thomas E. Warren, III*, 51 S.E.C. 1015, 1020 (1994) (rejecting argument that FINRA did not conduct an adequate investigation into respondent's misconduct where FINRA did not interview certain individuals). Indeed, the evidence in the record (including respondents' admissions that they referred a number of individuals to e2 Communications and later received e2 Communications common stock) indicates that interviews with all e2 Communications investors tied to Calandro and Browne were unnecessary.

B. Motions Decided by the Hearing Officer

Respondents filed a number of motions with the Hearing Officer prior to the hearing, many of which respondents argue were wrongly decided. We address the more pertinent pleadings below.

1. Requests for Documents

Browne filed a Request for Issuance of NASD Rule 8210 Orders, which requested that Enforcement, pursuant to NASD Rule 9252(a), compel PaineWebber and Lehman Brothers to produce documents. The Hearing Officer denied the request as unreasonable, excessive in scope, and unduly burdensome, but granted Browne leave to renew his request after he conferred with PaineWebber and Lehman Brothers in good faith. Approximately one month later, Browne filed a Renewed Request for Issuance of NASD Rule 8210 Orders, which sought documents from Lehman Brothers only. Browne dropped several categories of documents from the renewed request and shortened the time period for which documents were sought, but the Hearing Officer again denied Browne's request. The Hearing Officer noted that Browne sought documents related to Lehman Brothers' investment banking and research department between Browne's start-date in September 2000 and August 31, 2001, and failed to show that the requested material was relevant to the complaint.

The Hearing Officer properly denied Browne's original and renewed requests for information. NASD Rule 9252(b) sets forth the standard for requiring that Enforcement invoke NASD Rule 8210 to compel the production of information from a party subject to FINRA's jurisdiction. Under the rule, Browne must demonstrate that the information sought is relevant, material and noncumulative, and that he attempted in good faith to obtain the documents through other means. Further, the Hearing Officer must consider whether the request is unreasonable,

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sales of e2 Communications stock to DB (which presumably was a reference to DPG) in finding respondents liable for selling away.

oppressive, excessive in scope or unduly burdensome. Even after Browne allegedly narrowed the scope of his requests to Lehman Brothers, Browne's requests were still unduly burdensome, excessively broad in both scope and time-frame, and not relevant to the issue of whether Browne violated Rule 3040, especially considering that Browne's activity at Lehman Brothers relevant to this case covered only several months.[35] Browne's statements that the documents sought were pivotal and that such denials operated to deny him a fair hearing are unsupported by the record.[36]

2. Motion for Summary Disposition and Alleged Enforcement Misconduct

Finally, Exhibit A—one of the spreadsheets referenced in BMB's March 2003 letter and ultimately attached to the complaint—was the object of a number of pre-hearing motions. Exhibit A lists Calandro and Browne as the source of certain investors and shows the calculation of the shares they received in March 2000. Despite the fact that the Hearing Panel expressly determined that Exhibit A was unreliable and thus did not give it any weight in rendering its decision, Calandro and Browne continue to argue that the Hearing Panel improperly relied upon Exhibit A in finding that they violated Rule 3040 and denied key motions relying upon Exhibit A. We briefly address these issues.

Prior to the hearing, Calandro and Browne filed a motion for summary disposition pursuant to NASD Rule 9264. The motion argued that Enforcement's entire case depended upon the viability of Exhibit A, and that no weight could be placed on the document for the following primary reasons: (1) e2 Communications was not known as "e2 Communications, Inc.," the name listed on top of Exhibit A, until one month after Exhibit A was allegedly drafted;[37] (2) BMB's affidavit attached to the motion stated that he had never seen Exhibit A while on e2 Communications' board of directors; and (3) e2 Communications' bankruptcy trustee's affidavit

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[35] For example, Browne requested that Lehman Brothers produce "Correspondence, Notes, meeting agendas, due diligence files, investment banking materials, research analyst materials and/or calendar entries relating to e2 which were prepared by or on behalf of" 15 different individuals. In addition, Browne requested that Lehman Brothers produce all incoming and outgoing email for Browne's email account from September 2000 through August 31, 2001.

[36] Browne also filed a Motion for Production of NASD Rule 9253 Documents, which sought to compel Enforcement to produce all materials in its possession, custody or control that fall under either NASD Rule 9253(a)(1) or (a)(2). The Hearing Officer granted Browne's motion, ruling that to the extent that Enforcement had not already produced documents falling within the scope of the rule, it must do so. Enforcement argued that it produced all documents that it was required to produce pursuant to both prongs of the rule. Nonetheless, Browne inaccurately states that the Hearing Officer denied such motion and that such denial deprived him of his right to a fair hearing. We disagree, and find that Browne does not specify which documents were not produced and how such documents were relevant to the issues of this case.

[37] Throughout these proceedings respondents have asserted that JLF fabricated a number of documents, including Exhibit A, because of his hostility towards Browne. Respondents' assertions, however, are not substantiated by the record.

stated that he had never seen Exhibit A. The motion further argued that respondents' activities were known to PaineWebber and Lehman Brothers and were within the scope of their employment.

In opposing Browne's motion, Enforcement relied on: (a) BMB's March 2003 letter explaining the Unanimous Written Consent and Exhibit A; (b) respondents' disclosures to PaineWebber and Lehman Brothers which omitted respondents' activities with e2 Communications and receipt of selling compensation; and (c) a FINRA examiner's affidavit (the "Affidavit"). Quoting BMB's March 2003 letter, the Affidavit stated that "[Browne] provided me with two spreadsheets, one created by [JLF] another from [Browne]. There was a significant disparity between the two spreadsheets (See Attached). In the end, the Company decided to issue the larger amount of stock . . ." The Affidavit further stated that:

> The spreadsheet reflecting the larger amount, and according to [BMB], prepared by respondent Browne, reflects that 10,177 shares of Series B preferred stock was 'payable in common shares' to respondent Browne and that 3,137 shares were 'payable in common shares' to respondent Calandro. . . . Rather than claiming that the spreadsheet was a fictitious document he had never seen, [BMB] affirmatively stated that respondent Browne prepared it in response to [JLF's] calculations. In addition, Browne's counsel attached the [BMB March 2003] letter to Browne's Wells Submission and did not claim that Browne's spreadsheet (a copy of which is now Exhibit A to the Complaint) was a fictitious document.

The Affidavit also cited to the Unanimous Written Consent, JLF's March 2001 "payment for services" email, Browne's response thereto, and the March 2001 board minutes reflecting e2 Communications' grant of 150,000 common shares to Browne.

The Hearing Panel denied the motion for summary disposition, finding that there was a material issue of fact regarding the extent and nature of respondents' activities on behalf of e2 Communications and whether such activities fell within their scope of employment, and whether Exhibit A was a genuine business record based upon the Affidavit which stated that Browne prepared Exhibit A. Further, the Hearing Panel concluded that "even if Exhibit A is excluded, the Panel finds that the allegations are sufficient to withstand a motion for summary disposition."

We find that the Hearing Panel properly denied the motion. NASD Rule 9264 permits an adjudicator to grant summary disposition if there is no genuine issue of material fact and the non-moving party is unable to produce evidence that, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor. *See S.E.C. v. Hughes Capital Corp.*, 124 F.3d 449, 452 (3d Cir. 1997). Presented with the Unanimous Written Consent, BMB's March 2003 letter explaining the Unanimous Written Consent and Exhibit A, the March 2001 emails between JLF and Browne, the March 2001 e2 Communications board minutes awarding Browne 150,000 shares, and the written disclosures by Calandro and Browne to their member firms which omitted the nature and extent of their relationships with e2 Communications, we find that the Hearing Panel properly found that there were material issues of fact in dispute.

The Affidavit discussed all of the forgoing documents and stated (based upon BMB's March 2003 letter) that Browne prepared Exhibit A. Respondents argue that the Hearing Panel's reliance on the Affidavit in denying the motion for summary disposition was improper. We disagree, and further find that respondents' allegations that Enforcement engaged in fraud by (1) fabricating certain statements in the Affidavit concerning Browne's preparation of Exhibit A and the contents of Browne's Wells submission, and (2) having the FINRA examiner sign the Affidavit despite not drafting the Affidavit and without reviewing the Wells submission referenced in the Affidavit, are without merit. The statement in the Affidavit that Browne prepared Exhibit A was based upon BMB's March 2003 letter, and testimony at the hearing revealed that Browne's Wells submission did not refer to Exhibit A as fictitious or fraudulent, but rather that it was inaccurate. Further, BMB's March 2003 letter did not refer to the veracity of Exhibit A. Thus, the Affidavit, while perhaps inartfully worded, was not fraudulent. The fact that the Affidavit was drafted by an Enforcement attorney rather than the FINRA examiner signing the Affidavit does not alter our conclusion.[38] Finally, the Hearing Panel specifically stated that even if it excluded Exhibit A, sufficient independent evidence existed of respondents' selling away to deny the motion for summary disposition.

VI. Sanctions

The FINRA Sanction Guidelines ("Guidelines") for private securities transactions provide that an adjudicator's first step in determining sanctions is to assess the quantitative extent of the transactions, including the dollar amount of sales involved, the number of customers, and the length of time over which the selling away occurred.[39] The Guidelines provide for a fine between $5,000 and $50,000 and a suspension of three to six months when the dollar amount of the sales is $100,000 to $500,000, and six to 12 months when the dollar amount of the sales is $500,000 to $1 million.[40] The Guidelines further provide that in determining the appropriate sanction for private securities transactions an adjudicator should consider 10 other factors,[41] as well as the General Principles and Principal Considerations in Determining Sanctions applicable to all violations.[42]

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[38] While we disagree with respondents' argument on this point, we are nonetheless troubled that the FINRA examiner did not review the Affidavit drafted by Enforcement more carefully, and did not review Browne's Wells submission, before executing the Affidavit.

[39] *See FINRA Sanction Guidelines* 15 (2006), http://www.finra.org/web/groups /enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

[40] *Id.*

[41] *Id.* at 15-16.

[42] *Id.* at 15.

The Hearing Panel suspended Calandro in all capacities for three months and fined him $5,000, suspended Browne in all capacities for six months and fined him $25,000, and ordered that both Calandro and Browne pay costs, jointly and severally, totaling $9,930.30. In assessing sanctions, the Hearing Panel noted the unusual nature of this case, and further noted that for a number of reasons the dollar amounts of the transactions ($475,500 in the case of Calandro[43] and $998,500 in the case of Browne) were not as reliable a measure of the severity of the misconduct as they would be in more typical selling away cases. The Hearing Panel stated that certain of the investors attributed to Calandro and Browne had significant independent ties to e2 Communications, and that SKF first invested in e2 Communications prior to Browne's involvement with SKF's and CBI's purchases of Series C Preferred and common shares. Further, the Hearing Panel noted that Browne's father was a registered representative with the ability to evaluate the risks and rewards associated with an investment in e2 Communications, and found that neither Calandro nor Browne attempted to conceal their conduct from their firms or attempted to create the impression that their firms were involved in the e2 Communications offerings. The Hearing Panel, however, found a number of aggravating circumstances, including the number of customers involved, the length of time over which the activity occurred, the fact that some investors were firm customers, respondents' refusal to accept responsibility for their misconduct, that investors were subject to harm as a result of e2 Communications' bankruptcy proceeding, and that Browne's actions resulted in an arbitration claim against PaineWebber.

After reviewing the record and considering the factors identified by the Guidelines, we affirm the Hearing Panel's sanctions. First, we agree that the dollar amount of the transactions is not as reliable a measure in this case as it is in others due, in part, to the length of time that passed from certain of the investor introductions to respondents' receipt of selling compensation. Second, we agree that a number of the investors had significant independent ties to e2 Communications.[44] Further, respondents were not the sole source of information concerning e2 Communications for many of the investors, they did not attempt to create the impression that their firms sanctioned e2 Communications' offerings, and their supervisors were generally aware of (and, in the case of PaineWebber, may have given the appearance of assent to certain of) their activities related to e2 Communications.[45]

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[43] As noted above, we attribute only $271,500 to Calandro, which still falls within the range utilized by the Hearing Panel in assessing sanctions.

[44] We also note that in addition to Browne's father, Calandro's brother JC was also a registered representative.

[45] *Id.* at 15-16. We note that while Eldemire, respondents' supervisor at PaineWebber, had a general knowledge of respondents' activities with e2 Communications, he did not have specific knowledge of the details of such activity. *See Keyes*, 2006 SEC LEXIS 2631, at *27-28 (finding that oral notice to supervisor, while a mitigating factor, was lessened by lack of specific notice to supervisor and firm).

However, similar to the Hearing Panel, we find aggravating that at least 13 investors (eight of whom were customers of respondents) were introduced by respondents to e2 Communications, and that respondents' networking and consulting on behalf of e2 Communications occurred over several years.[46] We also find aggravating that Browne was affiliated with e2 Communications as an advisory director, and that Browne was warned by his supervisor on two separate occasions to use caution in connection with his activities with e2 Communications.[47] Indeed, Browne's misconduct resulted in claims against PaineWebber.[48] Respondents' misconduct was serious, and "deprive[d] investors of a member firm's oversight and due diligence, protections they have a right to expect." *Keyes*, 2006 SEC LEXIS 2631, at *15; *Jim Newcomb*, 55 S.E.C. 406, 417 (2001) ("As we have held 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."). In this case, Calandro's and Browne's activities undermined both purposes underlying Rule 3040—protecting investors from unsupervised sales and protecting member firms from exposure to loss and litigation in connection with such sales.

Under the facts and circumstances of this case, and after considering all of the factors discussed above, we affirm the sanctions imposed by the Hearing Panel.[49] These sanctions are appropriately remedial and will discourage registered representatives from engaging in similar misconduct in the future.

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[46] *Guidelines*, at 15.

[47] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 15). Further, although the record is not entirely clear regarding whether and to what extent investors were harmed as a result of their investments in e2 Communications, we note that at a minimum customers were subject to losses and potential harm as a result of respondents' misconduct. *Id.* at 16; *see also id.* at 6 (Principal Considerations in Determining Sanctions, No. 11). However, we also note that Browne took a leading role in the bankruptcy proceeding in an attempt to recover funds on behalf of investors.

[48] In addition, contrary to respondents' arguments, we do not consider relevant the fact that investors named in the complaint did not complain to FINRA. *See Maximo Justo Guevara*, 54 S.E.C. 655, 664 (2000). Further, we do not consider the fees and costs incurred by respondents in connection with and as a result of this proceeding to be mitigating. *See Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanctions imposed upon [respondent] by the NASD excessive or oppressive").

[49] The record supports our imposition of a shorter suspension and smaller fine upon Calandro than Browne. Browne was the more active respondent in connection with e2 Communications during most time periods in question, was involved with the Series C Preferred Offering and SKF's and CBI's purchase of common shares from JYA, and served as an advisory director during much of the time period in question.

VII. Conclusion

We affirm the Hearing Panel's findings that Calandro and Browne engaged in private securities transactions without prior written notice to, and prior written approval from, their firms, in violation of Rules 3040 and 2110.

Accordingly, we suspend Calandro in all capacities for three months and fine him $5,000, suspend Browne in all capacities for six months and fine him $25,000, and order that they pay, jointly and severally, $9,930.30 in costs.[50]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and Corporate Secretary

[50] Pursuant to NASD 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.

We have also considered and reject without discussion all other arguments advanced by the parties.