

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58737 / October 6, 2008

Admin. Proc. File No. 3-12659

In the Matter of the Application of

MICHAEL FREDERICK SIEGEL
c/o George C. Freeman, III
Barrasso Usdin Kupperman Freeman & Sarver, LLC
909 Poydras Street, Suite 2400
New Orleans, Louisiana 70112

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Conduct Rules

Failure to Provide Written Notice to Member Firm Employer Regarding Private
Securities Transactions

Unsuitable Recommendations

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative of member firm of registered securities association participated in private securities transactions without providing prior written notice to his member-firm employer, made unsuitable recommendations, and, as a result, engaged in conduct inconsistent with just and equitable principles of trade. Held, association's findings of violations and sanctions are sustained.

APPEARANCES:

George C. Freeman, III and Meredith A. Cunningham, of Barrasso Usdin Kupperman Freeman & Sarver, LLC, for Michael Frederick Siegel.

Marc Menchel, James S. Wrona, and Michael J. Garawski, for FINRA.

Appeal filed: January 3, 2008

Last brief received: April 24, 2008

I.

Michael Frederick Siegel, formerly a general securities representative associated with Rauscher Pierce Refsnes, Inc. (“Rauscher”), an NASD member firm, appeals from NASD disciplinary action. 1/ NASD found that Siegel engaged in private securities transactions without providing prior written notice to Rauscher in violation of NASD Conduct Rules 3040 and 2110. 2/ NASD also found that Siegel made unsuitable recommendations to two couples in violation of NASD Conduct Rules 2310 and 2110. NASD fined Siegel a total of \$30,000, ordered him to serve consecutively two six-month suspensions in all capacities, ordered restitution to the customers at issue in the amount of \$400,300, and assessed costs of \$7,958.05. We base our findings on an independent review of the record.

1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Although FINRA issued the Supplemental Decision on restitution, NASD initiated the original disciplinary action. We will we continue to use the designation NASD.

2/ NASD Conduct Rule 3040(e)(1) defines “private securities transaction” as “any securities transaction outside the regular course or scope of an associated person’s employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission, provided however that transactions subject to the notification requirements of Rule 3050, transactions among immediate family members (as defined in Rule 2790), for which no associated person receives any selling compensation, and personal transactions in investment company and variable annuity securities, shall be excluded.”

II.

Siegel's Involvement with World Environmental Technologies, Inc.

Siegel has been registered as a general securities representative since 1981 and was associated with Rauscher from October 24, 1997 until June 16, 1999. ^{3/} At the beginning of 1997, Siegel met World Environmental Technologies, Inc. ("World ET") president, Jim Finkenkiller, and the chairman of World ET's board, Tom Denmark, to discuss a business opportunity. During several meetings with Finkenkiller and Denmark over the next three or four months, Siegel learned that World ET recently had been founded to offer antibacterial services to the poultry and swine industry and intended to acquire the rights to an odor-eradicating product called "Nok-Out."

Sometime in late 1997, Siegel agreed to become a director of World ET and to raise capital for the Nok-Out venture. He believed that, as a director, he would be well positioned to be selected for the company's potential initial public offering. In a letter dated October 22, 1997, Finkenkiller informed Siegel that World ET immediately required Siegel's fundraising efforts in connection with, among other things, fulfilling a "\$200,000 commitment" and obtaining "operating capital" and that Siegel could show his "investors" a "small job" that World ET was to perform at the end of the month.

On November 24, 1997, Siegel requested in writing permission from Rauscher to serve as a director of World ET. Siegel represented that he was not recommending World ET securities to his customers. Rauscher granted Siegel permission to serve as a director but informed Siegel that he would "not be able to effect transactions in the securities of World [ET]" At the hearing, Siegel testified that his supervisor, Scott Grandbouche, told him that it was highly unlikely that Rauscher would ever approve a Rauscher registered representative selling unregistered securities. ^{4/} Rauscher never approved Siegel's offer or sale of World ET securities.

On December 6, 1997, Finkenkiller sent Siegel a draft employment agreement that provided that Siegel would use his best efforts to obtain, by March 31, 1998, at least \$15 million to fund World ET's "development and operations" in exchange for payments of cash and stock. Siegel signed the agreement in January 1998. In the executed agreement, Siegel substituted his home address for his office address for the purpose of receipt of all "notices, demands, and requests" under the agreement ("Notice Provision"). Grandbouche testified that all mail received

^{3/} Siegel also has been active as a radio and television personality providing investment advice since the mid-1980s, a registered investment adviser since 1999, and the author of a book entitled, "Investing for Cowards," published in 2001.

^{4/} Siegel testified that he later told Grandbouche that his "clients wanted to invest in World ET [and] do it on their own," but Grandbouche denied that Siegel told him anything about the transactions at issue.

through the firm was opened and reviewed by administrative personnel before being delivered to a registered representative. Siegel never informed Rauscher about his employment agreement with World ET.

When Siegel signed the employment agreement, he also loaned World ET \$22,000. On March 6, 1998, Siegel loaned World ET an additional \$20,166.01. Siegel testified that he was unclear about what repayment terms, interest rates, or maturity dates applied to the loans he made to World ET. World ET failed to pay Siegel for his services as a director or pursuant to the employment agreement or to repay any portion of his two loans to the company.

Siegel's Dealings with the Downers

Huntington and Linda Downer had been investing with Siegel since 1993. ^{5/} Siegel had discretion over their account. Over time, Siegel invested their funds in a combination of fixed-income products, mutual funds, and stock. ^{6/} The Downers testified that they had invested mainly in certificates of deposit prior to investing with Siegel and “looked to him for financial guidance.”

Seven days after Siegel became associated with Rauscher in October 1997, the Downers transferred all of their holdings from their account maintained at Siegel's previous firm to a new discretionary joint account with Rauscher. In early November 1997, Siegel visited the Downers' home to discuss their account, as he had done routinely since they began investing with him. During the visit, Siegel brought up World ET. He told the Downers that World ET was a new company and that he was going to invest in the company. Siegel also told the Downers that World ET planned on acquiring the rights to “Nok-Out.” He said that he was very excited about the formula (which he described to them) and gave them a sample of “Nok-Out” to use on their cat's litter box. Based on Siegel's representation that he was investing in World ET, Huntington Downer asked Siegel to contact the company to inquire about any investment opportunities for the Downers. Following the visit, Siegel spoke with Finken Keller or Denmark who informed him that the Downers could invest \$300,000 in World IEQ Technologies, Inc. (“World IEQ”), purportedly a subsidiary of World ET. Siegel conveyed this information to the Downers who asked him to obtain the relevant paperwork on their behalf.

On November 24, 1997, Siegel visited the Downers a second time and brought with him several documents related to World IEQ. The World IEQ subscription agreement provided that

^{5/} Huntington Downer earned \$150,000 annually as a legislator and focused on finance and budget issues. Downer previously had been a partner in a law firm. Linda Downer, his wife, had no separate income. The Downers had a net worth of approximately \$1.5-2.0 million, excluding their home.

^{6/} The Downers relied on the income generated from their investments and sought growth and income as their investment objective.

the subscriber waived the right to receive a document “typically called a Prospectus or Private Placement Memorandum.” It also provided that a subscriber’s \$300,300 investment would purchase a 120-day debenture for \$300,000 plus 300,000 shares of World IEQ common stock for \$300 at \$0.001/share. The World IEQ questionnaire, in contrast, requested that the subscriber confirm the purchase of a 365-day debenture for \$300,000 plus 300,000 shares of “Class Common Stock” without specifying a price. The documents contained no information regarding an interest rate or repayment terms for the debenture.

Siegel testified that he did not review or analyze any of the documents. Without completing any blank sections or discussing the contents of the documents with Siegel, Huntington Downer signed and returned to Siegel the World IEQ subscription agreement and the World IEQ questionnaire. Huntington Downer testified that he often signed documents that Siegel provided without reviewing them or questioning Siegel. ^{7/} Linda Downer gave Siegel a personal check made payable to World IEQ in the amount of \$300,300. She testified that, “I know that sounds really strange to invest \$300,000 [sic] in something that you know nothing about, but . . . I trusted [Siegel] to do whatever.” Siegel faxed the forms to World ET.

Shortly thereafter, the Downers decided to pay for the World IEQ investment by using funds from their Rauscher account instead of paying with the check that Linda Downer wrote and which was never negotiated. Siegel provided, and the Downers signed, a letter dated November 28, 1997 that authorized him to wire \$300,300 from their Rauscher account to a World IEQ bank account in Texas. Rauscher effected the wire transfer on December 1, 1997.

Approximately one or two weeks later, Finkenkeller called Siegel and told him that the Downers could no longer invest in World IEQ and had the option of receiving a refund or investing in World ET. Siegel conveyed this information to the Downers. When Huntington Downer asked Siegel for advice on how to decide, Siegel stated that he “would rather be in the mother company if [he] had a choice.” The Downers told Siegel that they opted to invest in World ET. Siegel was the Downers’ only source of information regarding their decision to invest in World IEQ and World ET.

Siegel’s Contacts with the Landrys

Dorothy and Barry Landry opened a Rauscher account with Siegel in November 1997 based on a referral by Huntington Downer. The Landrys vested Siegel with discretion over their account. The Landrys sought to increase the return on \$1 million that they acquired from the

^{7/} For example, Huntington Downer testified, “Mr. Siegel was my friend. He would come to my house. He would give me recommendations. Whatever he said, whatever he put in front of me, I signed. I trusted him implicitly. I never once filled out any forms, to the best of my recollection. He filled out whatever and showed me where to sign, and I signed.”

recent sale of their healthcare business. Siegel told them that he subsequently might recommend that they invest in higher-risk, start-up companies.

Later that month, Siegel visited the Landrys' home to complete some follow-up paperwork regarding their new account and to discuss their portfolio. Siegel raised the topic of World ET, stating that he thought it was something in which they might be interested and that he wanted them "to take a look at" the company. Siegel told them that World ET was a new company that intended to introduce Nok-Out to the poultry and swine industry and that he and the Downers were investing "three times" the minimum investment amount in the company.

The Landrys testified that, while Siegel did not pressure them to invest, he did "promote the benefits of [Nok-Out]" and assure them that "this looked like a really good deal." For example, Dorothy Landry testified that Siegel told them that Nok-Out "looked like a product that . . . is going to be needed" and "is going to have lots of sales," that it "could be global," that "the opportunities existed to get in on the ground floor," and that "distribution is going to be coast-to-coast almost immediately because of the nature of the poultry and swine industries." Barry Landry testified that Siegel told them that he "knew of a company [i.e., World ET] that was on its ground floor getting started up and might be a nice place to invest some money," and that "it looked like a good idea." Dorothy Landry testified that Siegel told the couple that the minimum investment amount was \$100,000 and that they could get their money back in as little as ninety days or perhaps one year.

Dorothy Landry asked Siegel to call World ET to determine whether any investment opportunity existed. Siegel said he would be "glad to" and called Denmark when he returned to his office. After speaking with Denmark, Siegel told the Landrys that they could invest in World ET.

On a subsequent visit a couple of weeks later, Siegel gave the Landrys a folder containing World ET documents and including Siegel's Rauscher business cards. ^{8/} Siegel testified that he did not review the documents or discuss them with the Landrys. A World ET subscription agreement provided that a subscriber could invest in a debenture at \$100,000 per "unit" and would waive the right to receive a document "typically called a Prospectus or Private Placement Memorandum." A World ET strategic plan described World ET's first-year plan to provide odor- and bacteria-combating services to the swine industry, with a "[s]econdary focus" in the poultry industry. Siegel also gave the Landrys a World ET outline and a World ET "pro forma summary information" statement that contained conflicting repayment terms. None of the documents contained information about an interest rate or a maturity date for the debenture.

^{8/} The record is unclear as to whether the information related directly to World ET or to a subsidiary whose name was listed inconsistently in the documents. Resolution of this issue is not relevant to our disposition of Siegel's appeal. However, in the interest of clarity, we will use the designation World ET.

On Siegel's advice, the Landrys kept the documents to review for a couple of months before making a decision on whether to invest in World ET. Dorothy Landry testified that Siegel's planned investment in World ET led them to the conclusion that, "if [Siegel] was interested in it, consider it solid." The Landrys testified that learning from Siegel that the Downers had invested in World ET further validated their decision to invest.

On February 5, 1998, the Landrys faxed to Rauscher and Siegel a request to wire transfer \$100,000 from their Rauscher account to their joint bank account with Hibernia National Bank, which Rauscher effected on that same day. On February 11, 1998, the Landrys gave the signed World ET subscription agreement and a \$100,000 check made payable to World ET to Siegel, who sent them to World ET. World ET negotiated the check. Siegel was the Landrys' only source of information about World ET prior to making their investment decision.

World ET Goes Out of Business

Pursuant to an arbitration decision rendered on August 28, 2002, World ET lost the rights to Nok-Out because World ET defaulted on payments it owed to the company that had developed the product. On February 13, 2004, the Texas Secretary of State revoked World ET's corporate charter. The Downers and Landrys never received any payments of any kind on their World ET investments.

Siegel's Testimony at the Hearing

Siegel testified that he believed the Downers invested in World IEQ because he told them that he was going to invest in World ET. Siegel further testified that the World IEQ and World ET documents that he provided to the Downers and Landrys were deficient because they either lacked or contained conflicting or confusing information about details that private placement transaction documents typically specify, such as maturity dates, interest rates, and repayment terms.

Siegel conceded at the hearing that these documentary deficiencies rendered an investment in World IEQ and World ET unsuitable for the Downers, the Landrys, or any investor. For example, Siegel agreed with an NASD hearing panelist who commented at the hearing that, with respect to the World IEQ and World ET documents, "[t]his is one of the worst sets of offering documents I have ever seen in my life. I mean you can't tell what these people are investing in." Siegel also stated, "I didn't know how bad they were because I was trying to not sell away. . . . Had I looked over the documents, yes, I probably would have been discouraged with the company right then and there. I didn't look them over. I wish I had." Siegel did not claim at any time during the proceeding, and the record does not indicate, that his communications with Finkenkeller or Denmark or his position as a World ET director provided him any additional information about the potential risks and rewards associated specifically with a World ET investment.

Procedural Background

On November 26, 2002, NASD's staff filed a complaint against Siegel alleging that he engaged in private securities transactions without providing prior written notice to Rauscher and that he made unsuitable recommendations to both the Downers and the Landrys. On April 19, 2004, an NASD Hearing Panel found that Siegel had committed the violations alleged in the complaint. The Hearing Panel fined Siegel \$30,000 and ordered him to serve concurrently two six-month suspensions in all capacities.

Siegel appealed and NASD staff cross-appealed the decision to NASD's National Adjudicatory Council ("NAC"). On July 26, 2005, the NAC remanded the proceeding and ordered the Hearing Panel to make credibility determinations and supplemental findings as to Siegel's interactions with the Landrys.

On May 11, 2007, the NAC affirmed the Hearing Panel's March 16, 2006 findings of violation and credibility determination in favor of the Landrys. The NAC also affirmed the Hearing Panel's sanctions, except that it ordered Siegel to serve his suspensions consecutively and to pay restitution to the Downers and Landrys in the amount of \$400,300. The NAC found that the record evidence was insufficient to make a determination whether the restitution amount was subject to offset. Accordingly, the NAC ordered a NAC Subcommittee to make a recommendation to the NAC regarding the offset amount.

The NAC Subcommittee denied Siegel's request for an in-person evidentiary hearing. Siegel did not dispute that the Downers and the Landrys never sold their investments in World securities, that their World securities have no residual value, and that they recovered no restitution through other avenues. Based on documentary evidence, including affidavits submitted by Siegel and NASD staff, the NAC subcommittee recommended that no offset be imposed. On that basis, the NAC concluded that no offset was required in its supplemental decision dated December 4, 2007.

III.

Pursuant to Section 19(e) of the Securities Exchange Act of 1934, we will sustain NASD's decision if the record shows by a preponderance of the evidence that Siegel engaged in conduct that NASD found to have violated its rules and that NASD applied its rules in a manner consistent with the purposes of the Exchange Act. ^{9/}

Private Securities Transactions

NASD Conduct Rule 3040 prohibits an associated person from participating "in any manner" in a private securities transaction without prior written notification to the employer, i.e.,

^{9/} 15 U.S.C. § 78s(e).

selling away. 10/ Siegel does not dispute that he violated NASD Conduct Rule 3040. Siegel stipulated before NASD that the investments made by the Downers and Landrys in World ET involved securities. 11/ Siegel admits that he participated in the private securities transactions at issue. Among other things, he introduced World ET to the customers, was the customers' sole source of information about World ET prior to their investments, and facilitated their purchases of World ET. 12/ Siegel further admits that he did not provide prior written notice to Rauscher of his participation in the sales activity at issue.

Accordingly, we find that Siegel participated in private securities transactions without providing prior written notice to Rauscher in violation of NASD Conduct Rules 3040 and 2110. 13/

Unsuitable Recommendations

Siegel Made Recommendations. NASD Conduct Rule 2310 requires that a transaction recommended by a registered representative to a customer be suitable. Whether the

10/ Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 214, aff'd, 209 Fed. Appx. 6 (2nd Cir. 2006) (Unpublished); NASD Manual at 4836-37 (1998). NASD Conduct Rule 3040 also provides that if an associated person is to receive selling compensation, he must give prior written notice to the firm and receive written approval before engaging in the transaction. NASD stipulated that it did not contend that Siegel received any commission or other compensation in connection with any investments made by the customers at issue in World ET or its subsidiaries. Thus, selling compensation is not an issue in this proceeding.

11/ Exchange Act Section 3(a)(10) defines the term "security" to include "any" "stock" or "debenture." 15 U.S.C. § 78c(a)(10). The subscription agreements signed by the Downers and the Landrys each stated that an investment resulted in the purchase of a debenture, as well as stock. The parties do not dispute that each of the World ET investments purchased by the Downers and the Landrys was a security. We agree with NASD's finding that these investments were securities.

12/ See Abbondante, 87 SEC Docket at 216 (finding that applicant participated in private securities transactions by introducing security to customers, being the sole source of information about the security, and facilitating purchase of security).

13/ NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. NASD Manual at 4111. NASD General Provisions Rule 115 extends the applicability of NASD rules governing members to their associated persons. It is well settled that a violation of a Commission or NASD rule or regulation also constitutes a violation of Conduct Rule 2110. E.g., Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

communication between a registered representative and a customer constitutes a recommendation is a “‘facts and circumstances’ inquiry to be conducted on a case-by-case basis.” ^{14/} Such an inquiry “requires an analysis of the content, context, and presentation of the particular communication.” ^{15/} NASD has stated that factors considered in conducting this inquiry include whether the communication “reasonably could be viewed as a ‘call to action’” and “reasonably would influence an investor to trade a particular security or group of securities.” ^{16/} For the reasons set forth below, we find that Siegel’s communications with the Downers and the Landrys constitute recommendations.

The nature of the relationship between Siegel and his customers, their reliance on him, the nature of the specific conversations, and Siegel’s initiation of the subject of World ET are the main factors supporting a finding that Siegel made recommendations. Siegel visited the Downers’ home in November 1997 to discuss their portfolio. Siegel raised the topic of investing in World ET during that discussion. The Downers had never heard of World ET. Siegel was the Downers’ sole source of information about the company. He told the Downers that he was very excited about Nok-Out. Siegel also told the Downers that he was going to invest in the company. ^{17/} The Downers had sought Siegel’s investment guidance for three years and routinely deferred to his decisions without question. Siegel admitted that he believed the couple invested in World ET because he told them that he planned on investing in the company. Siegel claims that his communications with the Downers were merely conversations about World ET, but we disagree.

Siegel made further inquiries, obtained and conveyed information, and facilitated execution of subscription documents and payment for the purchase of World IEQ shares. After Siegel informed the Downers that it was no longer possible to invest in World IEQ, he advised them to invest in World ET rather than receive a refund on their World IEQ investment, stating that he “would rather be in the mother company if [he] had a choice.” Siegel admits that he could have refused Huntington Downer’s request to obtain additional information about investing in World ET.

With respect to the Landrys, Siegel raised the topic of investing in World ET while reviewing their portfolio. He was the Landrys’ sole source of information about the company

^{14/} NASD Notice to Members, 01-23 (Apr. 2001).

^{15/} Id.

^{16/} Id.

^{17/} Siegel testified that he also informed the Downers and the Landrys that he was going to become a director of World ET. The Downers and the Landrys testified that he did not disclose this fact. Resolution of this issue is not necessary for us to determine whether Siegel’s communications with his customers were recommendations.

prior to making their investment decision. Siegel told the Landrys that he and the Downers were investing “three times” the minimum investment amount in the company. The Landrys testified that the knowledge that Siegel and the Downers also were investing in World ET comforted them. He gave them glowing projections about its potential success. Siegel made encouraging statements about the investment and proceeded on behalf of the Landrys to make further inquiries, obtain and convey information, deliver documents, return executed originals, and facilitate payment to World ET.

We find that Siegel’s conduct constitutes a recommendation because it was a “call to action” that reasonably influenced the Downers and the Landrys to invest in World ET. The Downers and the Landrys relied on Siegel for investment advice. Within the context of Siegel’s visits to the Downers and the Landrys to provide such advice, he introduced them to World ET, made encouraging statements about investing in World ET, and facilitated his customers’ overall investments.

Siegel’s Arguments. Siegel contends that the NAC improperly found that he made a recommendation to the Downers “only by ignoring key evidence.” In support of that argument, he claims that the Downers “were able to distinguish a recommendation – a ‘call to action’ – from the mere mention of a company in personal conversation” because they are “among the most sophisticated investors under the law” and thus able to “fend for themselves.” However, while sophistication of the investor may be relevant, sophistication alone does not mean that a communication is not a recommendation. Siegel did not merely mention World ET to the Downers. He repeatedly provided the Downers with positive details about the company and associated investment opportunities during ongoing conversations that began in the context of his periodic review of their investments.

Siegel claims that Huntington Downer initiated the idea of investing in World ET and insisted on investing. However, Downer was aware of World ET only because Siegel brought it to his attention and spoke enthusiastically about its prospects. Siegel also claims that he told the Downers not to invest simply because he was investing and that they would be on their own if they did decide to invest and that he discouraged Huntington Downer from investing in World ET by advising him that “he would have to wait until the company went public.” Yet, these statements do not change the conclusion that he made a recommendation. Siegel provided significant information and assistance to the Downers in making their investment in World ET while it was a nonpublic company, including encouraging them to invest in World ET after learning they could not invest in World IEQ.

Siegel asserts that, “[g]iven its election to forego any credibility findings as to the Downers, the NAC was required to constrain its review [regarding whether Siegel made a recommendation to the Downers] to Siegel’s testimony.” Siegel’s argument is without merit. In the absence of a credibility finding with respect to the Downers’ testimony, the NAC was

required to conduct a de novo review and was permitted to make its findings based on a review of the entire record. 18/ We also have conducted a de novo review. 19/

Siegel does not dispute that he recommended an investment in World ET to the Landrys. The Hearing Panel credited the Landrys' testimony on this issue. It is well established that we defer to the credibility determination of a fact-finder. 20/ We see no reason to question the Hearing Panel's determination here. We find that Siegel made recommendations to the Downers and the Landrys within the meaning of NASD Conduct Rule 2310. 21/

Siegel's Recommendations Were Unsuitable. NASD Conduct Rule 2310 requires that, in recommending a transaction to a customer, a registered representative "shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." 22/ The suitability rule thus requires that, before making a customer-specific suitability determination, a registered representative must first have an "adequate and reasonable basis" for believing that the recommendation could be suitable for at least some

18/ See Michael B. Jawitz, 55 S.E.C. 188, 200 & n.24 (2001) (stating that the NAC conducts a de novo review and has broad discretion to review any finding in the Hearing Panel decision) (citing Timothy L. Burkes, 51 S.E.C. 356, 359 (1993), aff'd, 29 F.3d 630 (9th Cir. 1994) (Table)); cf. Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3126 (acknowledging the NAC's power to conduct a de novo review and make its own independent findings), petition denied, No. 07-15736 (11th Cir. 2008) (Unpublished).

19/ See Keith Springer 55 S.E.C. 839, 841 n.5 (2002) ("Our de novo review of the record [under Exchange Act Section 19(e)] permits us to make our own findings based on a review of all material in the record."); Kenneth C. Krull, 53 S.E.C. 1101, 1109 (1998), aff'd, 248 F.3d 907 (9th Cir. 2001).

20/ E.g., Stephen Michael Sohmer, 57 S.E.C. 240, 255 & n.27 (2004) (citation omitted).

21/ Cf. Gordon Scott Venters, 51 S.E.C. 292, 294 (1993) (finding that applicant made a recommendation within the meaning of NASD Conduct Rule 2310 where customer's interest in investment was whetted by salesperson's and firm's promotional campaign); F.J. Kaufman and Co. of Va., 50 S.E.C. 164, 172 (1989) (finding that applicant made a recommendation within the meaning of the suitability rule where customers invested as a result of salesperson's substantial involvement and participation in the investment strategy).

22/ Maximo Justo Guevara, 54 S.E.C. 655, 662 (2000), petition denied, 47 Fed. Appx. 198 (3d Cir. 2002) (Table); Rafael Pinchas, 54 S.E.C. 331, 341 (1999); NASD Manual at 4261.

customers. ^{23/} The reasonableness of any recommendation is predicated on a registered representative's understanding of "the potential risks and rewards inherent in that recommendation." ^{24/} We have stated that "a broker may violate the suitability rule if he fails so fundamentally to comprehend the consequences of his own recommendation that such recommendation is unsuitable for any investor, regardless of the investor's wealth, willingness to bear risk, age, or other individual characteristics." ^{25/}

The record establishes, and Siegel does not dispute, that he had no basis, and certainly not a reasonable and adequate basis, for believing that his recommendations regarding an investment in World IEQ and World ET could be suitable for at least some customers. Siegel testified that he did not read any of the World IEQ and World ET documents that he provided to the Downers and the Landrys.

Even if Siegel had read them, he would not have had a reasonable basis for recommending World ET securities. Siegel admitted at the hearing that the World IEQ and World ET documents that he provided to the Downers and the Landrys were deficient: they either lacked or contained conflicting or confusing information about details that private placement transaction documents typically specify, such as maturity dates, interest rates, and repayment terms. Siegel agreed with a Panelist's comment at the hearing that the material provided to the Downers and the Landrys was "one of the worst sets of offering documents" he had ever seen and that "you can't tell what these people are investing in." During the exchange with the Panelist, Siegel further testified that, had he reviewed the documents, he "probably

^{23/} Terry Wayne White, 50 S.E.C. 211, 212 & n.4 (1990) ("It is well established that a broker cannot recommend any security to a customer 'unless there is an adequate and reasonable basis for such recommendation,'" and "[a] broker cannot conclude that a recommendation is suitable for a particular customer unless he has a reasonable basis for believing that the recommendation could be suitable for at least some customers"); F.J. Kaufman and Co., 50 S.E.C. at 168 & n.16 (citing Hanley v. SEC, 415 F.2d 589, 597 (2d Cir. 1969) (a broker-dealer "cannot recommend a security unless there is an adequate and reasonable basis for such recommendation"))).

^{24/} F.J. Kaufman and Co., 50 S.E.C. at 168 & n.18 (citing Alexander Reid & Co., 40 S.E.C. 986, 990 (1962) (a broker's recommendation must be "responsibly made on the basis of actual knowledge and careful consideration"); Distribution by Broker-Dealers of Unregistered Securities, Exchange Act Rel. No. 6721 (Feb. 2, 1962) ("the making of recommendations for the purchase of a security implies that the dealer has a reasonable basis for such recommendations which, in turn, requires that, as a prerequisite, he shall have made a reasonable investigation"))).

^{25/} See F.J. Kaufman and Co., 50 S.E.C. at 169-71 (finding recommendation unsuitable for any investor where registered representative was unaware of implications of investment strategy and therefore should not have recommended such strategy).

would have been discouraged with the company right then and there.” Siegel also conceded at the hearing that the deficiencies in the documents rendered an investment in World IEQ and World ET unsuitable for the Downers, the Landrys, or any investor, particularly because there was no other information on which a prospective investor could rely to make an investment decision. 26/

Accordingly, we find that Siegel made unsuitable recommendations to the Downers and the Landrys in violation of NASD Conduct Rules 2310 and 2110.

IV.

Exchange Act Section 19(e) provides that we may cancel, reduce, or require the remission of a sanction imposed by NASD where we find, having due regard for the public interest and the protection of investors, that NASD’s sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 27/ Siegel claims that NASD’s sanction determinations were “result-driven” because NASD took “irreconcilable positions as to cases it previously decided” and “misappl[ied] the Sanction Guidelines in a way it had not previously applied them.” As an initial matter, it is well established that “[b]ecause the selection of an appropriate sanction depends on the facts and circumstances of each particular case, action taken in other proceedings is not determinative.” 28/ In this case, in view of the seriousness of Siegel’s conduct, we believe that the sanctions imposed by NASD are neither excessive nor oppressive and that NASD properly applied the Sanction Guidelines.

A. Suspensions and Fines

1. NASD Conduct Rule 3040 Violations

NASD fined Siegel \$20,000 and suspended him in all capacities for six months for having violated NASD Conduct Rules 3040 and 2110. NASD’s Sanction Guidelines (“Sanction Guidelines”) recommend a fine of \$5,000 to \$50,000 and a suspension of three to six months for

26/ Because we have determined that Siegel did not have a reasonable basis for his recommendation of World ET, we do not address whether World ET was suitable for the Downers and the Landrys based upon their personal situations.

27/ 15 U.S.C. § 78s(e)(2). Siegel does not claim, and the record does not show, that NASD’s action imposed an undue burden on competition.

28/ See Robin Bruce McNabb, 54 S.E.C. 917, 927 & n.38 (1999) (citing Butz v. Glover Livestock Comm’n Co., 411 U.S. 182, 187 (1976); Edward C. Farni II, 51 S.E.C. 1118, 1120 n.11 (1994)), aff’d, 298 F.3d 1126 (9th Cir. 2002).

selling-away violations involving sales totaling \$100,000 to \$500,000. 29/ The fine and suspension are within the recommended range. 30/

NASD identified several aggravating factors present in this case. Siegel sold \$400,300 in World ET and World IEQ securities – an amount at the high end of the relevant range of \$100,000 to \$500,000. He was affiliated with World ET as a director and an employee. 31/ Siegel’s sales of World ET and World IEQ securities injured his customers – who were customers of Rauscher. He attempted to conceal his sales activity by failing to inform Rauscher about his employment agreement with World ET and changing his address in the Notice Provision of his employment agreement with World ET, preventing Rauscher from discovering the extent of his involvement with the issuer. 32/ Siegel directly participated in the sales at issue. 33/

Siegel claims that he did not receive or expect financial benefit from his customers’ investments. However, his activities on World ET’s behalf had the potential for monetary or other gain from his roles at World ET as a director, creditor, and employee, as well as the potential of Rauscher’s underwriting a future initial public offering.

29/ Sanction Guidelines at 15 (2006 ed.).

30/ The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. Sanction Guidelines at 1. Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD Adjudicators, which the Guidelines define as Hearing Panels and the National Adjudicatory Council. Id. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

31/ NASD further determined that, “[a]lthough Siegel disclosed to [the Downers] that he had applied to become a member of the World ET board of directors, he did not disclose to [the Landrys] that he had done so or that he had become a member of its board.”

32/ See text following note 4 supra.

33/ Although Siegel claims that he did not sell World ET securities directly to the Downers and the Landrys, his conduct in connection with his customers’ purchases, described at length above, evidences a significant involvement.

Contrary to Siegel's contention, he did not provide verbal notice of the details of his sales activities to his firm. ^{34/} Moreover, he ignored a warning from his firm not to sell World securities. Siegel argues that Rauscher's warning not to sell World ET securities applied "only if World were to go public." However, Siegel proffers no evidence in support of this assertion, and Rauscher made no such statement in its written permission for Siegel to become a director. Moreover, Siegel admitted at the hearing that Grandbouche informed him that it was highly unlikely that Rauscher would ever approve a sale of unregistered securities, such as World ET. In any event, Siegel is responsible for compliance with regulatory requirements and cannot shift his responsibility for compliance to his supervisors. ^{35/}

We have held repeatedly that selling away is a serious violation. "Conduct Rule 3040 is designed not only to protect investors from unsupervised sales, but also to protect securities firms from liability and loss resulting from such sales. Such misconduct deprives investors of a firm's oversight, due diligence, and supervision, protections investors have a right to expect." ^{36/} Siegel sidestepped his firm's protections and supervision. Siegel's misconduct illustrates the potential for harm to public investors through private securities transactions. ^{37/}

2. NASD Conduct Rule 2310 Violations

NASD fined Siegel \$10,000 and suspended him in all capacities for six months for having violated NASD Conduct Rules 2310 and 2110 by making unsuitable recommendations to the Downers and the Landrys. The Sanction Guidelines recommend a fine of \$2,500 to \$75,000

^{34/} Siegel cites his testimony that he told his supervisor, Scott Grandbouche, that "these clients wanted to invest in World ET [and] do it on their own." However, Grandbouche testified that Siegel told him nothing about any of the transactions at issue. Even crediting Siegel's testimony, the information he conveyed lacks the required details of his sales activities, and, therefore, it does not constitute verbal notice to the firm. Cf. Chris Dinh Hartley, 57 S.E.C. 767, 775 (2004) (finding that failure to provide the firm with the necessary details about the investments and sales activities at issue was not verbal notice).

^{35/} See Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 n.19 and accompanying text.

^{36/} Hartley, 57 S.E.C. at 776.

^{37/} See Anthony H. Barkate, 57 S.E.C. 488, 501 & n.28 (2004) (citing Ronald W. Gibbs, 52 S.E.C. 358, 365 (1995)), petition denied, 125 Fed. Appx. 892 (9th Cir. 2005) (Unpublished).

and a suspension of ten business days to one year or, in egregious cases, a suspension of up to two years or a bar. 38/ The suspension and fine are within this range.

NASD found aggravating that Siegel attempted to conceal his misconduct from his employer, that his misconduct resulted directly in injury to the Downers and the Landrys, and that his misconduct carried the potential for monetary or other gain.

NASD also found aggravating that Siegel's misconduct was the result of recklessness. We agree. 39/ At the time of the conduct at issue, Siegel was a securities professional with over seventeen years' experience. Yet, he testified that he neither read nor discussed with the Downers and the Landrys the contents of any of the World IEQ and World ET documents that he provided to them. He admitted at the hearing that these documents were deficient and that these deficiencies rendered an investment in World IEQ and World ET unsuitable for any investor.

In response to NASD's finding that he acted recklessly, Siegel claims that he did not act with fraudulent intent. However, Principal Consideration Number Thirteen under the Sanction Guidelines directs adjudicators to consider in all cases "[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence." The applicability of this factor is not limited to proceedings involving fraud violations. 40/

38/ Sanction Guidelines at 99.

39/ Cf. RESTATEMENT (THIRD) OF TORTS § 2 (Proposed Final Draft 2005) ("A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk."); Oliver Wendell Holmes, THE COMMON LAW 135-36 (1881) ("The question is, what known circumstances are enough to throw the risk of a statement upon him who makes it, if it induces another man to act, and it turns out untrue. . . . Now what does 'recklessly' mean. It does not mean actual personal indifference to the truth of the statement. It means only that the data for the statement were so far insufficient that a prudent man could not have made it without leading to the inference that he was indifferent. That is to say, . . . it means that the law, applying a general objective standard, determines that, if a man makes his statement on those data, he is liable, whatever was the state of his mind, and although he individually may have been perfectly free from wickedness in making it.")

40/ See generally Robert E. Strong, Exchange Act Rel. No. 57426 (Mar. 4, 2008), _ SEC Docket _ (considering whether chief compliance officer acted negligently or intentionally in allowing defective disclosures in research reports); Hans N. Beerbaum, Exchange Act Rel. No. 55731 (May 30, 2006), 90 SEC Docket 1863 (considering whether owner and
(continued...)

Siegel argues that the “NAC’s decision to jettison the Hearing Panel’s credibility determination regarding his intent violates the rule of deference to fact-finders,” and that the Hearing Panel’s finding that he acted negligently “may be overcome only where the record contains substantial evidence for doing so.” Siegel’s arguments are without merit. The Hearing Panel did not make a credibility determination when it found that Siegel acted negligently. Thus, Siegel’s state of mind and its mitigative effect are subject to the NAC’s and our de novo review. 41/ The record provides ample support for finding that Siegel acted recklessly in making the unsuitable recommendations.

3. Siegel’s Mitigation Claims

Siegel argues, as he did before the NAC, that there are a number of mitigating factors that justify a reduction in the sanctions imposed by NASD. We have discussed several of Siegel’s assertions above and found them not supported. The remaining asserted mitigating factors fall into two general categories.

a. Siegel asserts that NASD improperly ignored “mitigating factors by considering them merely as ‘non-aggravating.’” However, Siegel has failed to establish that the following group of factors, even if true, provides any mitigation. Siegel argues that his violation of NASD Conduct Rule 3040 “stemmed from his misunderstanding of it.” We repeatedly have held that an associated person is obligated to be familiar with NASD’s rules and ignorance of the requirements at issue is no excuse. 42/ Siegel’s claimed misunderstanding of his obligation to comply with Conduct Rule 3040 is especially not mitigating because of his seventeen years of experience as an associated person in the securities industry and the fact that he has been active as a registered investment advisor, authored a book on investment advice, and served as a local media expert on financial topics. 43/

40/ (...continued)
 president of member firm acted intentionally in engaging in conduct requiring registration as a general securities principal without being so registered).

41/ See supra notes 18 and 19.

42/ See Prime Investors, Inc., 53 S.E.C. 1, 5 & n.12 (1997) (finding a claimed ignorance of the law not mitigating).

43/ Cf. Keyes, 89 SEC Docket at 800 & n.18 (finding that associated person’s claimed ignorance of his obligations regarding NASD Conduct Rule 3040 to be aggravating in light of his fifteen years of experience in the securities industry and the fact that he previously taught a preparatory class for the Series 6 qualification examination).

Siegel also asserts that he has no disciplinary history and that he cooperated in NASD's investigation. These facts are not mitigating because when Siegel registered with NASD, he agreed to abide by its rules, and compliance with this obligation is not a mitigating factor. 44/

Siegel asserts that he never performed any act pursuant to the World ET employment agreement, that the World ET securities have not been found to involve a violation of federal or state securities laws or federal, state, or self-regulatory organization rules, that he did not attempt to create the impression that Rauscher sanctioned the activity, and that he did not recruit other registered individuals to sell World ET securities. While the presence of any of these factors could constitute aggravating circumstances justifying an increase in sanctions, their absence is not mitigating. This is because an associated person should not be rewarded for acting in compliance with the securities laws and with his duties as a securities professional. 45/

b. NASD did find certain factors mitigating. Siegel argues that his recommendations were neither numerous nor made over an extended period of time, that the Downers and Landrys were "comparatively sophisticated persons who knew that they were risking money on a start-up enterprise with a new product," that a small number of customers were involved in the sales at issue, and that he disclosed to his customers that he was seeking an appointment to World ET's board. We agree with NASD that the mitigating impact of these factors is outweighed by the aggravating factors, especially given Siegel's failure to take steps to determine if investing in World ET was suitable for any investor.

Accordingly, we find that the mitigating factors raised by Siegel do not support a reduction in the sanction imposed by NASD.

4. Consecutive Suspensions

NASD ordered Siegel to serve the two six-month suspensions consecutively. In making this determination, NASD stated that "the purpose of sanctions in NASD disciplinary proceedings is to remedy misconduct" and that "in cases involving rule violations of fundamentally different natures, consecutive suspensions specifically discourage all types of

44/ See Michael A. Rooms, Exchange Act Rel. No. 51467 (Apr. 1, 2005), 85 SEC Docket 444, 450-51 (finding sanction neither oppressive nor excessive where respondent noted a lack of disciplinary history), aff'd, 444 F.3d 1208, 1214 (10th Cir. 2006); Keyes, 89 SEC Docket at 801 & nn. 20, 22 (finding cooperation during NASD investigation and a lack of disciplinary history not mitigating) (citing cases); Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (3d Cir. 1994). The Guidelines provide that an associated person's "substantial assistance" to NASD during an investigation is generally mitigating. Siegel's cooperation was consistent with the responsibility he agreed to fulfill when he became an associated person and does not constitute substantial assistance.

45/ See Keyes, 89 SEC Docket at 801 & n.20.

additional misconduct at issue.” NASD noted that “consecutive suspensions might exceed what is needed to be remedial, depending on the facts and circumstances.” NASD suggested that, where the underlying violations involved wholly unintentional or negligent conduct and similar violations resulted from the same underlying conduct, concurrent suspensions “might be enough to alert such a respondent about his various regulatory responsibilities and deter him from again engaging in the same kinds of violative conduct.” ^{46/} However, NASD concluded that consecutive suspensions were necessary to discourage Siegel’s misconduct “because his selling away and suitability violations involve different kinds of misconduct and raise separate and serious regulatory concerns.”

Siegel argues that the imposition of consecutive suspensions is punitive because his violations involved the “same underlying conduct” and should therefore have resulted in “batching,” or concurrent suspensions. We have not previously addressed whether the imposition of consecutive – as opposed to concurrent – suspensions is excessive or oppressive. We agree with NASD that Siegel’s violations are different in nature and raise separate public interest concerns. The purpose of NASD Conduct Rule 3040 is to protect “investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment.” ^{47/} The suspension will protect the public interest by discouraging Siegel and others from selling away and from undermining the protections in place at firms. ^{48/} In contrast, the purpose of the suitability rule is to protect customers from potentially abusive sales practices by ensuring that a registered representative has reasonable grounds for believing that his recommendation is suitable. ^{49/} The second suspension will protect the public interest by encouraging Siegel and others to take the steps necessary to

^{46/} General Principle Four of the Sanction Guidelines also discusses when the aggregation or “batching” of violations may be appropriate if (a) the violative conduct was unintentional or negligent; (b) the conduct did not result in injury to public investors; or (c) the problem resulted from a single systemic problem or cause that has been remedied. General Principle Four also states that multiple violations may be treated individually “[d]epending on the facts and circumstances of a case.”

^{47/} See Hartley, 57 S.E.C. at 775 n.17 (citation omitted).

^{48/} See Hartley, 57 S.E.C. at 776 (affirming suspension for violation of NASD Conduct Rule 3040).

^{49/} See Self-Regulatory Organizations; NASD; Order Granting Approval to Proposed Rule Change, Exchange Act Rel. No. 37588 (Aug. 20, 1996), 62 SEC Docket 1784, 1795 (“The concept of suitability, rooted in notions of just and equitable principles of trade and the protection of investors, plays an important role in the scheme of the federal securities laws. Prohibitions against making unsuitable recommendations . . . lay the foundation for good and sound business practices by broker-dealers and help avoid potential abusive sales practices regarding customers.”)

determine that recommendations that they make to their customers are suitable while also deterring them from putting their own interests ahead of those of their customers. ^{50/} Under the circumstances and with due regard for the public interest and the protection of investors, we find that NASD's imposition of two consecutive six-month suspensions with respect to the violations found here does not exceed what is needed to be remedial and therefore is not excessive or oppressive. ^{51/}

* * *

Accordingly, we find that the suspensions and fines serve a remedial purpose and that Siegel has failed to identify any mitigating factors that support a reduction in these sanctions.

B. Restitution

NASD ordered restitution to the customers at issue in the amount of \$400,300. Siegel attempts to import common law equity principles to an analysis of NASD's restitution award. However, NASD's authority to order restitution arises not from common law but from its power to impose "any other fitting sanction." ^{52/} As a result, Siegel's contentions with respect to judicially assessed restitution are inapposite.

For example, Siegel argues that an award of restitution is inappropriate because he did not cause the customers' losses but only caused them to invest. Siegel relies on Bastian v. Petren Resources Corp. ^{53/} However, Bastian was a private action for damages under the antifraud provisions of the federal securities laws where "loss causation" was an element of the claim.

In contrast, we have stated that self-regulatory organization "[r]estitution is founded on the principle that a wrongdoer shall not be unjustly enriched by his wrongdoing, or that the

^{50/} Cf. McNabb, 54 S.E.C. at 928 & n.41 (1999) (finding that associated person put his own interests ahead of those of his customers by making unsuitable recommendation that they purchase promissory notes to give him money to use in his business).

^{51/} See PAZ Sec., Inc., Exchange Act Rel. No. 57656 (Apr. 11, 2008), __ SEC Docket __, __ (finding sanction to be remedial and therefore neither excessive nor oppressive), appeal docketed, No. 08-1188 (D.C. Cir. May 13, 2008).

^{52/} NASD Rule 8310(6), NASD Manual at 7271.

^{53/} 892 F.2d 680 (7th Cir. 1990).

wrongdoer should restore his victim to the status quo ante.” 54/ To that end, we have expressed “our preference that the NASD issue orders of restitution, in contrast to fines payable to the NASD, in instances in which losses have been suffered by identifiable customers as a result of a respondent’s misconduct.” 55/ Our decision in David Joseph Dambro 56/ anticipated the possibility that, under certain circumstances, restitution may be an appropriate remedy where an identifiable person has suffered a loss as a result of a registered representative’s recommendation. As we stated in Dambro, 57/ as between Siegel’s customers, who were placed in unsuitable investments and Siegel, who recommended them, equity requires Siegel, as the person responsible for the losses, to bear their burden and to return the customers to the position occupied prior to the unsuitable recommendations. The current Sanction Guidelines recommend restitution “where necessary to remediate misconduct” and when an identifiable person “has suffered a quantifiable loss as a result of a respondent’s misconduct.” 58/

Here, Siegel introduced the Downers and the Landrys to World ET, recommended without any basis that they invest in the company, was their sole source of information about the company prior to making their investment decisions, and facilitated their purchases of World ET securities. Given that Siegel was the first to identify World ET to the customers and the significance of Siegel’s involvement and influence in the decision of the customers to invest in World ET, we conclude that the customers’ losses were a result of his recommendations. We therefore reject Siegel’s argument.

54/ Toney L. Reed, 51 S.E.C. 1009, 1013 & nn.15, 16 (1994) (citing RESTATEMENT OF RESTITUTION § 1 (1937)); see also David Joseph Dambro, 51 S.E.C. 513, 518 (1993).

55/ Toney L. Reed, 52 S.E.C. 944, 946 & n.11 (1996) (emphasis added) (citing Dambro, 51 S.E.C. at 518-19). In requiring that a loss be a result rather than the result of a respondent’s misconduct, we acknowledge that other factors may bear upon the loss and that any determination as to the propriety of restitution will be based on an analysis of all the relevant facts and circumstances.

56/ 51 S.E.C. 513 (1993).

57/ 51 S.E.C. at 518-19 (“As between Wiegman, who was placed in an unsuitable investment and Dambro, who recommended it, equity requires Dambro, as the person responsible for the loss, to bear its burden and to return the customer to the position occupied prior to the improper recommendation.”).

58/ Sanction Guidelines at 4 (“Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss as a result of a respondent’s misconduct, particularly where a respondent has benefitted from the misconduct.”); see also Wendell D. Belden, 56 S.E.C. 496, 507 (2003).

Siegel argues that restitution is not appropriate because he received no monetary gain. We have repeatedly stated, however, that restitution does not require that an applicant have profited or benefitted from his actions. 59/ Sanction Guidelines General Principle Five also provides that NASD orders of restitution may exceed the amount of the respondent's ill-gotten gain. 60/

Siegel asserts that the customers should not receive restitution because they knew the risks associated with their investment and were sophisticated. As a result, Siegel claims that he did not cause their losses. Even where a customer seeks to engage in a highly speculative investment, a registered representative has a duty to refrain from making unsuitable recommendations. 61/ Siegel did not satisfy this duty. Instead, he made reckless recommendations to customers who relied on his financial advice.

Siegel claims that the Downers and the Landrys are guilty of laches and violation of the statute of limitations. He asserts that they delayed in bringing an arbitration against Siegel, which, in turn, delayed the initiation of the current proceeding. Siegel also claims the customers are guilty of unclean hands because Huntington Downer's law firm threatened Siegel with criminal prosecution. However, the party in this proceeding is NASD, not the customers. Whether the customers were estopped by laches or a statute of limitations from pursuing an arbitration proceeding does not affect NASD's ability to discipline associated persons of its members, including imposing a "fitting sanction" for that person's wrongful conduct.

Siegel argues that he was prejudiced by the alleged delay because he was unable to call three now deceased or ill customers who would have testified that Siegel had not recommended World ET securities to them. This testimony, however, has no bearing on whether Siegel recommended World ET securities to the Downers and the Landrys. 62/ This testimony also

59/ See Franklin N. Wolf, 52 S.E.C. 517, 526 (1995); Toney L. Reed, 51 S.E.C. at 1013-14.

60/ Sanction Guidelines General Principle Five.

61/ See Jack H. Stein, 56 S.E.C. 108, 113 & n.14 (2003) (finding that a registered representative is under a duty to refrain from making unsuitable recommendations even where a customer affirmatively seeks to engage in highly speculative trading) (citations omitted).

62/ Cf. Gluckman, 54 S.E.C. at 190-91 (finding that applicant suffered no prejudice from inability to examine witness during an NASD hearing due to passage of time where testimony of the witness would not have had a material effect on the proceeding).

would not mitigate Siegel's misconduct with respect to the Downers and Landrys. 63/ Siegel also claims that he was unable to produce certain records but does not identify the substance or relevance of those records. Thus, Siegel has not demonstrated that he suffered any prejudice.

Siegel claims that NASD acted unfairly when it failed to hold an in-person hearing regarding whether the restitution amount required offset. Siegel does not dispute that there is no offset under the three factors set forth by the NAC, *i.e.*, the Downers and the Landrys did not sell their investments in World securities, their World securities have no residual value, and they recovered no restitution through other avenues. Yet, Siegel contends that an in-person hearing was required so that he could present evidence of the “customers’ expectations [of recovery and] measures of their reasonable expectations” and demonstrate the prejudice that he allegedly suffered due to the customers’ purported “undue delay in . . . voicing complaint.” However, this evidence goes to whether restitution was an appropriate sanction, a determination that had been resolved in the initial in-person hearing at which Siegel had the opportunity to, and did, examine and cross-examine witnesses and present evidence. While Siegel also contends that an in-person hearing was required so that he could cross-examine the affiants, it is unclear what purpose cross-examination would have served, because Siegel did not dispute the affiants’ testimony that there was no offset to the restitution award. 64/

63/ Cf. Dane S. Faber, 57 S.E.C. 297, 313 n.33 (2004) (finding that failure to engage in other violative conduct did not mitigate violations at issue); Richmark Capital Corp., 57 S.E.C. 1, 18 (2003) (finding that failure to engage in misconduct “that was arguably more serious” did not mitigate violations at issue).

64/ We are unpersuaded by Siegel’s citation to SEC v. Smyth, 420 F.3d 1225 (11th Cir. 2005), in support of his argument that an evidentiary hearing was required. In Smyth, the court acknowledged that an evidentiary hearing is not always required to determine the appropriate amount of a sanction. It found that, under the particular circumstances of the case, the trial court improperly denied an evidentiary hearing because the appellant had explicitly reserved in a written settlement agreement the right to litigate the amount of disgorgement and prejudgment interest, which had not yet been determined and could potentially have amounted to zero if certain of the appellant’s claims about the undetermined amount were true. Such circumstances do not exist here.

Siegel complains that the NAC increased his sanctions when it ordered restitution where the Hearing Panel did not, rendering this aspect of the sanction determination punitive and unfair. Here, the NAC found that the Hearing Panel improperly concluded that the pending arbitration proceeding foreclosed restitution. We have stated that the “NASD procedural rules expressly permit the NAC, where appropriate, to ‘affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction.’” 65/

On the basis of the record in this proceeding, we do not find these sanctions either excessive or oppressive.

An appropriate order will issue. 66/

By the Commission (Chairman COX and Commissioners CASEY and PAREDES),
Commissioners WALTER and AGUILAR not participating.

Florence E. Harmon
Acting Secretary

65/ See Abbondante, 87 SEC Docket at 224 & n.71 (citing NASD Code of Procedure Rule 9348, NASD Manual at 7371).

66/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 58737 / October 6, 2008

Admin. Proc. File No. 3-12659

In the Matter of the Application of

MICHAEL FREDERICK SIEGEL

c/o George C. Freeman, III

Barrasso Usdin Kupperman Freeman & Sarver, LLC

909 Poydras Street, Suite 2400

New Orleans, Louisiana 70112

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Michael Frederick Siegel,
and NASD's assessment of costs be, and they hereby are, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary