BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Joseph A. Padilla and Andrea M. Ritchie f/k/a Andrea M. Bruno[1] Los Angeles, CA, Respondents.	DECISION Complaint No. 2006005786501 Dated: August 1, 2012

Registered representatives sold unregistered securities without the benefit of an exemption. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Helen G. Barnhill, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Irving M. Einhorn, Esq.

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[1] Ms. Ritchie was formerly known as Andrea M. Bruno, prior to her marriage. The complaint refers to her as Bruno, but Ms. Ritchie has changed her registration in the Central Registration Depository ("CRD"®) to use her married name. The caption of this case is changed to reflect the name change.

Decision

Pursuant to FINRA Procedural Rule 9311, Joseph A. Padilla ("Padilla") and Andrea M. Ritchie ("Ritchie") appeal an October 18, 2010 Hearing Panel decision. In that decision, the Hearing Panel found that Padilla and Ritchie violated NASD Rule 2110 by selling unregistered shares of securities as prohibited by Section 5 of the Securities Act of 1933 ("Securities Act").[2] For these violations, the Hearing Panel: (1) suspended Padilla for six months in all capacities and fined him $132,701; and (2) suspended Ritchie for six months in all capacities and fined her $12,891.

The facts of this case are largely undisputed and turn on which party has correctly interpreted the law governing Securities Act Section 5. After reviewing the record, we find that the respondents incorrectly interpreted the law, and we affirm the Hearing Panel's findings of liability. We, however, modify the sanctions that the Hearing Panel imposed to account for the respondents' recent disciplinary history and the lesser role that Ritchie played in the misconduct.

I. Background

A. Joseph A. Padilla

Padilla first registered as a general securities representative in February 1992. Padilla was associated with five member firms before associating with Empire Financial Group, Inc. ("Empire Financial") in May 2005. He was registered through Empire Financial as a general securities representative from May 25, 2005, until January 2007, when he became associated with Cambria Capital, LLC ("Cambria Capital"). He was registered through Cambria Capital as a general securities representative and a general securities principal from January 18, 2007, until June 26, 2007, and is not currently registered with a FINRA member firm.

B. Andrea M. Ritchie

Ritchie first registered as a general securities representative with Empire Financial in February 2006. At this time, she began working with Padilla and assisting him with transactions for his customer accounts.

Ritchie was registered with Cambria Capital as a general securities representative from December 11, 2006, through May 7, 2007, and as a general securities principal from April 30, 2007, through May 7, 2007, and she is not currently associated with a FINRA member firm. Padilla and Ritchie conducted business jointly at Cambria Capital from January 12, 2007, until May 7, 2007.

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[2] "A violation of Securities Act Section 5 also violates NASD Rule 2110." *Midas Secs., LLC*, Exchange Act Rel. No. 66200, 2012 SEC LEXIS 199, at *46 n.63 (Jan. 20, 2012) (citation omitted); *see also Alvin W. Gebhart*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *54 n.75 (Jan. 18, 2006), *aff'd in relevant part*, 255 F. App'x 254 (9th Cir. 2007) (finding that respondent's sale of unregistered notes was a violation of NASD Rule 2110).

II. Procedural History

On March 20, 2009, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint alleging that: (1) Padilla sold the unregistered securities of one issuer while he was associated with Empire Financial in violation of NASD Rule 2110; and (2) Padilla and Ritchie sold the unregistered securities of five issuers while they were associated with Cambria Capital in violation of NASD Rule 2110.[3] On April 15, 2009, the respondents filed an answer to the complaint and requested a hearing. In a decision issued on October 18, 2010, the Hearing Panel found the respondents liable for the violations alleged in the complaint. The Hearing Panel imposed the sanctions listed above for the respondents' misconduct. On November 11, 2010, Padilla and Ritchie appealed the Hearing Panel's decision.

III. Facts

The respondents' main business was the receipt and liquidation of Pink Sheets[4] and bulletin boards stocks. Padilla testified that this was 90 percent of his business and the respondents did hundreds of such transactions each week. As described below, Padilla is charged with the unlawful sale of unregistered securities of one issuer while he was associated with Empire Financial, and both Padilla and Ritchie are charged with the unlawful sale of unregistered securities of five issuers while they were associated with Cambria Capital.

A. Padilla's Sales of Unregistered Securities at Empire Financial

From October 21, 2005, through June 5, 2006, while associated with Empire Financial, Padilla accepted and executed orders for the sale of approximately 6,389,033 shares of VMT Scientific, Inc. ("VMT") common stock for total proceeds of $1,392,709.[5]

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[3] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation in to FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed after December 15, 2008, the procedural rules that apply are those that became effective on December 15, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

[4] "The Pink Sheets, now known as OTC Link, is an electronic quotation system, operated by OTC Markets Group Inc., which displays quotes and last sale information for many over-the-counter securities. At the time of the stock sales in question, the Pink Sheets had no listing requirements for companies whose securities were quoted on its system." *Midas*, 2012 SEC LEXIS 199, at *5.

[5] The VMT shares were not registered pursuant to Securities Act Section 5. VMT was a thinly traded Pink Sheets stock. On VMT's website, and in press releases in November 2005, VMT claimed to have patented breakthrough technology for the treatment of vascular problems associated with diabetes. The press releases indicate that the product had not yet been marketed.

Padilla executed the majority of these sales on behalf of his customer, SD, even though Padilla did not know how SD had acquired the VMT shares. On June 14, 2005, SD opened an account with Padilla at Empire Financial in the name of Cornerstone Alliance Group, Inc. ("CAGI"). On the account opening form, CAGI's occupation was listed as "consulting." The account opening form did not provide a more detailed description of CAGI's business. From October 7, 2005, to December 8, 2005, SD deposited a total of 8,111,269 unregistered VMT shares into the CAGI account at Empire Financial.[6]

From October 21, 2005, to June 5, 2006, Padilla executed sales of 4,290,533 of the VMT shares deposited by CAGI in its Empire Financial account for proceeds of $935,235. During this time, SD transferred 2 million shares of VMT from CAGI's account to SM's account and Padilla sold 600,000 of SM's shares for proceeds of $262,342.[7] According to the letters of authorization that allowed this transfer, the reason for the transfer was "consulting services."

Padilla sold the remaining 1,498,500 VMT shares after CAGI transferred the shares to five accounts of persons or entities who were referrals and mostly unknown to Padilla.[8] According to the

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[6] In connection with the CAGI deposits of VMT stock, SD provided VMT corporate resolutions stating that the certificates associated with the deposits were "validly issued as indicated on its face, [and that] there [were] no adverse claims pertaining to [the certificates] and [that] the shares [were] free trading and [would] not be retracted at a later date." The resolutions, however, contained no information concerning the reason for the issuance of the certificates, whether the recipients paid consideration for the stock, or the basis for the statements contained therein.

[7] Customer SM opened an account with Empire Financial on July 20, 2005. According to the new account documents, SM was in the business of "investing."

[8] The details for sales related to these five accounts are as follows:

(1) On December 13, 2005, Padilla sold 100,000 shares of VMT on behalf of customer MC for proceeds of $23,500;

(2) From October 31, 2005, to December 8, 2005, Padilla sold 698,500 shares of VMT on behalf of customer KAI for proceeds of $152,273. KAI's new account documents indicated KAI had known Padilla for one year;

(3) From December 8, 2005, to February 10, 2006, Padilla sold 200,000 shares of VMT on behalf of customer PB for proceeds of $28,295. PB was a golf caddie who Padilla had not known prior to PB opening an account at Empire Financial. Padilla met PB because KD, the brother of SD, introduced PB to Padilla;

(4) On October 28, 2005, KAI transferred 250,000 shares of VMT to customer JS. From November 8, 2005, to November 29, 2005, Padilla sold the 250,000 shares of VMT on behalf of JS for proceeds of $54,500. According to JS's new account documents,

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letters of authorization that allowed these transfers, the reason for the transfers was "consulting services." In all, Padilla received approximately $53,312 in net commissions from these sales of VMT stock.

B. Padilla's and Ritchie's Sales of Unregistered Securities at Cambria Capital

1. Sales of Unregistered First Pet Life, Inc. Stock

On December 12, 2006, one of Padilla's customers at Empire Financial, HM, opened an account with Cambria Capital.[9] The next day, HM opened another Cambria Capital account on behalf of Entertainment Sports and Gaming Group, Inc. ("ESGG"), a company of which HM was the sole officer. On December 14, 2006, HM caused ESGG to transfer electronically 29,767,000 shares of First Pet Life stock from an account at Empire Financial into ESGG's Cambria Capital account. On December 19, 2006, HM transferred electronically 11,975,000 unregistered shares of Pet Life stock from his Empire Financial account to his Cambria Capital account.[10]

On January 12, 2007, customer RD opened an account at Cambria Capital. Between January 24, 2007, and February 5, 2007, ESGG transferred a total of 5,000,000 shares of Pet Life to RD's account.[11] Thereafter, the respondents executed orders to sell 41,742,000 shares of Pet Life into the market on behalf of HM, ESGG, and RD for proceeds of $40,982.[12] The respondents jointly earned

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Padilla met JS one week prior to JS opening the account. The new account documents did not identify JS's occupation; and

(5) On November 28, 2005, KAI transferred 250,000 shares of VMT to customer EC. From November 29, 2005, to December 9, 2005, Padilla sold the 250,000 shares of VMT stock on behalf of EC for proceeds of $54,500. EC's new account documents identified EC's business as consulting.

9 According to the new account applications, HM's occupation was "consulting."

10 Pet Life was a thinly traded Pink Sheets stock. According to unaudited financial statements dated June 30, 2006, Pet Life was "positioning itself to offer many services, including pet health insurance, pet supplies, along with boarding and grooming services nationwide." Pet Life, however, had no income, and reported net losses from inception.

11 According to the letters of authorization allowing this transfer, the reason for the transfer was consulting services.

12 Between January 4, 2007, and February 7, 2007, the respondents sold 24,767,000 shares of Pet Life on behalf of ESGG for proceeds of $15,848.

Between January 5, 2007, and January 26, 2007, the respondents sold 11,975,000 shares of Pet Life on behalf of HM for proceeds of $23,006.

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approximately $1,888 in net commissions for these sales. For *all* transactions at Cambria Capital, Padilla received 96 percent of the "jointly earned" net commissions, and Ritchie received 4 percent.

2. Sales of Unregistered Sustainable Power Corp. Stock

On December 20, 2006, customer JD opened an account with Cambria Capital. On February 26, 2007, and March 2, 2007, JD deposited two certificates for 10,790,000 unregistered shares of Sustainable Power Corp. ("Sustainable Power") stock into the account.[13] From March 1, 2007, to March 30, 2007, the respondents executed orders from JD to sell 1,102,700 of Sustainable Power stock for proceeds of $225,000. The respondents jointly earned $6,600 in net commissions for these sales.

3. Sales of Unregistered Pearl Asian Mining Industries Stock

On December 8, 2006, customer MB opened an account in the name of Black Forest International ("BFI") with Cambria Capital. On December 12, 2006, BFI deposited 1,075,000,000 shares of unregistered Pearl Asian Mining Industries, Inc. ("Pearl Asian Mining") stock into its newly opened Cambria Capital account.[14] On December 11, 2006, a law firm that represented BFI faxed Padilla a copy of a letter that the law firm had previously sent to the transfer agent for Pearl Asian Mining. The letter acknowledged receipt of a corporate resolution from Pearl Asian Mining stating that shares were free trading.[15] Between December 12, 2006, and March 28, 2007, the respondents executed orders to sell 1,002,771,000 shares of Pearl Asian Mining stock from the BFI account, generating proceeds of approximately $525,600. The respondents jointly earned $15,000 in net commissions from these sales.

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Between February 5, 2007, and February 6, 2007, the respondents sold 5,000,000 shares of Pet Life on behalf of RD for proceeds of $2,128.

[13] Sustainable Power was a thinly traded Pink Sheets stock. On February 20, 2007, Sustainable Power issued a press release announcing the commencement of trading in its stock. The release stated that Sustainable Power was a division of U.S. Sustainable Energy ("USSEC") and "assumes the role of worldwide marketing for turnkey power plant solutions that will utilize USSEC's biofuel discovery as the exclusive fuel source."

[14] Pearl Asian Mining was a thinly traded Pink Sheets stock. Pearl Asian Mining purported to be engaged in gold and silver mining. For the year ending December 31, 2006, Pearl Asian Mining had revenues of $53 and a net loss of $388,617.

[15] MB was the name partner of the law firm that sent this letter.

4. Sales of Unregistered eHolding Technologies, Inc. Stock

On January 26 and 27, 2006, customers LMTS Trading Inc., ERF Trading, Inc., and R&B Trading Inc. opened accounts at Cambria Capital. All three clients had the same mailing address, permanent street address, and business telephone and fax numbers. Between February 2, and March 5, 2007, each account received a total of 91,333,333 unregistered shares of eHolding Technologies, Inc ("eHolding") stock.[16] On February 7, 2007, LMTS Trading, Inc., and ERF Trading, Inc., transferred 57,666,667 shares of eHolding to a Cambria Capital account owned by customer GG. On March 2, 2007, R&B Trading, Inc. transferred 33,333,333 shares to a Cambria Capital account owned by customer JL. Between February 14, 2007, and March 20, 2007, the respondents executed orders for the sale of 257,146,000 shares of eHolding stock from all five of these Cambria Capital accounts for proceeds of $246,000. The respondents jointly earned $9,800 in net commissions.

5. Sales of Unregistered Aladdin Trading & Co. Stock

On December 8, 2006, customers Big Time Financial, Real Time Interests, JW, MM, and RP opened new accounts (the "Initial Accounts") at Cambria Capital.[17] Between December 11, and December 18, 2006, the transfer agent of Aladdin Trading & Company ("Aladdin") deposited electronically a combined total of 25,000,000 unregistered shares of Aladdin stock into the Initial Accounts.[18] As a result of several other transfers of stock among Cambria Capital accounts, 16 customers of Padilla and Ritchie held Aladdin shares originating from the 25,000,000 shares deposited in the Initial Accounts.[19]

Between December 12, 2006, and March 30, 2007, the respondents accepted and executed orders to sell a net total of 1,410,000 Aladdin shares for their Cambria Capital customers, generating proceeds of $524,300. The respondents jointly earned net commissions of $38,900 for these sales.

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[16] eHolding was a Pink Sheets stock. As of April 18, 2007, eHolding described itself as a developmental stage company in the process of raising capital to install its first laminating facility. It had no revenues as of that date.

[17] In account opening documents: (1) Big Time Financial's business was described as Consulting/Business; (2) Real Time Interests' business was described as Consulting; (3) MM's employer was as a consulting company; (4) JW identified himself as the sales director of a Nissan dealership; and (5) RP identified himself as the owner of a seafood company.

[18] Aladdin was a thinly traded Pink Sheets stock, and the company described itself as a "fine craft beer and ale importer." For the quarter ended June 30, 2007, the company reported revenues of $158,326, but was operating at a loss.

[19] Most of the letters of authorization requesting the transfers among the various accounts listed the reason for the transfers as marketing or "consulting" services.

IV. Discussion

Securities Act Section 5 prohibits any person from selling a security in interstate commerce unless a registration statement is in effect as to the offer and sale of that security or there is an applicable exemption from the registration requirements.[20]

To establish a prima facie case of a violation of Securities Act Section 5, Enforcement must show that: (1) no registration statement was in effect as to the securities; (2) the respondents sold or offered to sell the securities; and (3) interstate transportation or communication was used in connection with the sale or offer of sale.[21] There is no dispute that the respondents sold unregistered shares of stock using interstate means. There is also no dispute that no registration statement was on file or in effect for the sale of these shares. Consequently, Enforcement has established a prima facie case of a violation of Securities Act Section 5.

A. The Respondents Failed to Prove that the Transactions at Issue Were Exempt from Registration

After Enforcement establishes a prima facie case, the burden shifts to the respondents to show that the transactions at issue were exempt from the Securities Act's registration requirements.[22] "Exemptions from the registration requirements of the Securities Act are construed narrowly." *Blazon Corp.*, 609 F.2d at 968. Thus, evidence in support of an exemption must be "explicit, exact, and not built on mere conclusory statements."[23]

The respondents contend that the sale of the unregistered shares qualified for an exemption under Securities Act Section 4(4). Securities Act Section 4(4) is known as the "broker's exemption" and exempts from Securities Act Section 5's registration requirements any "brokers' transactions executed upon customers' orders on [an] exchange or in the over-the-counter market." 15 U.S.C. § 77d(4).

Securities Act Section 4(4) is "intended to exempt trading transactions with respect to securities already issued to the public." *Quinn & Co.*, 44 S.E.C. 461, 466-67 (1971), *aff'd*, 452

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20 15 U.S.C. § 77e(a) and (c); *see also Midas Secs., LLC*, 2012 SEC LEXIS 199, at *25-26; *Jacob Wonsover*, 54 S.E.C. 1, 8 (1999), *aff'd*, 205 F.3d 408 (D.C. Cir. 2000).

21 *SEC v. Cont'l Tobacco Co. of S. Carolina, Inc.*, 463 F.2d 137, 155 (5th Cir. 1972); *Gebhart*, 2006 SEC LEXIS 93 at *53.

22 *See SEC v. Blazon Corp.*, 609 F.2d 960, 968 (9th Cir. 1979) (stating that "[t]he burden of proof is on the person who would claim [a Section 5] exemption"); *Robert G. Leigh*, 50 S.E.C. 189, 192 (1990) (stating that "[i]t is well settled that the burden of establishing the availability of a [Section 5] exemption rests on the person claiming it").

23 *Robert G. Weeks*, Exchange Act Rel. No. 48684, 2003 SEC LEXIS 2572, at *42 & n.34 (Oct. 23, 2003).

F.2d 943 (10th Cir. 1971). Therefore, Securities Act Section 4(4) "cannot be used to exempt distributions by issuers or underwriters."[24] *Quinn*, 44 S.E.C. at 466-67. "The legislative history of the brokers' exemption indicates that it was meant to preserve the distinction between [the] *distribution* [of securities], with which the Securities Act is mainly concerned, and [the] *trading* [of securities]." *Quinn*, 44 S.E.C. at 467. (emphasis added).

The respondents, however, did not meet their burden of proving that the unregistered shares were eligible for the broker's exemption. This is because, in order to be eligible for the broker's exemption, the respondents were required to conduct a "searching inquiry" to satisfy themselves that the unregistered shares at issue were not part of an unlawful distribution. *See Laser Arms Corp.*, 50 S.E.C. 489, 503 (1991) (stating that a "dealer who offers to sell, or is asked to sell a substantial amount of securities must take whatever steps are necessary to be sure that this is a transaction not involving an issuer, person in a control relationship with an issuer or an underwriter" and, thus, an unlawful distribution). Accordingly, the Commission has held that "[a] broker relying on the [broker's exemption] cannot merely act as an order taker, but must make whatever inquiries are necessary under the circumstances to determine that the transaction is . . . not part of an unlawful distribution." *Robert G. Leigh*, 50 S.E.C. 189, 193 (1990).

Here, the respondents did not make a "searching inquiry" on their own accord. Instead, the respondents would only make piecemeal inquiries when prompted by their firm's compliance office. The respondents testified that they do not recall any of the transactions involving unregistered securities that are the subject of Enforcement's complaint and therefore cannot confirm what specific steps they took to perform the required inquiry.

The respondents testified, however, that they generally relied on their firms to perform the due diligence necessary to determine if an unregistered security could be sold without violating Securities Act Section 5. When asked by their firms, they performed additional due diligence by helping their firms obtain one or more of the following from the issuers or the respondents' customers: (1) corporate resolutions from the issuer confirming that the stock was validly issued, was not restricted, and either had a proper exemption or was registered; (2) information regarding the amount of the issuer's outstanding stock; (3) copies of consulting agreements between the issuer and their customers; (4) legal opinions (from their customer's attorneys); (5) letters or questionnaires explaining how the customers acquired the stock; (6) letters attesting that the stock was free trading; and (7) letters authorizing the transfers of securities between customers. If their firms did not ask for anything from them, they assumed the unregistered securities could be sold.[25] The respondents' almost exclusive reliance on their

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[24] Securities Act Section 2(a)(11) defines "underwriter" to include "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security." 15 U.S.C. § 77b(a)(11). Section 2(a)(11) further defines "issuer" to include "any person directly or indirectly controlling or controlled by the issuer." *Id.*

[25] The respondents also indicated that they would check the stock certificates they received to determine if the certificates had a restrictive legend. If there was no restrictive legend, they would assume the stock was free trading.

firms to perform the necessary due diligence—thereby shifting their duty of performing a "searching inquiry" to others—precludes them from relying on the broker's exemption.

For more than two decades, the Commission has consistently warned the industry that a broker (or a broker's registered representative) selling unregistered shares who does not adequately inquire into whether those shares are part of an unlawful distribution cannot rely on the broker's exemption. *See, e.g.*, *Gregory Christian*, 50 S.E.C. 971, 975 (1992) (finding that a registered representative could not "rely on [the broker's exemption] to escape liability under [Exchange Act] Section 5" because the representative failed to make an adequate inquiry); *Leigh*, 50 S.E.C. at 193 (stating that "[a] broker relying on [the broker's exemption] cannot merely act as an order taker, but must make whatever inquiries are necessary under the circumstances to determine that the transaction is only a normal 'brokers' transaction' and not part of an unlawful distribution"); *Evans Llewellyn Secs., Inc.*, 48 S.E.C. 107, 110 (1985) (stating that broker's exemption was not available to a brokerage firm because the firm and its registered representatives "failed to make an adequate inquiry into the nature of the [stock] which [their client] wished to sell").[26]

Here, the respondents admit that they relied on third parties—including the transfer agent and the clearing firm—to determine whether the shares at issue were part of an unlawful distribution. The respondents contend that such reliance is well-established "industry practice."[27] The respondents further contend that the law is "unclear" as to the responsibility of

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[26] The Commission also issued two releases acknowledging the broker's role as a gatekeeper in preventing unlawful distributions of unregistered securities. *See Distribution by Broker-Dealers of Unregistered Securities*, Exchange Act Rel. No. 6721, 1962 SEC LEXIS 74, at *4-5 (Feb. 2, 1962) (describing the circumstances that call for a searching inquiry by a broker); *see also Sales of Unregistered Securities by Broker-Dealers*, Exchange Act Rel. No. 9239, 1971 SEC LEXIS 19, at *7-8 (July 7, 1971) (describing how brokers must review the facts surrounding the acquisition of shares and that an opinion from outside counsel may be necessary). The respondents admit that they "were not reading [these] SEC releases . . . [which are] dated before [Ritchie] was born" and claim that the "average broker" would not have been aware of these releases either. A lack of awareness, however, does not excuse respondents' misconduct because, as persons associated with FINRA, they were obligated to know and comply with the releases. *Cf. Carter v. SEC*, 726 F.2d 472, 473-74 (9th Cir. 1983) (stating that a registered representative is "assumed as a matter of law to have read and have knowledge of [FINRA's] rules and requirements"); *see also Walter T. Black*, 50 S.E.C. 424, 426 (1990) (stating that a "lack of familiarity with the [FINRA's] rules cannot excuse a [registered representative's] conduct").

[27] The respondents argue that the Hearing Officer erred by not allowing them to present expert testimony to define the "industry practice" regarding a broker's obligations when selling unregistered securities. This argument has no merit.

First, it is undisputed that in the proceedings below, the respondents did not submit a motion requesting expert testimony as required by the Hearing Panel's scheduling order.

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brokers regarding Securities Act Section 5 compliance—and that the absence of clear law allows them to turn to industry practice for guidance. We reject these arguments. The Commission has made it clear that registered representatives may not rely on transfer agents or clearing firms to investigate whether a transaction involving unregistered securities is exempt from Securities Act Section 5's registration requirements. *See Midas Secs., LLC*, 2012 SEC LEXIS 199, at *41 (stating that "clearance of sales by a transfer agent and clearing firm does not relieve a broker of its obligation to investigate") (citation omitted); *John A. Carley*, Initial Decision Rel. No. 292, 2005 SEC LEXIS 1745, at *112 (July 18, 2005) (broker handling "large blocks of a little-known security . . . was not entitled to rely on . . . the acquiescence of the transfer agent and clearing broker").

We also reject the respondents' argument that they did not have to make an inquiry into whether the shares at issue were exempt because the shares did not contain restrictive legends indicating that the unregistered shares were not freely tradable. *See Quinn & Co., Inc. v. SEC*, 452 F.2d 943, 947 (10th Cir. 1971) (stating that petitioners "were not entitled to rely on the lack of cautionary legends on the stock certificates" as a means of determining compliance with the Securities Act's registration provisions); *see also Leigh*, 50 S.E.C. at 194 (stating that "the transfer agent's willingness to reissue the [stock] certificates without restrictive legends did not relieve [the registered representative] of his obligation to investigate"); *Herbert L. Wittow*, 44 S.E.C. 666, 672 (1971) (stating that "[t]he magnitude of the transactions involved and [the representative's] lack of familiarity with the issuer should have indicated to him the need for a careful inquiry, notwithstanding . . . the absence of any restrictive legend on the certificates involved").

In addition, we reject the respondents' claim that it was not their responsibility as registered representatives to perform an inquiry because it was their firms' responsibility to do so. *See Newbridge Secs. Corp.*, Initial Decisions Rel. No. 380, 2009 SEC LEXIS 2058, at *136 (June 9, 2009) (stating that "[t]he duty of inquiry extends beyond brokers and dealers to their registered representatives"); *Owen V. Kane*, 48 S.E.C. 617, 621 (1986) (stating that "[w]e have made it clear that the . . . duty of inquiry extends to salesmen"). Specifically, the respondents

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Second, even if the motion had been submitted, the respondents had not shown that expert testimony was necessary, particularly because the law is clear as to a broker's obligations when selling unregistered securities. *See Richard G. Cody*, Exchange Act Rel. No. 65235, 2011 SEC LEXIS 3041, at *10 (Aug. 31, 2011) (stating that "the Commission is not bound to admit or consider expert testimony" and refusing to remand case where respondent had "not substantiated a need for expert testimony") (internal quotation omitted), *appeal docketed*, No. 11-2247 (1st Cir. filed Oct. 25, 2011). Moreover, it is well settled that a hearing officer has broad discretion with regard to whether expert testimony should be allowed in a disciplinary proceeding. *See Meyer Blinder*, 50 S.E.C. 1215, 1222 (1992) (describing how NASD hearing panels have sufficient knowledge and expertise to render a businessman's judgment without the aid of expert testimony).

assert that they fulfilled their responsibilities of performing an inquiry by helping their firms' compliance officials obtain "additional information" pursuant to their firms' procedures for complying with Securities Act Section 5. There was, however, no attempt by the respondents to: (1) verify any of this information; (2) make an inquiry themselves; (3) discover what steps were being taken by the firm's compliance department to comply with Securities Act Section 5's registration requirements; or (4) determine if there was an applicable exemption. *Cf. First Pittsburgh Secs. Corp.*, 47 S.E.C. 299, 302 (1980) (stating that "[w]hile salesmen have a lesser responsibility for compliance with registration requirements than their superiors . . . salesmen cannot absolve themselves of all responsibility simply by relying on senior officials of their firm").[28] We therefore find that the respondents made no serious effort to perform the required inquiry.

Next, we reject the respondents' defense that they relied on the advice of their employer's counsel to ensure that the transactions complied with Securities Act Section 5. In the context of disciplinary proceedings, the Commission has held that to successfully assert reliance on the advice of counsel, a respondent must establish "that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice." *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008), *petition for rev. denied*, 347 F. App'x 692 (2d Cir. 2009). Moreover, the Commission has found that "[t]he advice must be based on full and complete disclosure, and the respondent asserting reliance must produce 'actual advice from an actual lawyer.'" *Id.* (*quoting SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007)) (internal citation omitted). Here, the respondents claim that they paid for legal advice from outside counsel that was given to their firms' compliance department directly, but they do not even identify what actual advice that outside counsel provided.[29] Under these facts, the respondents cannot successfully assert a reliance on advice of counsel defense. *See also Sales of Unregistered Securities by Broker-Dealers*, 1971 SEC LEXIS 19, at *8 (describing how a broker's determination that an exemption from Securities Act Section 5's registration requirements is available should only be made after "competent outside counsel having no proprietary interest in the offering" provides an opinion that explicitly supports and provides a legal basis for such a determination).[30]

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[28] Respondents' argument that they were not obligated to make determinations as to the applicability of any registration exemptions because they were not attorneys and did not have expertise in interpreting the Securities Act has no merit. The requirement that a broker perform a searching inquiry applies to all brokers and does not make an exception for those without legal training. *See Kane*, 48 S.E.C. at 621.

[29] The respondents assert that it would be "unrealistic" to demand that they recall the legal advice given by counsel that relates to the transactions that are the subject of this proceeding because the respondents engaged in a high number of transactions.

[30] We note, however, that the "searching inquiry" required under Securities Act Section 5 to qualify for the broker's exemption is not accomplished by a representative or a firm merely relying on a customer's or issuer's self-serving statements, including letters from counsel or

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In short, the Securities Act requires a registered representative to function in a special role as a gatekeeper who acts to prevent unlawful distributions. As a gatekeeper, the registered representative cannot rely solely on others and must make an individual effort to determine if a sale of unregistered securities actually complies with Securities Act Section 5 in order to rely on the broker's exemption. *See Paul L. Rice*, Admin. Proc. File No. 3-2451, 1973 SEC LEXIS 3477, at *26 (Apr. 30, 1973), *aff'd*, 45 S.E.C. 959 (1975) (stating that "[s]alesmen . . . should be aware of the requirements necessary to establish an exemption from [Securities Act Section 5's registration requirements] and should be reasonably certain such an exemption is available before engaging in the offer and sale of unregistered securities").

Here, the respondents sold hundreds of millions of unregistered securities and the record shows that in the face of several red flags, the respondents did not make any serious effort—aside from relying on others—to ensure that their sales were not part of an unlawful distribution. Because there was no registration statement in effect for the sale of the shares at issue, and the respondents did not make a "searching inquiry" into the source of these shares, they could not reasonably assume that the shares were exempt from Securities Act Section 5's registration requirements. *See Kane*, 48 S.E.C. at 622 (concluding that because petitioner did not make the necessary investigation, "he had no reasonable basis for believing that the . . . stock [he] sold was exempt from registration").[31] The respondents therefore did not meet their burden of proving that the shares at issue were eligible for the broker's exemption and cannot claim the exemption. Accordingly, we find that the respondents violated NASD Rule 2110 by failing to comply with Securities Act Section 5.[32]

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corporate resolutions. *See Kane*, 48 S.E.C. at 622 (analyzing the sufficiency of registered representative's inquiry and stating that the "[registered representative] could not simply rely on self-serving statements made by [his customer]"); *Wittow*, 44 S.E.C. at 672 (finding that representative did not comply with Securities Act Section 5 where the representative made no inquiry, but instead accepted statements of his customer and his customer's attorney that unregistered shares could be traded freely).

[31] The respondents' contend that their firms' procedures governing the sale of unregistered securities must have been adequate because FINRA never took action against their firms for faulty procedures despite several audits by FINRA examiners. The respondents further contend that because they followed these procedures, they should not be liable for violating NASD Rule 2110. This contention has no merit. The Commission has long held that "[a] regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation." *See W.N. Whelen & Co., Inc.*, 50 S.E.C. 282, 284 (1990).

[32] The respondents argue that they could only be held liable under NASD Rule 2110 for their failure to comply with Securities Act Section 5 if Enforcement proved that the respondents had "actual knowledge" that they were participating in an unlawful distribution. This argument fails. The Commission has never implied such a burden on Enforcement and has explicitly

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B. The Respondents' Procedural Arguments Have No Merit

1. The Respondents Have Not Established Bias

On appeal, the respondents claim that one of the panelists in the proceedings below made a statement that showed she was biased against the respondents' line of business.[33] A party to a disciplinary proceeding may move to disqualify a panelist if the party believes that a panelist is biased. *See* FINRA Rule 9234(b). The motion must be based on a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the panelist's fairness might be questioned. *Id.* The rule provides that the moving party file a motion to disqualify a Hearing Panelist within 15 days of learning of the facts that are the grounds for disqualification. *Id.* The respondents, who were represented by counsel at the hearing, could have moved to disqualify the panelist when the alleged statement occurred, but did not.

The respondents therefore failed to comply with FINRA Rule 9234. We find that, by waiting until this appeal to raise the issue of a hearing panelist's alleged bias, the respondents waived the argument. *See Robert Fitzpatrick*, 55 S.E.C. 419, 431 (2001) (stating that "[w]e have required that objections to the composition of the Hearing Panel be raised first to the Hearing Panel so that the situation can be considered and, if appropriate, remedied as soon as possible"), *aff'd*, 63 F. App'x 20 (2d Cir. 2003) (unpublished opinion); *Brooklyn Capital & Secs. Trading, Inc.*, 52 S.E.C. 1286, 1294 n.34 (1997) (stating that "we have held, we are not required to consider objections that were not raised at a time when the matter complained of could have been remedied").

Moreover, we find that there was no bias arising from the statement at issue. We further conclude that the Hearing Panel did not find liability against the respondents for selling unregistered securities on any basis other than the facts of the case. *See Fitzpatrick*, 55 S.E.C. at 431-32 (finding no evidence of Hearing Panel bias and holding that, even if Hearing Panel member made an alleged prejudicial statement, there was no evidence that the Hearing Panel member formed an opinion in the case based on anything other than the evidence), *petition*

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rejected this argument. *See e.g.*, *Midas Secs., LLC*, 2012 SEC LEXIS 199, at *39 (rejecting applicants' claim that proof of actual knowledge of an unlawful distribution is required to prove a violation of NASD Rule 2110 for failing to comply with Securities Act Section 5).

[33] At the hearing, the attorney for the respondents' current employer testified that he began working with bulletin board and penny stocks because he wanted to get into the corporate world and working with these types of stocks were "the only place [he] could get started."

The panelist accused of bias asked the attorney whether working with bulletin board and penny stocks was an "attractive area" for him and followed up by asking him whether he ever wanted to "move up the food chain once [he] got rolling."

denied, 63 F. App'x 20 (2d Cir. 2003) (unpublished opinion); *U.S. Secs. Clearing Corp.*, 52 S.E.C. 92, 101 (1994) (refusing to find bias where there was "no indication that the [adjudicators] prejudged [the] matter or sought to do anything but determine the facts"); *cf. Mgmt. Fin., Inc.*, 46 S.E.C. 226, 233 n.17 (1976) (declining to find bias where respondents made naked accusation that adjudicators "look[ed] askance at and [did] not understand the problems of a small, young brokerage firm"). Furthermore, our de novo review would cure Hearing Panel's prejudice if any had existed.[34]

2. The Hearing Panel Did Not Err in Denying the Respondents Access to Privileged Documents

The respondents argue that they were prejudiced because they were not allowed to view reports and materials that were part of FINRA's investigative file on the grounds that they were privileged.[35] FINRA procedures, however, specifically allow Enforcement to withhold documents that are "privileged or [constitute] attorney work product." FINRA Rule 9251(b); *see also Dep't of Enforcement v. Scott Epstein*, Complaint No. C9B0040098, 2007 FINRA Discip. LEXIS 18, at *85 (FINRA NAC Dec. 20, 2007) (stating that "the [FINRA] Code of Procedure does not grant, and cannot be read to grant, a respondent wholesale discovery of the investigative files of FINRA staff"), *aff'd*, 2009 SEC LEXIS 217, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 2010 App. LEXIS 24119 (3d Cir. Nov. 23, 2010). The Hearing Officer overruled the respondents' objection to Enforcement withholding these documents and we affirm the Hearing Officer's ruling.

3. The Hearing Panel Did Not Err in Admitting Hearsay Evidence

The respondents claim that they were prejudiced because G. William Johnson ("Johnson"), Enforcement's principal investigator, rather than Jonathan Block ("Block"), a former FINRA examiner, gave testimony regarding the respondents' conduct at Cambria Capital.[36] The respondents objected to Johnson's testimony on the grounds that it is hearsay. It

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[34] *See Dep't of Enforcement v. Dunbar*, Complaint No. C07050050, 2008 FINRA Discip. LEXIS 18, at *33 (FINRA NAC May 20, 2008) (holding that the NAC's de novo review cures alleged Hearing Panel prejudice); *see also Robert E. Gibbs*, 51 S.E.C. 482, 484-85 (1993) (discussing how de novo review by the NASD Board during NASD disciplinary proceedings insulates against bias), *aff'd*, 25 F.3d 1056 (10th Cir. 1994) (table).

[35] At the hearing, the respondents' counsel asked to see materials that Gene Davis, a FINRA examiner, used to prepare himself to testify. The respondents' counsel made no allegation that Enforcement was withholding exculpatory evidence in these materials. Instead, the respondents' counsel implied, with no proof whatsoever, that these materials might explain why others, such as the firms' officers, compliance, and legal personnel were not charged by Enforcement.

[36] Block, a FINRA examiner, left FINRA prior to the hearing, although according to his CRD records, he was employed by a FINRA member firm at the time of the hearing. Johnson,

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is well settled, however, that hearsay evidence is admissible in FINRA disciplinary proceedings. *See Epstein*, 2009 SEC LEXIS 217, at *46-47 (stating that "it is well-established that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify"); *see also Otto v. SEC*, 253 F.3d 960, 966 (7th Cir. 2001) (stating that "it is well established that hearsay evidence is admissible in administrative proceedings, if it is deemed relevant and material").

"In determining whether to rely on hearsay evidence, 'it is necessary to evaluate its probative value and reliability, and the fairness of its use.'" *Epstein*, 2009 SEC LEXIS 217, at *47 (*quoting Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992)). "The factors to consider include 'the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated.'" *Id.* Here, we refuse to find that Johnson's testimony is automatically biased because he works for Enforcement.[37] Johnson's testimony was under oath and he was subject to cross examination by the respondents' counsel.[38] In addition, the subject matter of Johnson's

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an investigator for Enforcement, prepared his testimony using documents from Block's investigative file, some of which the Hearing Officer deemed privileged.

[37] Johnson testified that in all of the 12 to 15 cases he has worked on that involved a hearing, he was not the examiner who participated in the initial investigation. Johnson also testified that as the principal investigator of Enforcement's litigation group, he is usually "brought in at various stages, but . . . brought in when we know that the case is most likely going to go into litigation." Even if we thought his being assigned on multiple occasions to provide hearsay testimony at cases headed for litigation was evidence of bias (which we do not), we would not find that it invalidated the proceedings. *See Dillon Secs, Inc.*, 51 S.E.C. 142, 150 (1992) (finding that "[w]hether the examiner was . . . biased against the applicants . . . [was] irrelevant [and that] such bias, if it did in fact exist, would not render the proceedings invalid"); *see also id.* at n.29 (stating that "NASD staff does not decide cases and, therefore, the allegations of bias, even if true, do not suggest that the fairness of the hearing itself was compromised") (citations omitted).

In addition, the respondents have also not identified any aspects of Johnson's testimony that were in dispute. *See id.* at 150 (rejecting applicants' contention that the alleged bias precluded a fair hearing where applicant "failed to identify any disputed issues of fact, resolved against either him or the firm, that turned on the credibility of the allegedly biased examiner") (citations omitted).

[38] The respondents also had the opportunity to call Block as a witness so that they could question him, but they failed to do so. *See* NASD Rule 9252(a) (describing how a respondent may "request that FINRA invoke Rule 8210 to compel . . . testimony"); *Cf. Dillon*, 51 S.E.C. at 150 (rejecting the applicants' hearsay objections where "NASD officials testified concerning the

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testimony is largely undisputed and consists of his summaries of uncontested facts found in documents whose authenticity also are not in dispute.[39] *Cf. Vladislav Steven Zubkis*, 53 S.E.C. 794, 800 (1998) (finding violation and admitting NASD staff's hearsay testimony where NASD staff witnesses were credible, the NASD staff's testimony was corroborated by documentary evidence in the record, and where applicant had an opportunity to cross-examine the NASD's witnesses and rebut their testimony), *aff'd*, 145 F.3d 1344 (9th Cir. 1998) (table); *Dillon*, 51 S.E.C at 150 (stating that "the reliance of NASD officials on computations performed by the examiners does not undercut the probative value and reliability of the officials' testimony relating to the computations"). Under these circumstances, we do not find that the Hearing Officer erred in admitting Johnson's testimony or relying on such testimony.

V. Sanctions

The Hearing Panel fined each respondent $10,000 and imposed a six-month suspension in all capacities on each respondent after finding that they sold unregistered securities in violation of NASD Rule 2110.[40] We, however, find that Padilla's misconduct involved a greater proportion of the unlawful sales than Ritchie's misconduct. We therefore modify the sanctions that the Hearing Panel imposed for the unlawful sales.

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findings of NASD examiners who had inspected the firm but who were unavailable to testify because they no longer worked for the NASD [and] . . . [the] applicants were unable to cross-examine the examiners who were the sources of the testimony presented against them").

[39] The respondents claim that Johnson introduced unreliable, unsworn hearsay information from the Pink Sheets regarding the financial condition of the issuers of these shares. The Commission, however, has identified the Pink Sheets as something brokers can use to gather information about issuers. *See Midas Secs., LLC*, 2012 SEC LEXIS 199, at *33 (describing a broker's failure to conduct a proper inquiry into an issuer and stating that "the information on the Pink Sheets Web site would have raised red flags, showing [the issuer] to be a newly formed company that had been trading for less than two weeks, had little operating or earnings history, and had a negative balance sheet").

[40] The Hearing Panel aggregated the sanctions for Padilla's violations of NASD Rule 2110 under both cause one and two. *See Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005) ("where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals"), *aff'd*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005). We find that aggregation of sanctions is appropriate here because Padilla's violations stem from his failure to make the appropriate inquiry.

We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanction for the respondents' violations.[41] The Guidelines for the sale of unregistered securities in violation of Securities Act Section 5 provide for a fine of $2,500 to $50,000.[42] In egregious cases, these Guidelines recommend a higher fine and a suspension of up to two years or a bar.[43] The Guidelines further set forth five specific considerations for such violations: (1) whether the respondent attempted to comply with an exemption from registration; (2) whether the respondent sold before the effective date of a registration statement; (3) the share volume and dollar amount of transactions involved; (4) whether the respondent had implemented reasonable procedures to ensure that it did not participate in an unregistered distribution; and (5) whether the respondent disregarded "red flags" suggesting the presence of an unregistered distribution.[44] In addition, we consider the Principal Considerations in Determining Sanctions.[45]

We find that the respondents' misconduct was egregious and merits significant sanctions. The respondents intentionally disregarded Section 5's registration requirements and made no effort to comply with the broker's exemption. As noted above, the respondents failed to make a "searching inquiry" into whether the shares at issue were part of an unlawful distribution and ignored several "red flags" suggesting that their sales were part of an illegal distribution.[46] Significantly, not only did the selling respondents fail to make the required inquiry, they did not make *any* independent inquiry to determine whether the shares at issue were part of an unlawful distribution and therefore ineligible for the broker's exemption. Instead, the respondents ignored established case law and relied on others to make the inquiry that they were required to make to sell unregistered securities under the broker's exemption. In addition, the respondents' misconduct involved the sale of a significant volume of unregistered shares, amounting to

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41 *FINRA Sanction Guidelines* (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter "*Guidelines*"].

42 *Id.* at 24.

43 *Id.*

44 *Id.*

45 *Id.* at 6-7.

46 *Id.* at 24. We note that there was no registration statement in effect for the shares at issue. Consequently, the second consideration regarding whether the respondents sold before the registration statement's effective date is not applicable here and we do not address it. We also do not address the fourth consideration because the respondents were not in charge of implementing procedures to ensure that an unregistered distribution did not occur. They were, however, responsible for making an inquiry to prevent an unregistered distribution. *See Kane*, 48 S.E.C. at 621.

hundreds of millions of shares of unregistered stock. Padilla and Ritchie also received approximately $122,701 and $2,981, respectively, in net commissions for these sales.[47]

In addition, there are several aggravating factors identified in the Guidelines' Principal Considerations that call for significant sanctions. As noted above, we find that the respondents' violations of NASD Rule 2110 were intentional and also find that the millions of unregistered shares that were unlawfully distributed to the public was a significant amount.[48] In addition, we find it aggravating that the respondents have not accepted responsibility for their misconduct, and instead, have attempted to shift their responsibility for compliance with the Securities Act's registration requirements to others.[49] Finally, we also consider that on January 19, 2012, the Commission barred Padilla and Bruno for three years for selling unregistered securities and permanently enjoined them from committing future violations of Securities Act Section 5, and we find the respondents' recent disciplinary history for similar misconduct to be aggravating.[50]

After considering the above factors, however, we find that Padilla sold a higher volume of unregistered securities and received more commissions than Ritchie. We also consider that Ritchie was acting under Padilla's guidance and that she was not an equal partner in the business. We therefore modify the sanctions that the Hearing Panel imposed to reflect the relative amount of participation of each respondent in the unlawful sales.[51] Consequently, we impose the following sanctions: (1) for Padilla's violations of NASD Rule 2110, we fine him $147,701 (comprised of a $25,000, and disgorgement of $122,701 in commissions), and impose a two-year suspension in all capacities; (2) for Ritchie's violations of NASD Rule 2110, we fine Ritchie $5,391 (comprised of a $2,500 fine and disgorgement of $2,891 in commissions) and suspend her for one year in all capacities.[52] The respondents are also ordered to jointly pay $7,371.80 in costs imposed by the Hearing Panel, plus appeal costs of $1,574.65.[53]

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47 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

48 *Id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 13 and 18).

49 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2)

50 *Id.* at 2 (stating that "[a]n important objective of the disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists . . . .").

51 *See Dep't of Enforcement v. Conway*, Complaint No. E102003025201, 2010 FINRA Discip. LEXIS 27, at *52 & n.59 (FINRA NAC Oct. 26, 2010) (imposing less severe sanctions on respondent who played a lesser role in misconduct).

52 We note that the Hearing Panel ordered the respondents to pay interest on the amount of the fine that resulted from disgorgement. This, however, is inconsistent with our recent decision addressing this exact issue. *See Dep't of Enforcement v. Murphy*, Complaint No. 2005003610701, 2011 FINRA Discip. LEXIS 42, at *122 (FINRA NAC Oct. 20, 2011) (stating that "[i]n FINRA disciplinary proceedings, when the disgorgement amount is to be paid to

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VI. Conclusion

For violating NASD Rule 2110 by selling unregistered securities, we suspend Padilla for two years and fine him $147,701. For violating NASD Rule 2110 by selling unregistered securities, we suspend Ritchie one year and fine her $5,391.[54] We also order the respondents to jointly and severally pay costs in the amount of $8,946.45.[55]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and
Corporate Secretary

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FINRA, the disgorgement award is essentially a fine . . . [and] [i]nterest is not awarded on fines imposed through FINRA disciplinary proceedings"). We therefore overturn the Hearing Panel's order that the parties pay such interest.

[53] The respondents argue that they should receive lower sanctions because the supervisors at the firms were either not disciplined or received lighter sanctions than the respondents. The Commission, however, has "consistently . . . held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *Dennis S. Kaminski*, Exchange Act Rel. No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011) (citations omitted).

[54] Pursuant to FINRA Rule 8320, 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.

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