SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62374 / June 24, 2010

Admin. Proc. File No. 3-12988r

In the Matter of the Application of

LUIS MIGUEL CESPEDES

27542 Gable Street
Capistrano Beach, California 92624

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION ON REMAND

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade
Unsuitable Recommendations

Former registered representative made unsuitable investment recommendations to customers. *Held*, on remand, after consideration of hearing transcript previously not included in the record certified by registered securities association, the sanctions imposed by registered securities association are *sustained*.

APPEARANCES:

Luis Miguel Cespedes, pro se.

Danielle I. Schanz, for FINRA, on behalf of NYSE Regulation, Inc.

Mandate issued: December 11, 2009
Briefs received: March 1, 2010

I.

On February 13, 2009, we issued an opinion sustaining findings by NYSE Regulation, Inc. (the "NYSE")[1] that Luis Miguel Cespedes, formerly a registered representative associated with Financial Industry Regulatory Authority member firm A.G. Edwards and Sons, Inc., made unsuitable investment recommendations of high concentrations of technology sector securities, the majority of which were unit investment trusts ("UITs"), to fourteen of his brokerage customers (the "February 2009 Opinion").[2] In the February 2009 Opinion, we found that "Cespedes's recommendations that [his] customers invest with significant concentrations in the technology sector, often using margin to purchase the securities in their accounts, were unsuitable and inconsistent with just and equitable principles of trade," in violation of NYSE Rule 476(a)(6).[3] We further found that the sanctions the NYSE imposed for Cespedes's violations (a censure and a ten-year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization) were neither excessive nor oppressive and were consistent with the public interest.

The February 2009 Opinion found that:

> Cespedes recommended that all of the customers at issue invest the majority, and in many cases all, of their account values in the technology sector. Many of the customers were of an advanced age and already retired or about to retire. At least one customer was forced to return to work at a low-paying job to pay for her living expenses. Many of the customers had relatively modest incomes and net worth and relied significantly on Cespedes to provide investment recommendations suitable to their life situations and needs. Cespedes failed to explain adequately to these inexperienced customers the significant risk of loss that his recommendations of highly concentrated technology sector portfolios entailed.[4]

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[1] On July 26, 2007, the Commission approved proposed rule changes 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. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to the Financial Industry Regulatory Authority, or FINRA. *See* Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the underlying proceeding in this matter was initiated by NYSE Regulation, we use the designation "NYSE" in this opinion.

[2] *Luis Miguel Cespedes*, Exchange Act Rel. No. 59404 (Feb. 13, 2009), 95 SEC Docket 14272.

[3] NYSE Rule 476(a)(6) provides that members and their employees can be disciplined for conduct that is "inconsistent with just and equitable principles of trade."

[4] *Cespedes*, 95 SEC Docket at 14287.

The February 2009 Opinion further found that Cespedes's violations were aggravated by Cespedes's attempts to intimidate two witnesses and to persuade one of his customers "that they were on the same side and encourag[e] [the customer] to obtain money from the firm."[5]

Cespedes sought review of the February 2009 Opinion in the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"). In connection with Cespedes's appeal to the D.C. Circuit, Commission staff noted that the record the NYSE certified in connection with Cespedes's initial appeal to the Commission did not include the transcript of a hearing session (the "Missing Hearing Transcript") held before the NYSE hearing board on February 6, 2007, one of seven hearing sessions in Cespedes's NYSE disciplinary proceeding. In addition, the record index, provided by the NYSE to both Cespedes's then-counsel and the NYSE counsel, as well as to the Commission, did not include the Missing Hearing Transcript on the list of record items, and neither Cespedes nor the NYSE noted the absence of the Missing Hearing Transcript from the certified record.

In an August 14, 2009 Motion to Remand (the "Motion to Remand"), the Commission requested that the D.C. Circuit remand Cespedes's appeal to the Commission "to 1) direct the NYSE to supplement the record with the [Missing Hearing Transcript]; and 2) allow the parties to submit briefs on what effect, if any, the testimony should have on the Commission's sanction determination." On December 11, 2009, the D.C. Circuit issued a Mandate (the "Mandate") granting the Motion to Remand "for proceedings consistent with the motion." On January 7, 2010, the NYSE filed a Revised Index and Supplementation of the Certified Record, including the Missing Hearing Transcript. We base our findings on an independent review of the record.

II.

The only testimony in the Missing Hearing Transcript is that of two witnesses called by Cespedes.[6] The first character witness, John P, was the chairman of a charitable organization on whose board of directors Cespedes served. John P testified that Cespedes assisted the organization with fundraising activities, but that John P and Cespedes did not have any social, business, or investment relationship beyond their work with the organization. On cross-examination, John P acknowledged that he was unaware of the nature of the NYSE's charges against Cespedes.

The second character witness, Travis A, was the branch manager at the firm where Cespedes was employed at the time of the hearing. Travis A testified that he was aware of the NYSE's charges when Cespedes joined his firm. Travis A further stated that Cespedes was under "heightened supervision" at his new firm, had received no customer complaints at the new firm, and that

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[5] *Id*. at 14287-88.

[6] The Missing Hearing Transcript also included closing and sanctions arguments by counsel, which we need not address because those arguments did not include testimony and are not evidence.

Cespedes was particularly conscientious about obtaining "letters of explanation from clients, disclosure agreements from clients, where they're not really required by the industry, but we now as a practice get lots of disclosure from the clients simply because we have seen what can happen when you don't." On cross-examination, Travis A testified that he had no knowledge of the specifics of the NYSE's charges against Cespedes and stated, "I didn't get to see what was going on in the accounts" at issue in this proceeding.

III.

In setting forth the bases for our finding that the NYSE's sanctions were appropriate, we stated in the February 2009 Opinion:

> Given Cespedes's conduct and his attempts to prevent detection of his conduct and to influence prospective witnesses in this proceeding, a ten-year bar will have the remedial effect of protecting the investing public from harm by preventing Cespedes from continuing to invest customer funds without adequate consideration of the customer's age, financial situation, and needs. The sanction will also deter other registered representatives from making similarly unsuitable recommendations in customer accounts in the future.[7]

Cespedes mentions neither witness's testimony in his brief on remand. The testimony of John P and Travis A does not address any of the bases for our finding in the February 2009 Opinion that the sanctions the NYSE imposed were appropriate. Neither witness testified or had knowledge of Cespedes's conduct in making recommendations in the customer accounts at issue. The witnesses also had no knowledge about the aggravating factors cited in the sanction analysis. Further, neither witness provided any information that would contradict our finding about the deterrent effect of the sanctions.

In addition to the issues identified in the February 2009 Opinion, we are concerned that Cespedes's continued employment in the industry could provide opportunity for future violations. As we stated in the February 2009 Opinion,

> Cespedes fails to recognize the wrongfulness of his conduct. Although Cespedes knew that his customers lacked investment experience and, based on their financial situations and needs, could not afford to suffer the losses to which his recommendations made them susceptible, he continues to suggest that he merely

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[7] *Cespedes*, 95 SEC Docket at 14289 (citing *SEC v. PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (stating that "general deterrence" may be "considered as part of the overall remedial inquiry," quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005))).

> fulfilled the wishes of the customers by following an aggressive, risky investment strategy in all of their accounts.[8]

Cespedes is not currently employed at the firm where Travis A served as his branch manager or at any other firm. Therefore, Travis A's testimony that the new firm was providing additional supervision over Cespedes does not allay our concerns. Further, Travis A's testimony contained few specifics about the nature of that supervision, and we question whether it would have addressed the particular dangers posed by Cespedes since Travis A had no knowledge of Cespedes's violative conduct. Given the concerns about Cespedes's conduct expressed in the February 2009 Opinion, Cespedes's efforts at continued employment as a registered representative support our finding that the ten-year bar was an appropriate sanction. Therefore, we reaffirm our sanction analysis in the February 2009 Opinion and our determination that the sanctions imposed by the NYSE were appropriate.

Although we asked the parties to limit their briefs to what impact the testimony in the Missing Hearing Transcript might have on our sanction analysis, Cespedes more broadly argues: 1) that the NYSE's proceeding was unfair; 2) that the testimony of his customers before the NYSE was dishonest and that the evidence cited by the NYSE with respect to customer investment experience and losses was inaccurate; 3) that the NYSE illegally admitted taped telephone conversations between Cespedes and customer James J and that these tapes were altered; and 4) that the NYSE's expert witness provided flawed testimony about the suitability of UITs. None of these arguments relate to the testimony in the Missing Hearing Transcript, and therefore they are beyond the scope of the Mandate and our Order Scheduling Briefs on Remand. Further, Cespedes did not raise many of these arguments in his initial appeal and waived his right to seek reconsideration of the matters he did raise when he chose not to file a timely motion for reconsideration pursuant to Rule 470 of our Rules of Practice.[9] The February 2009 Opinion constitutes our decision with respect to Cespedes's liability as well as the sanctions, and we reaffirm our findings in that opinion in their entirety here. Cespedes has waived his right to raise now any arguments not raised in his initial appeal to us,[10] and his new arguments do not depend on newly discovered evidence or an intervening change in the governing law and are not, therefore, within an exception to the law of the case doctrine.[11] Nevertheless, certain issues he raises bear addressing specifically.

Fairness of Proceeding

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[8] *Id.* at 14287.

[9] 17 C.F.R. § 201.470.

[10] *Nw. Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument in a second appeal . . . .").

[11] *Compare Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (exceptions to law of the case doctrine).

Cespedes argues that the NYSE's proceeding was biased against him, and he broadly alleges that the proceedings violated unspecified rights.[12] The February 2009 Opinion states, "Cespedes has not argued that the Hearing Board itself was biased, nor does our independent review of the record find any support for such a notion,"[13] and we found that "the NYSE applied its rules in a manner consistent with the purposes of the Exchange Act."[14] Further, our *de novo* review of the record cured whatever bias, if any, may have existed below.[15]

Credibility of Evidence Supporting Findings

Cespedes did not, in his initial appeal, challenge the accuracy or truthfulness of the customers who testified during his hearing. In any event, we conducted an independent review of the record, and our February 2009 Opinion determined that the record evidence supported the NYSE's findings and the sanctions it imposed.[16]

Cespedes also makes new arguments related to customer accounts other than the fourteen that were the basis of the February 2009 Opinion. Specifically, he complains that "the NYSE used bullying tactics to subpoena information from AG Edwards in order to impeach [a Cespedes customer] and we were not provided those documents for review until just prior to their introduction at the hearing to which my attorney objected but was overruled," and that the parents of customers Antonina and Maria G did not lose money in their accounts. Since Cespedes's conduct with respect to these customers' accounts did not form the basis of our February 2009 Opinion, these arguments are irrelevant.

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[12] Cespedes's arguments are not clear, but he makes broad statements such as, "The NYSE became a for-profit corporation and is not a government agency, and I don't understand how they can get away with violating my rights. I look forward to challenging the tactics that were used in a real court of law that follows the laws and does not make a mockery of the justice system."

[13] *Cespedes*, 95 SEC Docket at 14284.

[14] *Id*. at 14279.

[15] *Guy P. Riordan*, Exchange Act Rel. No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23473 n.82 (citing *Robert Bruce Orkin*, 51 S.E.C. 336, 344 (1993) (stating that "our *de novo* review of this matter cures whatever bias or disregard of precedent or evidence, if any, that may have existed below"), *aff'd*, 31 F.3d 1056 (11th Cir. 1994)).

[16] The February 2009 Opinion noted that the "NYSE expressly found each of the testifying witnesses to have testified credibly. Credibility determinations of an initial fact finder are entitled to considerable weight," citing *Joseph Abbondante*, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 n.21 (citing *Laurie Jones Canady*, 54 S.E.C. 65, 78 n.23 (1999) (citing *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993)), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000)), *petition denied*, 209 Fed.Appx. 6 (2d Cir. 2006) (unpublished). *Cespedes*, 95 SEC Docket at 14280 n.15.

Cespedes also disputes the accuracy of the calculations of customer losses and Cespedes's commissions that the NYSE cited in support of its argument before the Hearing Board that Cespedes should be ordered to pay restitution. The NYSE Hearing Board, however, did not order Cespedes to pay restitution, and therefore this issue is not part of this appeal.

Admissibility of Taped Telephone Conversations

Cespedes argues that the NYSE "violat[ed] [Cespedes's] rights as a resident of California by illegally admitting phone conversations that were doctored and altered." In his initial appeal, Cespedes contended only that it was a violation of California law for the NYSE to admit the transcripts of the taped telephone conversations. Based on the analysis set forth in the February 2009 Opinion, we found that "the NYSE's determination to admit the audiotape and written transcripts was appropriate."[17]

Cespedes did not argue in his initial appeal that the tapes had been altered. In fact, the February 2009 Opinion noted "Cespedes does not dispute the authenticity of the tape and transcripts."[18] He has thus waived his right to make this argument. Further, Cespedes does not specifically challenge the accuracy of the transcript portions that we quoted and relied on in reaching our conclusion in the February 2009 Opinion that the tapes "exhibit bad faith and [are] an aggravating factor in our sanctions analysis."[19]

Expert Witness Testimony

On remand, Cespedes disputes the testimony of the NYSE's expert witness regarding the suitability of UITs for the customers at issue. In his initial appeal, Cespedes argued that the expert witness was biased and had an insufficient basis for his opinion. We previously rejected those arguments. The February 2009 Opinion also states, "The record supports the Hearing Board's determination that Cespedes's recommendations were incompatible with his customers' financial situations and needs, even without [the expert witness's] testimony."[20] Further, the basis of our finding that Cespedes's recommendations were unsuitable was not that Cespedes recommended

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17 *Cespedes*, 95 SEC Docket at 14288-89.

18 *Id*. at 14288.

19 *Id*. at 14289.

20 *Id*. at 14284.

UITs, but rather that he recommended "that these customers invest with significant concentrations in the technology sector, often using margin to purchase the securities in their accounts."[21]

* * * *

Accordingly, after reviewing the Missing Hearing Transcript, we reaffirm our determinations in the February 2009 Opinion that the sanctions imposed on Cespedes by the NYSE are neither excessive nor oppressive and are consistent with the public interest, and we sustain them.[22]

An appropriate order will issue.

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

Elizabeth M. Murphy
Secretary

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[21] *Id*. at 14282-83.

[22] We have considered all of the parties' contentions. 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. 62374 / June 24, 2010

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In the Matter of the Application of

LUIS MIGUEL CESPEDES

27542 Gable Street
Capistrano Beach, CA 92924

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

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 NYSE Regulation, Inc. against Luis Miguel Cespedes be, and it hereby is, *sustained*.

By the Commission.

Elizabeth M. Murphy
Secretary