BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Mark B. Beloyan Davie, FL, and Tradespot Markets, Inc. (f/k/a Beloyan Investment Securities, Inc.) Davie, FL, Respondents.	DECISION Complaint No. 2005001988201 Dated: December 20, 2011

Respondents emailed stock recommendations that were not fair and balanced, did not provide a sound basis for evaluating the recommended stock, omitted material information, and misrepresented material facts. Respondents also failed to review the current financial filings of an issuer whose stock they recommended. The Hearing Panel fined respondents $13,500 (joint and several) and suspended individual respondent for 10 business days. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Robin W. Sardegna, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Alan M. Wolper, Esq., Jeremy S. Hyndman, Esq., Locke Lord Bissell & Liddell LLP

Decision

Pursuant to FINRA Rule 9311, Mark B. Beloyan ("Beloyan") and Tradespot Markets, Inc. ("Tradespot") appeal a FINRA Hearing Panel's August 6, 2010 decision. The Hearing

Panel found that respondents violated NASD Rules 2210(d)(1)(A) and (B) and 2110 by emailing to current and prospective customers stock recommendations that were not fair and balanced, failed to provide a sound basis for evaluating the recommended stock, omitted material information, and misrepresented material facts.[1] The Hearing Panel also found that Beloyan and Tradespot violated NASD Rules 2315(a) and 2110 by failing to review the current financial filings for an over-the-counter stock before recommending the stock to customers. For these violations, the Hearing Panel fined Beloyan and Tradespot $13,500 (joint and several), suspended Beloyan from associating with any member firm in any capacity for 10 business days, and assessed costs of $3,868.

After a thorough review of the record, we affirm the Hearing Panel's findings and uphold the sanctions imposed.

I. Background

Beloyan entered the securities industry in 1985. He has been associated with Tradespot since 1992 and is currently registered as a general securities representative and principal, financial and operations principal, options principal, and investment banking limited representative. Beloyan is president, chief compliance officer, owner, and the sole producing registered representative of Tradespot. Tradespot was formerly known as Beloyan Investment Securities, Inc. ("BIS"). Beloyan founded BIS in 1992. He changed the firm's name from BIS to Tradespot in June 2008.[2]

The conduct alleged in the complaint occurred between January and October 2005, and involves the securities of two issuers – Solucorp Industries Ltd. ("SLUP") and Global Music International, Inc. ("GMUS").

II. Procedural History

FINRA's Department of Enforcement ("Enforcement") filed the complaint in this matter on February 2, 2009, and amended the complaint on November 2, 2009. Cause one of the amended complaint alleged that, in email correspondence dated February 1, June 8, August 5, and September 13, 2005, Beloyan and Tradespot recommended the purchase of SLUP stock to more than 100 current and potential customers without providing a sound basis for the recommendation, a fair and balanced presentation, and disclosing material negative facts, and while also misrepresenting material facts, in violation of NASD Rules 2210(d)(1)(A) and (B) and 2110. The amended complaint further alleged that, in the September 13, 2005 email, respondents also recommended the purchase of GMUS stock in an equally deficient manner. Cause two alleged that, in the same June 8, August 5, and September 13, 2005 emails, respondents recommended the purchase of SLUP stock without first reviewing current financial

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[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[2] In this decision, "Tradespot" will be used to refer both to BIS and its successor entity.

information necessary to provide a reasonable basis for making the recommendation, in violation of NASD Rules 2315(a) and 2110.[3]

Beloyan and Tradespot admitted that Beloyan drafted the emails at issue and that the content of each individual email, viewed in isolation, may not have complied with the requirements of NASD Rule 2210. They contended that the emails did not, however, violate NASD Rule 2210 because, when placed in the context of the many other conversations and email exchanges that Beloyan had with these customers, most of whom already owned SLUP stock, the emails were fully compliant. Respondents otherwise denied all allegations of the complaint.

The Hearing Panel found that respondents violated NASD Rules 2210, 2315, and 2110, as alleged. For these violations, the Hearing Panel fined Beloyan and Tradespot $13,500 (joint and several), suspended Beloyan in all capacities for 10 business days, and assessed hearing costs of $3,868.

This appeal followed.

III. Facts

A. SLUP Stock

During the relevant period, SLUP was a Canadian company engaged in environmental remediation. SLUP developed and licensed products used to clean up heavy metal contamination of the environment. Its stock traded in the over-the-counter market and was quoted in the Pink Sheets. In September 2003, SLUP filed Form 15-12g with the SEC, terminating the registration of its securities, and it stopped filing financial statements.

In December 1999, the SEC filed a complaint in federal court against SLUP, its outside auditor, and several of its officers and directors, including Joseph Kemprowski ("Kemprowski"), its founder, and Peter Mantia ("Mantia"), its president, both of whom also were clients of Tradespot and Beloyan. The Commission alleged that Kemprowski, Mantia, and other defendants engaged in a scheme to defraud investors by, among other allegations, issuing false and misleading press releases, falsifying SLUP's financial statements, and providing false and misleading information to company auditors. In March 2003, the company and several individual defendants settled the SEC's allegations. The remaining defendants, including Kemprowski and Mantia, proceeded to trial.

In a final judgment dated October 8, 2003, the United States District Court for the Southern District of New York found that Kemprowski and Mantia committed the violations alleged and enjoined them from engaging in future violations. The court ordered Kemprowski and Mantia to disgorge the gains they realized by selling SLUP stock while in possession of material, non-public information, found them unfit to serve as officers or directors of public companies, and barred them from serving in such capacities. Although neither continued as an officer or director of SLUP, both continued to work with the company.

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[3] This action resulted from FINRA's routine examination of Tradespot.

SLUP's consolidated financial statements for the years ended December 31, 2002 and 2003 reported net losses of $1,588,547 in 2002 and $3,222,087 in 2003. SLUP's consolidated financial statements for December 31, 2004 (prepared in February 2007) reported total assets of $4,439,063, total liabilities of $4,032,023, and a net loss of $14,365,095. SLUP's consolidated financial statements for December 31, 2005 (prepared in October 2007) reported total assets of $3,394,504, total liabilities of $7,754,546, and a net loss of $14,795,472.

B. GMUS Stock

GMUS is a Florida corporation that was formed in July 2004. Beloyan was one of its founders. During the relevant period, GMUS was a development-stage company that operated a diversified entertainment company that webcast music videos of unsigned artists and bands from around the world. GMUS's operations, from its inception through the end of March 2005, were devoted to strategic planning, raising capital, and developing revenue-generating opportunities. For the quarter ending March 31, 2005, GMUS reported a working capital deficiency of $1,388,624, had no revenues, and had incurred a net loss since its inception of $135,278. The company also reported substantial doubt about its ability to continue as a going concern. In 2004, GMUS secured agreements with well-established communications companies to provide music videos and ring-tone music.

C. Beloyan and Tradespot

Beloyan testified that, when he entered the securities industry, he sold mutual funds and blue-chip and NASDAQ securities. He handled a few venture capital deals and determined that he was good at it. He realized that his clients were interested in even more venture capital deals, so he began to specialize in sales of development-stage, high-risk investments. Beloyan and Tradespot now focus primarily on high-risk and high-reward investments. In 2005, he had in excess of 200 customers, all focused in these types of investments. Most of Beloyan's customers invested most of their money in more traditional and less risky investments at other firms, but they relied on Beloyan to invest certain of their funds in speculative and high-growth investments.

Beloyan testified that he understood the elevated level of risks associated with the types of investments that he sold, and he has refused customers new to investing because the speculative and high-growth investments that he sold were not suitable for them. Beloyan also testified that, when Beloyan accepts a new customer, he completes a new account form and provides the customer with a penny stock disclosure form, which he ensures the customer understands.

Beloyan testified that Tradespot conducted a private placement for GMUS in 2004, for which the firm earned five percent of the money raised plus one million shares of GMUS stock. Between May 26 and August 2, 2005, Beloyan's wife's company, Blue Marlin, Inc., sold 20,000 shares of GMUS stock.

Beloyan testified that his interest in SLUP stock was not based on the company's historical financial performance, but rather on the company's technology and patents and the relevance of its products to today's marketplace. Beloyan testified that he truly believes in SLUP's products. As of early 2005, Beloyan personally owned approximately 1.1 million shares

of SLUP stock. Beloyan's wife's company, Blue Marlin, Inc., also had an account at Tradespot in which she held SLUP stock. Beloyan and Tradespot conducted a private placement of SLUP convertible debentures in 2003, which raised $1 million for the company. Beloyan sold the entire offering to a friend who subsequently gifted some of the stock to Beloyan's daughters and 600,000 shares to Blue Marlin, Inc. In late 2003, Beloyan personally entered into a 36-month consulting agreement with SLUP. As a consultant for the company, Beloyan facilitated SLUP's 2004 merger with another company, WITS, Inc. Beloyan estimated that, in all, he earned approximately 750,000 shares of SLUP stock in 2000, another 250,000 shares in 2003, and 450,000 shares for the 2004 merger.

Beloyan testified that he gathered significant information about SLUP's progress from his contacts at the company, which included Kemprowski, Mantia, and Richard Runco, SLUP's president after Mantia. Kemprowski and Mantia also were clients of Tradespot. Beloyan also kept abreast of SLUP's press releases and pending patent applications. He reviewed outside research reports about the company and discussed SLUP with chemical engineers and other knowledgeable individuals who could evaluate SLUP's scientific research.

Beloyan last purchased SLUP stock in March 2005. On June 7, 2005, one day before sending his clients an email that stated that he had been buying SLUP stock, Beloyan sold 1,000 shares of SLUP stock. During the two and one-half months before Beloyan's June 7, 2005 sale, Beloyan sold more than 80,000 shares of SLUP stock from his personal account, generating more than $150,000 in proceeds. On June 10, 2005, Beloyan sold an additional 20,000 shares of SLUP stock from his personal account. Even after these sales, Beloyan continued to hold more than 1.1 million shares of SLUP stock.

Beloyan stated that all of Tradespot's customers received a standard disclaimer in their monthly account statements that indicated that Tradespot and Beloyan may trade or hold long or short positions in securities purchased or sold in the customer's Tradespot account and that Beloyan and Tradespot may have fee-based consulting or other types of service agreements with the issuers of the securities that customers bought or sold. Between February 23, 2005 and August 8, 2005, Beloyan sold more than 85,000 shares of SLUP stock to Tradespot customers in solicited transactions.

D. Respondents' SLUP and GMUS Emails

The complaint alleged deficiencies in four of respondents' 2005 emails to customers.

The February 1, 2005 email, sent by Beloyan on behalf of himself and the firm, contained the subject line "SLUP." It stated "The article appeared today in the *Wall Street Journal*. I would recommend that you consider buying more shares at this level." Beloyan embedded in the email a link to a *Wall Street Journal* article titled "U.S. Expands List of Cancer Causes, Adding 17 Agents."

Respondents' June 8, 2005 email also contained the subject line "SLUP." It stated "I have been buying SLUP and I would encourage you to add to your position. Call me for details. Thanks."

Respondents' August 5, 2005 email again contained the subject line "SLUP." This email stated:

> Just a note to let you know that everything is OK with SLUP. At these levels you might want to consider putting a bid around 1.50 to 1.55 and see if you can buy any more stock. As some of you know we are in the final stages of what I believe is the summer dulldrums and things should start to pick up shortly. I have had many conversations with the company and corporately things are fine. I believe that in the near term (between now and after Labor Day) the stock price should start to go back up. Please feel free to call with any questions. Thanks.

Respondents' September 13, 2005 email included the subject line "Update." The email stated:

> I want to pass along some of my opinions regarding some of the stocks we own.
>
> I believe that we will see a move higher in SLUP going in to the 4th quarter. At current levels -- $2.10 I feel that it is a great buy. Based on past press releases I believe that the company has really grown and is making significant headway in their business and technology.
>
> Regarding GMUS, the stock doesn't trade much yet. I feel that at current levels -- $3.50 it is a great buy going into the 4th quarter as the client base should start to increase dramatically.
>
> If you have anything to invest at this time I would consider both of these stocks. Please feel free to call with any questions. Thanks.

Beloyan testified that, in 2005, he spoke with as many as 100 customers on any given day. He stated that he also regularly emailed information on SLUP and GMUS stocks to his customers, and the record included copies of emails and other correspondence that Beloyan sent to customers between 2003 and 2005 regarding SLUP and GMUS stock. On May 23, 2003, for example, Beloyan sent his customers a copy of the SEC's final judgment in its action against SLUP and a "current report" prepared by the company. In August 2003, Beloyan sent some customers an email that provided an overview of SLUP and invited customers to call and ask questions. Between early 2003 and late 2005, Beloyan emailed groups of customers a link to SLUP's website, copies of articles about SLUP's products and patents, SLUP's own press releases, and information about the price of SLUP's stock. In one email in 2004, Beloyan notified recipients of the email of the opportunity to meet with a spokesperson for SLUP. A September 2004 email included an article that referred to SLUP as "Probably the riskiest – but potentially most rewarding – environmental stock on our list . . . ." Similarly, in 2005, Beloyan emailed groups of customers GMUS internet links and articles related to GMUS.

Respondents sent all four emails that are the focus of this action to a total of 105 individuals. Of the 105 individuals, 23 did not receive any of Beloyan's other communications regarding SLUP. Respondents sent at least one of the four emails to 138 individuals. Of the 138, 42 had not received any of Beloyan's earlier SLUP communications.

IV. Discussion

A. Cause One

For the reasons discussed below, we affirm the Hearing Panel's findings that Beloyan and Tradespot distributed to firm customers email communications that were unbalanced, misleading, included material misrepresentations, and omitted material facts, in violation of NASD Rules 2210(d)(1)(A) and (d)(1)(B) and 2110.

1. NASD Rule 2210

During the relevant period, NASD Rule 2210 stated that "communications with the public" included advertisements, sales literature, correspondence, institutional sales material, public appearances, and independently prepared reprints. *See* NASD Rule 2210(a). For purposes of NASD Rule 2210, NASD Rule 2211 defined the term "correspondence" as any written letter or electronic mail message distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period. *See* NASD Rule 2211(a)(1). The parties have stipulated that the four emails at issue fell within the definition of correspondence.[4]

During the relevant period, NASD Rule 2210(d)(1) required, with no exceptions, that all communications with the public be based on principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts in regard to the particular securities discussed. *See* NASD Rule 2210(d)(1)(A). The rule also prohibited member firms from omitting a material fact if the omission, in the context of the material presented, would cause the communication to be misleading. *Id*. NASD Rule 2210(d)(1)(B) prohibited member firm communications with the public from making false, exaggerated, unwarranted, or misleading statements. *See* NASD Rule 2210(d)(1)(B). It is within the context of these rules that we now turn to respondents' emails.

2. Beloyan Emailed "I have been buying" When, In Fact, He Had Been Selling

Beloyan's June 8, 2005 email, sent by Beloyan on behalf of himself and the firm, omitted a material fact and was misleading, in contravention of NASD Rules 2210(d)(1)(A) and 2110.[5]

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[4] Beloyan stipulated that he drafted and distributed the emails to more than 100 Tradespot customers and that he was responsible for ensuring that Tradespot's communications with customers complied with all applicable rules.

[5] NASD Rule 2110 (now FINRA Rule 2010) requires that FINRA members shall, in conducting their business, "observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 0115 (now FINRA Rule 0140) makes all NASD rules, including NASD Rule 2110, applicable to both FINRA members and all persons associated with FINRA members. Violations of any other FINRA rules are viewed as violations of NASD Rule 2110 regardless of surrounding circumstances because members of the securities industry are

[Footnote continued on next page]

Respondents sent the June 8, 2005 email to more than 100 current and potential Tradespot customers. The email stated "I have been buying SLUP and I would encourage you to add to your position." In fact, Beloyan had not purchased SLUP stock since March 2005, and he had sold 84,000 shares from his personal account during the two and one-half months prior to the June 2005 email. Indeed, Beloyan sold the last 1,000 shares of SLUP stock the day before he sent the email, on June 7, 2005.[6] Beloyan misled his customers by omitting and misrepresenting to them a material fact – that he was actively buying SLUP stock when in fact he had been selling it.[7] *See Richmark Capital Corp.*, Exchange Act Rel. No. 48758, 2003 SEC LEXIS 2680, at *10 (Nov. 7, 2003) (holding that respondent's failure to disclose its own concurrent sales prevented customers from making an informed investment decision). Beloyan's misrepresentations and omissions misled Beloyan's clients by suggesting that he had been adding to his personal SLUP holdings and that he valued the stock enough to add to his personal position when in fact Beloyan had sold substantial amounts from his personal accounts and had not purchased any additional stock.

Respondents argue that a reasonable investor would understand Beloyan's statement to mean that he had been buying SLUP stock for customers, not that he personally had been buying the stock. Beloyan testified that he contacted nearly 50 recipients of this email to ask whether they understood his statement to mean that he personally had been buying SLUP stock or that he had been buying for his customers. He contends that they all understood his statement to mean the latter.[8] Without delving into what each individual customer may or may not have understood Beloyan's statement to mean, the plain meaning of the actual words that Beloyan said is clear. Beloyan wrote that *he* had been buying SLUP stock and that the email recipients should consider buying as well. Beloyan could have explained that he had been receiving purchase orders from

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expected and required to abide by the applicable rules and regulations. *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999) (holding that the violation of another Commission or FINRA rule constitutes a violation of Rule 2110).

[6] Beloyan continued the trend by selling an additional 20,000 shares on June 10, 2005, just two days after he sent the email.

[7] Respondents' omissions and misrepresentations were material. The test for materiality is whether a reasonable investor would consider the information significant with respect to his investment decisions. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). A misstated or omitted fact is material if a reasonable investor would have viewed the fact as having altered the "total mix" of information available to him. *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, 449 (1976).

[8] Respondents presented customer testimony to support his theory, and Enforcement entered into evidence signed customer declarations stating that they understood the opposite. We do not find that this evidence is material to our determination of whether objectively the email is misleading to a reasonable customer, and we have not relied on it.

customers or elaborated that retail demand for the stock had been high. He did not. Instead he allowed his customers to read words that, he contends, meant something other than what he actually stated. Regardless of whether Beloyan intended to mislead his customers, the fact is that his omission of the fact that he had been selling the stock from his personal accounts, coupled with his claim to have been buying SLUP stock, communicated inaccurate information to his customers.

Respondents also argue that Beloyan's sales did not affect the liquidity of SLUP stock and therefore were not material to the average SLUP investor. We do not agree. Regardless of whether Beloyan's sales of SLUP stock affected SLUP's liquidity, Beloyan's personal ownership and sales of SLUP stock was a material fact that his clients deserved to know. "By recommending the purchase of [SLUP] stock without disclosing their own concurrent sales, [r]espondents omitted material information, an omission that prevented customers from making an informed investment decision." *Richmark Capital Corp.*, 2003 SEC LEXIS 2680, at *10; *see also Charles E. French*, 52 S.E.C. 858, 863 (1996) (holding that an undisclosed financial interest in a recommended investment is a material omission). The recipients of Beloyan's buy recommendation email had a right to know that he was a recent seller, not a buyer, of SLUP stock. *See Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970) (finding that customers should have the opportunity to "evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest").

As respondents' customers evaluated respondents' June 8, 2005 recommendation to buy SLUP stock, they were entitled to know the truth about Beloyan's ownership of SLUP stock and his recent sales activities.

3. Respondents Failed to Provide a Sound Basis for Their Recommendations, a Fair and Balanced Presentation of Risks, and Full Disclosure of Material Negative Facts

The four emails at issue also failed to conform to NASD Rule 2210's content standards in other ways. In each of the four emails, respondents recommended that the emails' recipients buy SLUP stock. They did not, however, provide any explanation or support for the recommendation. Nor did respondents disclose material negative facts about SLUP. They did not explain, or even mention, risks associated with investing in SLUP, SLUP's struggling financial state, its development-stage status, or that it had stopped filing financial statements. Respondents' emails omitted material facts that, given the overall positive tone of the emails and their buy recommendations, rendered them misleading. The emails also failed to mention the SEC's fraud action against SLUP and several of its officers for issuing misleading press releases and the fact that SLUP's officers, who had been barred in an SEC action from serving as officers of public companies, still were associated in some capacity with SLUP. Finally, respondents' four emails did not disclose important information that would have shed light on Beloyan's objectivity, such as Beloyan's ownership and recent sales of SLUP stock.

Respondents' September 13, 2005 email also recommended that clients buy GMUS stock. Respondents referred to GMUS as a "great buy" and recommended investing in GMUS, but they did not otherwise provide an explanation of why investors should consider buying the stock. Respondents provided no basis, let alone a sound basis, for this recommendation and failed to discuss any risks. They did not mention that GMUS was a startup company that had not

earned any revenue since its July 2004 inception. They failed to disclose that, from its inception through March 31, 2005, GMUS had reported a net loss of $135,278 and had developed a working capital deficiency of $1,388,624. Additionally, the company reported that these factors, along with others, raised substantial doubt as to its ability to continue as a going concern. This is another material fact that respondents failed to disclose to their clients.[9]

All of the facts that respondents misrepresented, omitted, or failed fully to explain in the relevant emails were material to the customers' determinations as to whether to invest in SLUP and GMUS stock. A reasonable investor would consider significant information pertaining to an issuer's financial condition, profitability, solvency, and potential for success. *French*, 52 S.E.C. at 863 n.19 (holding that one cannot successfully challenge the materiality of information about the financial condition, solvency, and profitability of the entity). Also material is the speculative nature of the issuer and the fact that the issuer has lost money since its inception. *Dep't of Enforcement v. Golub*, Complaint No. C10990024, 2000 NASD Discip. LEXIS 14, at *20 (NASD NAC Nov. 17, 2000).

Respondents argue that details of the SEC's settlement with SLUP and judgment against Kemprowski and Mantia were not material because they were not current. The SEC commenced the action in December 1999, and resolved it by settling with the issuer and obtaining a judgment against other parties in March 2003. We do not agree that this information was not material. Whether information is material "depends on the significance the reasonable investor would place on the … information." *Basic Inc.*, 485 U.S. at 240. Although two full years had passed since the conclusion of the case, the SEC's allegations involved material misrepresentations by SLUP and its chief executives as to the company's potential future revenues and executed contracts. Some of these misrepresentations occurred in the company's press releases. Beloyan testified that SLUP's press releases were one of the sources upon which he relied to obtain information on SLUP. Furthermore, the United States District Court for the Southern District of New York found Mantia and Kemprowski, two individuals upon whom Beloyan admittedly relied for information on SLUP, responsible for the misrepresentations and barred them from acting as officers or directors of public corporations. Both nonetheless remained associated in some non-executive capacity with SLUP, and Beloyan disclosed none of this in 2005 when he recommended that his clients purchase SLUP stock. We find that all of this information would have altered the "total mix" available to Beloyan's clients and that his failure to disclose it resulted in his misleading his clients as to significant aspects of the advisability of investing in SLUP. *See TSC Indus., Inc.*, 426 U.S. at 449.

Respondents' emails ignored the financial conditions of SLUP and GMUS and the investment risks associated with both issuers, presented overly optimistic conclusory statements, and omitted other material facts. On key subjects, the emails simply camouflaged or omitted the truth in a manner that would mislead their recipients. Respondents did not provide the recipients with enough facts about SLUP and GMUS to support their recommendations of the stocks and

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[9] *Cf. Aron O. Bronstein*, Exchange Act Rel. No. 47789, 2003 SEC LEXIS 1072, at *4 (May 2, 2003) (finding precarious financial situation and going concern qualification sufficiently material to support a finding of fraud); *Tomer M. Yuzary*, Exchange Act Rel. No. 47788, 2003 SEC LEXIS 1071, at *4 (May 2, 2003) (same).

thereby misled the recipients as to SLUP's and GMUS's value as investments. In short, Beloyan failed to present the emails' recipients with a complete picture of SLUP and GMUS. "When a securities recommendation is made to a customer, it is necessary that full disclosure be made of all material facts." *Richmark Capital Corp.*, 2003 SEC LEXIS 2680, at *24. We affirm the Hearing Panel's findings that respondents' four emails violated NASD Rules 2210(d)(1) (A) and (B) and 2110.

4. Respondents Had a Duty to Comply in Each of Their Emails with the Content Standards of NASD Rule 2210

Respondents argue that we should consider Beloyan's oral communications and other correspondence with clients when evaluating the substance of the four emails at issue. They contend that the language in NASD Rule 2210(d)(1)(A), "in light of the context of the material presented," means that the NAC should not confine its review to the four corners of each email, but should consider the content of Beloyan's other emails to clients, many conversations with clients, and the standard penny stock risk and conflict of interest disclosures that Tradespot provided to all clients.[10] We reject this argument.

The applicable case law indicates that each of respondents' four emails, standing alone, was required to comply with the content requirements of NASD Rule 2210. *See Pacific On-Line Trading and Sec., Inc.*, 56 S.E.C. 1111, 1120 (2003) (rejecting respondent's argument that firm advertising should not be viewed on its own, but rather in conjunction with the disclaimers and risk disclosures provided to customers at seminars and when customers opened new accounts); *Sheen Fin. Res., Inc.*, 52 S.E.C. 185, 190-91 (1995) (rejecting argument that respondent cured violations of content standards by providing detailed risk explanations at seminars and finding that "[a]dvertisements must stand on their own when judged against the standards of [NASD Rule 2210]."). We have considered and rejected similar arguments. *Cf. Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17, at *36 (NASD NAC June 25, 2001) (rejecting respondent's argument that he did not violate NASD Rule 2210 by failing to discuss risks in research reports because the missing information was publicly available); *DBCC v. Prendergast*, Complaint No. C3A960033, 1999 NASD Discip. LEXIS 19, at *52 (NASD NAC July 8, 1999) (upholding finding that respondent violated NASD Rule 2210(d)(1) by including materially misleading information and omitting risk discussions in 21 form letters and rejecting defense that respondent provided more detailed disclosures of the risks orally to the customers); *DBCC v. Lucadamo*, Complaint No. C10930053, 1997 NASD Discip. LEXIS 35, at *64-66 (NASD NBCC May 20, 1997) (finding that respondent misrepresented and omitted material facts in three pieces of correspondence, rejecting defense that risk discussions with the customers occurred at seminars and in home visits, and holding that "the letters, standing alone, should have contained a more balanced presentation").

Respondents argue that many cases that have addressed this issue deal with sales literature and other types of customer communications and that correspondence, which is

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[10] Beloyan admits that the four emails, reviewed independently and without regard to his other communications with the customers, do not comply with the content standards of NASD Rule 2210.

directed to a finite and identifiable group of individuals, should be treated differently from other customer communications with respect to NASD Rule 2210's content standards. The very language of NASD Rule 2210, however, indicates otherwise. The content standards contained in subsection (d)(1) specifically indicate that they apply to "all communications with the public" and do not exempt correspondence. Our understanding that correspondence is not exempt from the content standards of subsection (d)(1) is reinforced by FINRA's 2003 revisions to the rule.

Prior to November 2003, NASD Rule 2210 treated any letter or email sent to more than one person as "sales literature," which subjected it not only to the content standards applicable to all communications, but also to sales literature content standards and other requirements. The term "correspondence" included only items prepared for delivery to a single current or prospective customer. In a FINRA filing that the SEC approved on May 9, 2003, FINRA revised the definition of correspondence to include any written letter or electronic mail message distributed to one or more existing retail customers and fewer than 25 prospective retail customers within any 30-calendar-day period. The purpose of the revision was to subject letters and emails sent to more than one existing and fewer than 25 prospective retail customers to the supervisory standards in NASD Rule 3010(d) rather than treat them as sales literature for purposes of sales literature-specific content standards and other requirements.[11] FINRA did not lessen or otherwise revise any of the content standards applicable to *all* communications with the public (contained in subsection (d)(1) and at issue in this case). If FINRA intended to carve out correspondence from the content standards of NASD Rule 2210(d)(1), it could have done so, but it did not. *See Order Approving Proposed Rule Change*, SR-NASD-2000-12, Exchange Act Rel. No. 47820, 2003 SEC LEXIS 1155 (May 9, 2003). FINRA has never exhibited intent to exclude correspondence from the general content standards applicable to all communications with the public contained in subsection (d)(1). Indeed, FINRA added correspondence to NASD Rule 2210 in 1998 specifically to apply content standards to correspondence. *See Order Approving Proposed Rule Change*, SR-NASD-1998-29, Exchange Act Rel. No. 40365, 1998 SEC LEXIS 11841 (Aug. 26, 1998) (amending NASD Rule 2210 to include correspondence as a type of "communication with the public" and to ensure that the general content standards in subsection (d)(1) apply to correspondence).

Even if we were to subscribe to respondents' interpretation of NASD Rule 2210, which we do not, the additional customer communications that respondents identify do not cure the deficiencies in the four emails at issue.[12] First we note that, while there is some overlap between

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[11] While not applicable to this case, we note that in 2006, FINRA amended NASD Rule 2211 to require registered principal pre-use approval of any correspondence sent to 25 or more existing retail customers within any 30-calendar-day period if the correspondence makes any financial or investment recommendation or otherwise promotes a product or service of the member. *See NASD Notice to Members 06-45* (Aug. 2006).

[12] On appeal, respondents argue that it is nonsensical that, if a registered person sends a list of clients a detailed stock recommendation that complies with the content standards of NASD Rule 2210, then three minutes later reiterates his buy recommendation to the same customers in a brief email that does not contain the detail of the earlier email, under FINRA's interpretation, the registered person would have violated the content standards of NASD Rule 2210 in the second email. This, however, is not remotely the fact pattern currently before us.

the list of recipients of the four emails at issue and the recipients of respondents' other emails, the lists are not identical. Several of the recipients of the four emails identified in the complaint did not receive some or all of the other emails that respondents offered into evidence. Second, the emails that respondents offered into evidence, which are dated between early 2003 and late 2005, even when taken together, do not necessarily present a fair and balanced picture of SLUP or GMUS and do not fully disclose all material information. The emails simply provide a scattering of press releases and news stories without linking the information together to provide a clear overall picture of the recommended investments. Third, respondents sent the emails and other correspondence over an extended period of more than 10 months, and the four emails identified in the complaint do not refer the reader back to earlier emails or incorporate any of the earlier emails by reference. Finally, Beloyan also claims to have provided additional information to the email recipients during telephone and in-person conversations. He cannot, however, provide any details as to which of the email recipients he spoke with or when he spoke to them. He also did not maintain contemporaneous notes of these conversations. We do not find that, even when considered in conjunction with respondents' other emails and Beloyan's conversations, respondents complied with the content standards of NASD Rule 2210.

* * * * *

We affirm the Hearing Panel's findings under cause one that Beloyan and Tradespot violated NASD Rules 2210(d)(1)(A) and (d)(1)(B) and 2210 by distributing emails dated February 1, June 8, August 5, and September 13, 2005 that were unbalanced, misleading, contained misrepresentations, and omitted material facts.

B. Cause Two

We also affirm the Hearing Panel's findings under cause two that Beloyan and Tradespot failed to review SLUP's current financial filings before recommending SLUP, in violation of NASD Rules 2315(a) and 2110.

1. NASD Rule 2315

NASD Rule 2315 (now FINRA Rule 2114) became effective in October 2002. The rule requires members and associated persons to review current financial statements of an issuer prior to recommending a transaction to a customer in an OTC equity security. The rule also requires members and associated persons to review current material business information about the issuer and to determine that such information, along with any other information available, provides a reasonable basis for making the recommendation. FINRA adopted the rule as part of its efforts to address abuses in the sales of thinly traded, under-capitalized securities that are not listed on the NASDAQ Stock Market or any other exchange.[13]

NASD Rule 2315 defines "current financial statement" differently for issuers that are foreign private issuers and issuers that are not. The definition requires more up-to-date

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[13] *See NASD Notice to Members 02-66*, 2002 NASD LEXIS 79, at *2 (Sept. 2002); *NASD Notice to Members 98-15*, 1998 NASD LEXIS 17, at *3-4 (Jan. 1998).

information for non-foreign private issuers than for foreign private issuers.[14] The parties agreed that SLUP is a foreign private issuer and therefore applied the less stringent standards to determine what qualifies as current financial statements. We do not necessarily agree that it is appropriate to categorize SLUP as a foreign private issuer because its headquarters and facilities appear to be located in New York, and its shareholder base seems to be primarily in the United States. *See* 17 C.F.R § 240.3b-4(c). The record, however, contains insufficient evidence to make an independent determination on this issue, and the parties have had no notice of the application of a different standard, so we will proceed with our analysis as if SLUP meets the definition of foreign private issuer.

NASD Rule 2315, as it read in 2005, provided the following definition of "current financial statements" for foreign private issuers:

> (i) a balance sheet as of a date less than 18 months before the date of the recommendation;
> (ii) a statement of profit and loss for the 12 months preceding the date of the balance sheet;
> (iii) if the balance sheet is not as of a date less than 9 months before the date of the recommendation, additional statements of profit and loss for the period from the date of the balance sheet to a date less than 9 months before the date of the recommendation, if any such statements have been prepared by the issuer; and
> (iv) publicly available financial statements and other financial reports filed during the 12 months preceding the date of the recommendation . . . .

NASD Rule 2315(a)(1)(B).

2. Respondents Did Not Review SLUP's Current Financial Statements Before Recommending the Stock

a. Background

Beloyan admits that he did not possess current financial statements for SLUP when he recommended the stock in emails dated June 8, August 5, and September 13, 2005. During on-the-record testimony in April, May, and June 2007, Beloyan admitted that, from September 2003

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[14] In response to comments during the rule-making process, FINRA developed different definitions of "current financial statements" to account for differences in customary accounting periods between foreign and non-foreign issuers. *See Notice of Filing of Amendment No. 1 to Proposed Rule Change*, Exchange Act Rel. No. 45277, 2002 SEC LEXIS 93, at *16 (Jan. 14, 2002). The term "foreign private issuer" means an issuer of a foreign country, other than a foreign government, except for an issuer meeting the following conditions: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States. 17 C.F.R § 240.3b-4(c).

through September 2005, he did not possess financial statements for SLUP because SLUP had not produced any financial filings during that period. SLUP's audited financial statements for 2004 and 2005 were not released until March and October 2007. Beloyan testified on the record on April 30, May 1, and June 18, 2007, that he gathered information upon which he based his recommendations of SLUP from SLUP press releases, conversations with members of SLUP's management team, and third parties, such as trade magazines.

On December 1, 2006, Enforcement requested, pursuant to NASD Rule 8210, that Beloyan and Tradespot produce, among other documents, SLUP financial statements for the period of January 1, 2003 through December 31, 2005. Beloyan and Tradespot responded in a January 22, 2007 letter that stated, "The Firm does not have possession of such financial statements for the period indicated." In a follow-up letter dated May 16, 2008, Beloyan and Tradespot stated that Beloyan had been involved with SLUP for years and that he knew the issuer well before recommending it to his clients.[15]

After Enforcement filed the complaint in this matter, respondents' counsel produced for the first time financial documents that respondents contended they had in their possession prior to recommending SLUP.[16] Respondents failed to produce these documents in response to Enforcement's NASD Rule 8210 request and Beloyan did not identify the documents during his on-the-record interviews. Enforcement requested that Beloyan appear for a post-complaint on-the-record interview to answer questions regarding these financial documents.[17] Beloyan

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[15] Respondents suggested that they complied with subsection (d) of NASD Rule 2315, which states:

> If an issuer has not made current filings required by the issuer's principal financial or securities regulatory authority in its home jurisdiction . . . . such review must include an inquiry into the circumstances concerning the failure to make current filings, and a determination, based on all the facts and circumstances, that the recommendation is appropriate under the circumstances. Such a determination must be made in writing and maintained by the member.

[16] Respondents' attorney produced (1) a profit and loss statement for EPS Environmental, Inc. d/b/a Solucorp Industries. LTD. ("EPS") for the period of January through August 2003; (2) an EPS balance sheet dated August 31, 2003; (3) a profit and loss statement for EPS for the period of January through December 2003; (4) an EPS balance sheet dated December 31, 2003; (5) a profit and loss statement for EPS for the period of January 1 through June 1, 2004; and (6) an EPS balance sheet dated June 1, 2004. Beloyan testified that EPS was the sole operating subsidiary of SLUP. SLUP acquired WITS, Inc. in June 2004. The record is unclear as to when WITS, Inc. became operational. Beloyan testified that he was instrumental in organizing SLUP's acquisition of WITS, Inc., so he possessed and reviewed WITS, Inc. financials as well before recommending SLUP purchases in 2005. The record does not include copies of financial statements for WITS, Inc.

[17] Enforcement and Beloyan disagreed as to whether Beloyan had ever mentioned these documents to Enforcement during telephone conversations and settlement discussions.

[Footnote continued on next page]

testified on July 12, 2009 that he possessed the EPS financial documents as of December 1, 2004 and that he maintained these documents in an "EPS" file that was separate from his SLUP due diligence file. Beloyan testified that he never mentioned the EPS financial statements during his prior on-the-record interviews because "the reason I recommended the stock was for the company's technology and their patents. It had nothing to do with the basis of the financial statement."

Beloyan testified before the Hearing Panel that SLUP had no operations at the time of his 2005 recommendations and that it conducted all of its business through EPS. Beloyan testified that in early 2005, he asked SLUP for recent financial statements.[18] Beloyan stated that, at the time of respondents' 2005 recommendations to purchase SLUP, respondents possessed the following: (1) an EPS balance sheet dated as of April 22, 2003 and EPS vendor balance summary dated May 1, 2003; (2) Beloyan's note to file dated September 3, 2003, stating that SLUP does not file financial statements with the Commission and that the company provided him with an EPS profit and loss statement from January to August 2003 and EPS balance sheet dated August 31, 2003, with both documents attached; (3) Beloyan's note to file dated January 15, 2004, stating that SLUP does not file financial statements with the Commission and that the company provided him with an EPS profit and loss statement from January to December 2003 and EPS balance sheet dated December 31, 2003, with both documents attached; and (4) Beloyan's note to file dated June 16, 2004, stating that SLUP does not file financial statements with the Commission and that the company provided him with an EPS profit and loss statement from January 1 to June 1, 2004, and EPS balance sheet dated June 1, 2004, with both documents attached.

Under cause two, we must resolve two issues. First, we consider whether the record establishes that, as respondents contend, Beloyan possessed and reviewed EPS's financial documents before recommending SLUP stock to customers. Second, we consider whether a review of EPS's financial documents would be sufficient to comply with the requirements of NASD Rule 2315.

b. Beloyan's Claim to Have Reviewed EPS Financial Documents

Beloyan testified that he possessed the identified EPS financial documents and reviewed them before recommending SLUP in 2005. The Hearing Panel found Beloyan's claim not credible, and we find no reason to disturb the Hearing Panel's credibility finding. *See Geoffrey*

[cont'd]

Respondents moved to quash the NASD Rule 8210 request. The Hearing Officer denied the motion and allowed Enforcement to proceed with an on-the-record interview of Beloyan on July 12, 2009.

[18] In September 2003, SLUP terminated its registration and stopped filing financial statements with the Commission. SLUP's last financial statements, which were consolidated financial statements dated December 31, 2002 and 2003, included an auditor's letter dated November 20, 2004.

Ortiz, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *18 (Aug. 22, 2008) ("We give great weight and deference to credibility determinations by a Hearing Panel, which can only be overcome by substantial record evidence."); *Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819, at *38 (Apr. 11, 2008) ("Credibility determinations by the fact finder deserve special weight, and can be overcome only when there is substantial evidence for doing so."). Here, substantial record evidence supports the Hearing Panel's credibility finding.

In December 2006, Enforcement requested that Beloyan and Tradespot produce the SLUP financial statements that they possessed between January 2003 and December 2005. Beloyan and Tradespot responded that they did not possess any SLUP financial statements during that period. Similarly, in an April 2007 on-the-record interview, Beloyan testified that he did not possess or review SLUP financial statements before recommending the stock in 2005 because SLUP had not issued updated financial statements until March 2007. Beloyan never mentioned the EPS financial statements in respondents' written response to FINRA's information request and during his on-the-record interview. He also did not mention the EPS financials in May and June 2007 on-the-record interviews, despite having been asked specifically about the information that he possessed in 2005 related to SLUP. Respondents also directly responded to Enforcement's allegations of potential NASD Rule 2315 violations in a letter dated May 16, 2008, without ever mentioning their having reviewed EPS financial statements. These facts convince us of the lack of credibility of Beloyan's claim to have possessed and reviewed EPS's financial statements to comply with NASD Rule 2315.

c. A Review of EPS's Financial Statements Would Not Satisfy the Requirements of NASD Rule 2315

Even if we overturned the Hearing Panel's finding that Beloyan was not credible when he claimed to have reviewed EPS financial statements, which we do not, that would not have been sufficient for Beloyan and Tradespot to comply with the requirements of NASD Rule 2315. EPS quite simply is not the stock that respondents recommended to their customers, and NASD Rule 2315 does not allow for a substitution of this nature.[19] Furthermore, EPS's unaudited financial statements did not provide a reliable picture of SLUP's financial situation. In June 2004, SLUP had acquired another subsidiary, WITS, Inc., which the record indicates was operating as early as November 2004. Additionally, many of the figures reported in EPS's financial statements differ significantly from SLUP's financial statements for the same period (and filed in 2007). Finally, Beloyan did not demonstrate that the EPS financial statements that he claims to have reviewed were current within the meaning of NASD Rule 2315. The latest EPS balance sheet that Beloyan claims to have reviewed is dated June 1, 2004, which is 12, 14, and 15 months prior to the three recommendations at issue here. NASD Rule 2315(b)(1)(B)(iii) provides that, if the balance sheet is not of a date less than nine months before the date of the recommendation, additional statements of profit and loss for the period from the date of the balance sheet to a date

[19] Subsection (d) of NASD Rule 2315 provides that, if an issuer is delinquent with its financial filings, an associated person may make a determination in writing, based on all the facts and circumstances, that a recommendation is appropriate. This section does not, however, apply in this instance because SLUP was not a delinquent filer. Rather, SLUP had de-registered its securities and stopped filing financial statements altogether.

less than nine months before the date of the recommendation must be reviewed if available. The latest EPS profit and loss statement that Beloyan reviewed was for the period ending June 1, 2004, and Beloyan has not indicated what efforts, if any, he undertook to determine if a more current EPS profit and loss statement was available.

We reject respondents' claim that they complied with the requirements of NASD Rule 2315 before recommending SLUP stock by reviewing the financial documents of EPS.

* * * * *

We affirm the Hearing Panel's findings under cause two that Beloyan and Tradespot failed to review SLUP's current financial filings before recommending SLUP in emails dated June 8, August 5, and September 13, 2005, in contravention of NASD Rules 2315(a) and 2110.[20]

V. Sanctions

For violating NASD Rules 2210 and 2110, the Hearing Panel fined Beloyan and Tradespot $10,000, jointly and severally, and suspended Beloyan in all capacities for 10 business days. For violating NASD Rules 2315 and 2110, the Hearing Panel fined Beloyan and Tradespot $3,500, jointly and severally. The Hearing Panel also ordered respondents to pay costs of $3,868. We affirm these sanctions and costs and impose appeal costs of $1,608.50.

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[20] Before the Hearing Panel, Beloyan and Tradespot argued that they have been treated unfairly by FINRA staff. Respondents stated that Tradespot was a modest firm and that it and Beloyan had no disciplinary history when, in February 2006, FINRA staff conducted a routine examination of the firm. They stated that, although the firm made two photocopy machines available to FINRA's examiners, the examiners insisted on taking documents off of the premises to reproduce. In the process, FINRA staff lost a disk that contained confidential customer information. Respondents argued that FINRA refused to admit to the loss until after significant time had elapsed, that the firm incurred losses as a result of FINRA's actions, and that Tradespot has been prejudiced in this action by the conduct of FINRA staff. Respondents have not repeated this argument on appeal. We nonetheless have reviewed the record for evidence of prejudice or unfairness in the disciplinary process. In determining the fairness of FINRA's proceedings, the Commission looks to whether the proceedings were conducted in accordance with FINRA's rules and whether FINRA implemented its procedures fairly. *See Robert J. Prager*, Exchange Act Rel. No. 51974, 2005 SEC LEXIS 1558, at *48-49 (July 6, 2005). The record establishes that FINRA's actions in this proceeding were fair and in accordance with its procedural rules, and we find no evidence of prejudice. *See E. Magnus Oppenheim & Co.*, Exchange Act Rel. No. 51479, 2005 SEC LEXIS 764, at *10 (Apr. 6, 2005) (rejecting fairness argument where applicant received adequate notice of the complaint, the complaint contained sufficient detail to apprise applicant of the charges against it, FINRA conducted a hearing on the record, and applicant had the opportunity to present a case and witnesses and cross examine Enforcement's witnesses).

We turn first to the FINRA Sanction Guidelines ("Guidelines").[21] *See Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *16 (Nov. 14, 2008) (endorsing FINRA's reliance on Guidelines), *aff'd*, No. 09-0062-ag (2d Cir. Oct. 1, 2009). The Guidelines for inadvertent misleading communications with the public and communications that otherwise violate the content standards of Rule 2210 recommend imposing a fine of $1,000 to $20,000 and, in cases involving intentional or reckless conduct, a fine of $10,000 to $100,000.[22] For failing to comply with content standards, the Guidelines also recommend, in egregious cases, considering a suspension of the firm for up to one year and a suspension of the responsible individual for up to 60 days.[23] For cases involving misleading communications, the Guidelines suggest suspending the firm for up to six months, and if the misconduct is intentional or reckless, the Guidelines recommend suspending the firm for up to two years and suspending the responsible individual for up to two years.[24] The Guidelines also recommend, in cases involving numerous acts of intentional or reckless misconduct over an extended period of time, considering a longer suspension of the firm and the responsible individual or expulsion of the firm and a bar of the responsible individual.[25]

The Guidelines for violations of NASD Rule 2315[26] recommend a fine of $2,500 to $75,000 and a suspension for 10 business days to one year.[27] The Guidelines also recommend, in egregious cases, a longer suspension or a bar of an individual respondent and a suspension of a member firm for up to two years.[28]

We find that respondents' misconduct under cause one was serious, although we do not characterize it as egregious. We credit Beloyan's contention that he did not intentionally mislead his clients about SLUP and GMUS and that he did not seek to convince them that the two issuers were something other than the risky start-up ventures that they were.[29] We conclude, however,

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21 *FINRA Sanction Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions); 80-82 (Communications with the Public); 96 (Suitability) (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter "*Guidelines*"].

22 *See Guidelines*, at 81-82.

23 *Id.*

24 *Id.*

25 *Id.*

26 *See Guidelines*, at 96 n.1 (stating that the Guidelines for suitability violations also are applicable to violations of FINRA Rule 2114, formerly NASD Rule 2315).

27 *See Guidelines*, at 96.

28 *Id.*

29 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

that respondents' emails, although not intentionally misleading, were woefully deficient of details and that respondents fell far short of complying with the content standards in NASD Rule 2210. Respondents exhibited repeated negligence when they sent their clients abbreviated emails that provided little detail or background about the stocks that they recommended for purchase. Respondents claim that Beloyan had many other email and oral communications with these clients, but respondents failed to ensure that they connected all the dots for their customers. Respondents did not necessarily send the earlier emails to the same customers, and they never incorporated earlier emails or conversations by reference. Furthermore, Beloyan's earlier correspondence with customers spanned an expansive time period and contained inadequate disclosures as well. Although Beloyan contends that he willingly accepted calls from clients and talked to many clients quite often, he failed to maintain a log of which disclosures he made to which clients and when, so that he could ensure that the clients who received the four emails at issue were fully familiar with the potential risks associated with SLUP. In determining that respondents' violations are serious, we also considered that respondents sent the four emails at issue to more than 100 recipients and that this conduct spanned four months.[30] Finally, we have considered that Beloyan stood possibly to gain from his actions. Beloyan, his wife, and his daughters owned SLUP stock and presumably would benefit from an increase in the stock's demand.[31]

We do find that Beloyan's statement "I have been buying" rises to the level of recklessness. Beloyan was a seasoned industry professional when he emailed clients on June 8, 2005, that he had been buying SLUP stock when, in fact, he had been selling it. Although Beloyan contends that he intended to convey that he had been buying the stock for clients, not himself, he made no effort in the email to ensure that his clients understood that. As an experienced industry professional, he should have understood that his statement could cause confusion, and his failure to make an effort to clarify the email was, in our opinion, reckless.[32]

Even putting aside questions about the credibility of Beloyan's testimony regarding his review of SLUP's financial information, we find that respondents' failures to comply with NASD Rule 2315 were, at a minimum, negligent. The rule is very clear as to the requirements for reviewing financial statements before recommending certain over-the-counter securities. Respondents demonstrated a lack of familiarity with the rule that is unacceptable, particularly for someone who, like Beloyan, specializes in selling these types of stocks.

We reject respondents' arguments in mitigation of sanctions that either rule was unclear or that their violations were technical in nature. Both rules are designed to protect investors from potential fraud. *See Order Approving Proposed Rule Change*, SR-NASD-99-04, Exchange Act Rel. No. 46376, 2002 SEC LEXIS 2156, at *3 (Aug. 19, 2002) (stating that NASD Rule 2315 is intended to address abuses in the trading and sales of thinly traded and thinly capitalized securities because the lack of financial information about these securities creates the potential for

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30 *See id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

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

32 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

fraud and manipulation); *Robert L. Wallace*, 53 S.E.C. 989, 996 (1998) (stating NASD Rule 2210 provides important safeguards for the protection of public investors). We cannot agree that violations of either of these rules reasonably can be categorized as technical in nature.

We similarly reject respondents' assertion that they should be credited with mitigation for their lack of disciplinary history. *See Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (holding that, while the existence of a disciplinary history is an aggravating factor when determining appropriate sanctions, its absence is not mitigating). Furthermore, we note that Beloyan and Tradespot recently settled a FINRA disciplinary action. Without admitting or denying the allegations, Tradespot and Beloyan consented to findings that they engaged in a distribution of unregistered securities, failed to maintain an adequate supervisory system, and failed to implement and enforce Tradespot's anti-money laundering program. We also reject respondents' argument that they have been hurt financially by FINRA's investigation and that this fact should be considered in mitigation of sanctions. *See Jason A. Craig*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) (holding that the economic disadvantages the respondent alleges he suffered as a result of his misconduct is not mitigating of sanctions).

We conclude that the sanctions imposed by the Hearing Panel, which are within the ranges recommended in the applicable Guidelines, are appropriately remedial and neither excessive nor oppressive. We affirm those sanctions.

VII. Conclusion

Even though the record does not support the conclusion that Beloyan and Tradespot were deliberately trying to mislead their customers, we find that Beloyan and Tradespot violated NASD Rules 2210(d)(1)(A) and (B) and 2110 by emailing to current and prospective customers stock recommendations that were not fair and balanced, failed to provide a sound basis for evaluating the recommended stock, omitted material information, and misrepresented material facts. We also find that Beloyan and Tradespot violated NASD Rules 2315(a) and 2110 by failing to review the current financial filings for an over-the-counter stock before recommending the stock to customers.[33] For these violations, we fine Beloyan and Tradespot $13,500 (joint and several), suspend Beloyan from associating with any member firm in any capacity for 10 business days, affirm the Hearing Panel's assessment of costs of $3,868, and impose appeal costs of $1,608.50.[34]

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith, Senior Vice President
and Corporate Secretary

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

[34] Pursuant to FINRA 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.