BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Angelo Xagoraris San Jose, CA, Respondent.	CORRECTED DECISION* Complaint Nos. 20080127674 & 20080133768 Dated: August 1, 2014

Respondent made unsuitable recommendations to two customers, engaged in outside business activities without providing prompt written notice to his member firm, and provided false information to his firm. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Mark Graves, Esq., Laura A. Cooper, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Alvin L. Fishman, Esq.

Decision

Pursuant to FINRA Rule 9311, Angelo Xagoraris ("Xagoraris") appeals a March 15, 2013 decision. In that decision, a FINRA Hearing Panel found that Xagoraris violated: (1) NASD Rules 2310 and 2110, by making unsuitable recommendations to two customers; (2) NASD Rules 3030 and 2110, by engaging in outside business activities without providing prompt written notice to his member firm; and (3) NASD Rule 2110 by providing false information to his firm.[1] For the suitability violations, the Hearing Panel barred Xagoraris. For engaging in outside business activities without providing prompt written notice to his firm and

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* This decision reflects a correction to the first complaint number, which is listed above.

[1] The Hearing Panel's decision contains a typographical error as to the date the decision was issued. It was issued on March 15, 2013, rather than March 15, 2012. The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

providing false information to his firm regarding these business activities, the Hearing Panel imposed a separate bar on Xagoraris. Xagoraris does not challenge the Hearing Panel's findings. Consequently, our review focuses on the limited issue of whether the sanctions the Hearing Panel imposed for these violations were appropriate. After an independent review of the record, we affirm the Hearing Panel's sanctions.

I. Background

Xagoraris first registered with a FINRA member firm in 1994. Xagoraris has been registered as a general securities representative with World Group Securities, Inc. ("WG Securities" or the "Firm") since April 2002. Xagoraris also was a loan officer for a mortgage company that was not affiliated with WG Securities.

II. Procedural History

On January 25, 2011, FINRA's Department of Enforcement ("Enforcement") filed a four-cause complaint alleging that Xagoraris: (1) made unsuitable recommendations to customer KM; (2) engaged in an outside business activity without providing prompt written notice to his Firm; (3) made unsuitable recommendations to customer RG; and (4) provided false information to his employer. Xagoraris denied the alleged violations.

A hearing was held on April 13, 2012. In a decision issued on March 15, 2013, the Hearing Panel concluded that Xagoraris, with one exception, violated FINRA rules as alleged in Enforcement's complaint.[2]

The Hearing Panel barred Xagoraris in all capacities for his suitability violations, imposing a unitary sanction for the two causes of action that resulted from this misconduct. The Hearing Panel also imposed an additional bar for Xagoraris's outside business activity and misrepresentation violations.[3] On April 4, 2013, Xagoraris appealed the Hearing Panel's decision.

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[2] In evaluating cause one, the Hearing Panel concluded that Xagoraris made unsuitable recommendations to customer KM in connection with the sale of a $500,000 Variable Universal Life ("VUL") policy in June 2005, but it dismissed allegations that Xagoraris also made an unsuitable recommendation to KM in connection with a $250,000 VUL policy purchased in February 2005.

[3] One member of the Hearing Panel dissented from the sanctions imposed by the majority. This member did not agree that Xagoraris's misconduct was egregious and would have imposed a sanction of a three-month suspension and requalification.

III. Facts

A. Customer KM's VUL Policies

In February 2005, KM sought Xagoraris's help with her difficult financial situation. KM, recently divorced after twenty years of marriage, wanted financial security and to increase her income. KM testified that her husband handled all of their finances during their marriage and, when she first met Xagoraris, she was "completely naïve" and "didn't know anything" about investments.

KM's assets consisted of a lump sum payment of $80,000 from her divorce settlement, two IRAs worth approximately $421,473, and $7,373 in mutual fund shares. She earned approximately $10,000 annually as a trainer who taught six to eight fitness classes a week.[4] KM could not cover her monthly expenses with her earnings, so she used credit cards or the money from her divorce settlement to pay bills. She supported two children in high school who were living at home and an adult child on a church mission. KM owned her home, subject to a mortgage requiring a $1,700 monthly payment.[5]

In February 2005, Xagoraris recommended, and KM purchased, a $250,000 VUL policy. To purchase this policy, Xagoraris filled out account forms for KM on February 9 and February 11, 2005, which KM and Xagoraris both signed. KM testified that she signed the forms without reading them. The forms contained inaccurate information, including that KM's investment objective was aggressive growth, that her risk tolerance was 100% high risk, that her annual income was $34,000, and that she had $1,000 of monthly discretionary income.

A few months after KM purchased the $250,000 VUL policy, Xagoraris recommended that she purchase an additional $500,000 VUL policy and he filled out an application for her. Xagoraris testified that KM came to his office in June 2005 and informed him that she had acquired more clients and her income was now about $64,000. According to Xagoraris, KM wanted to increase the amount on the initial policy to $750,000, but KM's income for 2005 was actually about $10,000 and WG Securities' policies required a letter of "insurable need" for a policy that exceeded ten times the applicant's annual income. Although KM still had the

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[4] Xagoraris's notes show that KM told him that her income was $64,000 and her taxable income was $39,000. Xagoraris testified that KM told him at their first meeting that her income was $64,000. KM testified that she never told him that her income was $64,000. KM reported her wages on her 2005 tax return as about $10,000 and her total income as about $15,000. The Hearing Panel found that KM was more credible than Xagoraris on this issue, and we find nothing in the record that would cause us to overturn this credibility determination. *See Dane S. Faber*, 57 S.E.C. 297, 307 (2004) (stating that "[c]redibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference").

[5] In February 2005, KM's husband paid her $1,200 monthly in child support. These payments, however, were set to end in June 2007.

$250,000 VUL policy, Xagoraris testified that he checked the box on the application that indicated that KM had no other life insurance by mistake.

The Hearing Panel did not find Xagoraris's testimony that KM told him that her income had increased to be credible, reasoning that it was not credible that KM would have known that she needed to tell Xagoraris, falsely, that her income had increased to $64,000 to qualify for the $500,000 VUL policy, or that KM had such a strong desire to buy additional life insurance that she would lie in order to qualify for the policy. The Hearing Panel also did not find that it was credible that Xagoraris inadvertently provided the incorrect information that was necessary to qualify KM for the additional $500,000 VUL policy. In addition, the Hearing Panel found that Xagoraris knew the information in the account forms was inaccurate when he wrote it. The thrust of the Hearing Panel's credibility determinations is that Xagoraris was willing to misrepresent the information in the forms to qualify KM for the $500,000 VUL policy. We uphold the Hearing Panel's credibility determination. *See Faber*, 57 S.E.C. at 307.

Despite the information that Xagoraris provided in the account forms, KM had no discretionary income and could not afford the $500,000 VUL policy. Nevertheless, Xagoraris sold KM the $500,000 VUL policy in June 2005. This policy required KM to make a monthly payment of $500. Xagoraris did this knowing that he had just sold KM a $250,000 VUL policy in February 2005 requiring a monthly payment of $250. These two policies together provided KM with a total of $750,000 in insurance and required a $750 monthly payment that, according to KM, she could not afford. In the end, KM lost everything she had paid into the policies.[6]

B. Customer KM's Real Estate Investment

When KM first met with Xagoraris, she told him she wanted an investment that would provide additional income. Xagoraris suggested that they jointly invest in Arizona real estate that would provide monthly rental income. Xagoraris told KM that he would find the property and manage it with the help of a property manager. Xagoraris also told KM that she should refinance her house to finance their proposed real estate transaction. She refinanced her house and took out $101,145.68 in equity. At Xagoraris's recommendation, she invested about $28,000 in a mutual fund, and on June 7, 2005, she gave a $70,000 check, payable to Xagoraris directly, to purchase the Arizona real estate. Xagoraris acted as loan officer for the refinancing and received a fee.

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[6] KM testified that she made payments on the VUL policies until she cancelled them in December 2007 because she could not afford the payments. According to KM, when she cancelled the policies she lost all the money that she had paid into them. Xagoraris does not dispute this testimony. According to KM, Xagoraris told KM that a VUL policy was really a mutual fund "masked" as an insurance policy. KM also testified that Xagoraris told her she could stop paying on the VUL policy at any time without a penalty. Xagoraris contends that he made it clear to her that the VUL policy was primarily an insurance product and that he warned her that she would be penalized if she stopped payments prematurely. As did the Hearing Panel, we credit KM's testimony.

Xagoraris kept information about the rental property investment from KM, did not provide any legitimate documentation to KM for the investment, put the property in his own name on all documents related to the investment, and kept the rental income. He did not disclose the investment to his Firm, and stated on compliance questionnaires that he had not received funds directly from a customer, knowing that he had received a $70,000 check from KM, payable to himself, for the real estate investment.[7]

Xagoraris testified that he and KM agreed that KM would not receive any portion of the rental income, and she would receive only a share of the gains on the sale of the property. He testified that they agreed that he would not contribute cash but would be solely liable for the property's mortgage, which he could pay using the property's rental income. In contrast, KM testified that they agreed that both would invest $70,000 and that she would receive monthly income. Only one member of the Hearing Panel, the Hearing Officer, made a credibility finding on this point. He found, and we agree, that Xagoraris's testimony that KM agreed to the terms of this partnership was not credible.[8]

After Xagoraris purchased the Arizona property, KM called him frequently to find out the address of the property, but he did not provide it. Later, on the advice of her boyfriend, she asked to see the deed. In November 2006, Xagoraris sent her a document dated November 14, 2006, 16 months after he bought the property. The document was a form deed with typewritten language that appeared to be a grant from Xagoraris, as the owner of a property, to himself and KM with a 50-50 split of the interest in the property. The document was unsigned, and identified the property only as "a property in Maricopa County, Arizona." Shortly thereafter, KM asked Xagoraris for her money back. In or around February 2007, Xagoraris repaid $68,500 to KM, which was $1,500 less than she had given to him in June 2005. Xagoraris told KM that he had to refinance his house to pay her back, and insisted that KM pay half the costs of his refinancing, or $1,500, because as part of the partnership, they had allegedly agreed to hold the property for three years. Xagoraris maintained that KM's demand for her money back breached this agreement.

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[7] Xagoraris gave KM a receipt stating that the money was for the purchase of a property, "Address to be determined." In July 2005, Xagoraris bought a rental property, in his name only, in Arizona. Xagoraris testified that he bought the property on behalf of his alleged partnership with KM. There was, however, no written partnership agreement between Xagoraris and KM. Xagoraris did not contribute any money to the real estate investment, and he took out the mortgage on the investment property in his name only. Xagoraris did not disclose the real estate purchase and his receipt of the $70,000 check from KM to WG Securities until March 2007, in response to questions from one of the Firm's compliance examiners.

[8] Xagoraris is not credible because his testimony both contradicts KM's account of the agreement and is not consistent with KM's investment objectives. Xagoraris and KM agreed that she wanted to augment her monthly income, yet, according to Xagoraris's version of events, KM agreed to contribute $70,000 to an investment that would provide no monthly income.

C. Xagoraris Provides False Information to His Firm

Registered representatives at WG Securities were required to fill out compliance questionnaires each year at one of the Firm's quarterly compliance meetings. Xagoraris filled out and signed a questionnaire on October 12, 2005. He certified that he had not "accepted from a customer or a WG Securities representative, any cash, [or] a check made payable to myself." At the time he gave this answer, he had accepted a $70,000 check from KM, payable to himself, for the purchase of the Arizona real estate. Xagoraris also answered this question falsely on two subsequent compliance questionnaires dated January 14, 2006, and November 6, 2006.

D. Xagoraris Recommends a VUL Policy to Customer RG

In early 2006, KM recommended Xagoraris as a financial advisor to her friend RG, who was also experiencing financial problems. RG was a 39-year-old unmarried nurse who had no children or dependents and owned a home subject to two mortgages. Her annual salary was approximately $78,000. She had about $3,600 in credit card debt and no discretionary income. She received a tax refund of about $8,000 every year, which she used as a fund for emergencies. She had a small 401(k) account worth about $7,000 and had very little experience investing in securities. Her liquid net worth was about $5,000. RG testified that she disclosed all of her assets and debts to Xagoraris. Xagoraris testified, however, that RG refused to disclose all of her financial information to him.[9]

When RG met Xagoraris in March 2006, she told him that she wanted to get out of debt and add money to her emergency fund. Relying on Xagoraris's recommendation, RG bought a $600,000 VUL policy, refinanced her home through Xagoraris, and used $20,000 in liquefied equity she took from the refinancing to fund a large up-front premium for the VUL policy.

RG testified that Xagoraris told her that a VUL policy was a "mutual fund packaged up in a life insurance policy" and "not about the life insurance." According to RG, Xagoraris also told her that she could frontload the payments, using equity from her home, so she did not have to worry about monthly payments for the VUL policy.

RG made total payments on the policy of $20,500, consisting of an initial payment of $500 and a lump sum payment of $20,000 from the proceeds of her home refinancing. RG knew she was purchasing life insurance, but according to her, Xagoraris explained to her that the objective of the VUL was growth, not insurance. Xagoraris filled out a client account form for RG, which she signed on March 10, 2006. RG testified that she did not read the form before

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[9] Xagoraris wrote in his notes, and testified at the hearing, that RG said she had other assets that she did not feel comfortable disclosing, directly contradicting RG's testimony. The majority of the Hearing Panel rejected Xagoraris's testimony as not credible, reasoning that it was not logical that RG would refuse to disclose information concerning her financial condition when she came to Xagoraris seeking help with a bad financial situation—and that it was unlikely that someone with two mortgages, little in the bank or investments, and credit card debt, would have substantial undisclosed financial assets. We concur.

signing it. According to the form, RG had a liquid net worth of $5,000, a total net worth of $41,000, and $1,800 of monthly discretionary income. On the form, Xagoraris wrote that RG's investment objective was aggressive growth and her risk tolerance was high, which was not true.[10] Contrary to what Xagoraris wrote on the form, RG also did not have any discretionary income.[11]

RG testified that she could not afford the $600,000 VUL policy and she complained to WG Securities about the policy in 2007. The Firm offered RG the opportunity to rescind the policy. RG accepted and the insurance carrier refunded her premiums of $20,500 in November 2008.

E. Xagoraris Recommends that RG Refinance Her Home to Purchase Securities

RG met with Xagoraris on May 13, 2006, three days after he refinanced her home. Xagoraris filled out a new account form and forms for the purchase of a mutual fund. The forms contained inaccurate information concerning RG's finances and financial objectives. RG gave Xagoraris three checks on May 13, 2006: a $5,000 check as an initial investment in a mutual fund; a $55,000 check payable to IDEX Investor Services ("IDEX"), postdated to May 18, 2006, for another mutual fund investment; and a $20,000 check to pre-fund the $600,000 VUL policy. According to RG, Xagoraris told her she should make the $55,000 check payable to IDEX, and asked her to post-date the check. The $80,000 for the three checks came from the $84,000 she received in the refinancing.[12]

Xagoraris testified that he knew it was against WG Securities' policy to recommend the use of home equity to invest in securities products, or to knowingly accept mortgage proceeds for investment purposes. Xagoraris further testified that he thought RG was refinancing so she could renovate her home—not to invest in securities. The Hearing Panel found this testimony not credible in light of the fact that RG invested in a mutual fund and a VUL policy immediately after refinancing in an amount that was almost identical to the cash equity she took out from her

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[10] The Hearing Panel found that Xagoraris knew that some of the information in the account form that he filled out was false. We agree.

[11] Xagoraris testified that RG had discretionary income because she received an $8,000 tax refund every year, and could adjust her withholding to have discretionary income. The Hearing Panel rejected this position because RG had virtually no financial assets and was burdened with debt. RG's ability to use her tax refund as discretionary income would require a change in her spending patterns. We affirm that RG lacked discretionary income.

[12] RG testified that Xagoraris was aware that the funds came from refinancing her home. Xagoraris testified that RG represented that the money came from assets that she was not comfortable disclosing and had not told him about. The Hearing Panel did not find it credible that the $80,000 came from undisclosed assets of RG due to the fact that she gave Xagoraris $80,000 for investments three days after she obtained $84,000 from the refinancing. We affirm this finding.

house. According to WG Securities' procedures, when a representative received a check from a client, he or she was required to record it on the blotter and send the check to the Firm. Xagoraris sent the $55,000 check directly to IDEX and did not enter it on the blotter.[13] Xagoraris claimed that he was not sure how to handle the check because it was the first time in 14 years that he had accepted a check from a client. Xagoraris later told the Firm that RG had sent the check directly to IDEX without his knowledge.[14] These two stories are inconsistent and the Hearing Panel did not find Xagoraris's claim that he did not know how to handle a check to be credible. We affirm this finding.

IV. Discussion

A. Xagoraris's Recommendations to KM and RG Violated the Suitability Rule

1. Brokers Must Make Suitable Recommendations

"NASD Rule 2310, sometimes referred to as the 'suitability rule,' requires that, in recommending the purchase, sale, or exchange of any security to a customer, a member must have reasonable grounds for believing that the recommendation is suitable for that customer based on the facts, if any, disclosed by the customer as to his other securities holdings and the customer's financial situation and needs." *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *3 n.2 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012). "The suitability rule . . . requires a broker to make a customer-specific determination of suitability and to tailor his recommendations to the customer's financial profile and investment objectives." *F.J. Kaufman & Co.*, 50 S.E.C. 164, 168 (1989).

Initially, a broker must have a reasonable basis to believe, after performing reasonable due diligence, that the recommendation could be suitable for some investors (reasonable-basis suitability). *Id.* at 168 & n.16. "A registered representative can violate the suitability rule if he or she inadequately assesses whether the recommendation is suitable for the specific investor to whom the recommendation is directed (customer-specific unsuitability)." *William J. Murphy*, Exchange Act Release No. 69927, 2013 SEC LEXIS 1933, at *38 (July 2, 2013) (internal quotations omitted). The Commission has acknowledged that a broker must make an independent suitability determination for a customer before recommending a security to the customer. *See Nazmi C. Hassanieh*, 52 S.E.C. 87, 89 (1994) (discussing a broker's "obligation to make an independent determination that [an] investment [is] suitable").

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[13] If Xagoraris had followed WG Securities' procedures and sent the check directly to the Firm, it could have alerted the Firm to possible misconduct regarding the refinancing because the amount of the check exceeded RG's financial assets.

[14] Xagoraris denied on the Firm's compliance questionnaires that he had helped RG liquefy home equity in order to purchase securities. Xagoraris also did not disclose to the Firm that he had accepted $55,000 directly from RG.

A broker must also disclose the risks associated with a recommended security to a customer, but "[m]ere disclosure of risks is not enough. A [broker] must 'be satisfied that the customer fully understands the risks involved and is . . . able . . . to take those risks.'" *James B. Chase*, 56 S.E.C. 149, 159 (2003) (quoting *Patrick G. Keel*, 51 S.E.C. 282, 284 (1993)). Even if a broker understands the specific risks and explains them to a customer in making a recommendation, the customer's understanding of the risks and acquiescence in following the recommendation does not "relieve [a broker] of his obligation to make reasonable recommendations." *Jack H. Stein*, 56 S.E.C. 108, 116 (2003). "A broker's recommendations must be consistent with his customer's best interests, and he or she must abstain from making recommendations that are inconsistent with the customer's financial situation." *Faber*, 57 S.E.C. at 310 (internal citation omitted).

2. The Suitability Rule Applies to the VUL Policies that Xagoraris Recommended

The VUL polices at issue here are "variable contracts," and FINRA's suitability rule applies when a broker recommends these policies to a customer.[15] Therefore, when registered persons recommend a VUL policy to a customer, they "are required to make reasonable efforts to obtain information concerning the customer's financial and tax status, the customer's financial objectives, and such other information used or considered to be reasonable by the member or registered representative in making recommendations to the customer."[16] FINRA has issued guidance that identifies specific factors that brokers should consider in determining whether the recommendation of a variable contract like a VUL policy is suitable for a particular customer.[17]

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[15] *See NASD Notice to Members 96-86*, 1996 NASD LEXIS 108, at *1 (Dec. 1996) (stating that "[FINRA] reminds . . . members and their associated persons who sell variable life insurance contracts and variable annuity contracts (Variable Contracts) of their obligations with respect to the suitability requirements of the NASD Conduct Rules" and explaining that "a member and its associated persons must have reasonable grounds for believing that a Variable Contract recommended to a customer is suitable for that customer").

[16] *Id.* at *4.

[17] Factors that may indicate a VUL policy is not suitable include: "(i) a representation by a customer that his or her life insurance needs were already adequately met; (ii) the customer's express preference for an investment other than an insurance product; (iii) the customer's inability to fully appreciate how much of the purchase payment or premium is allocated to cover insurance or other costs, and a customer's ability to understand the complexity of [variable contracts] generally; (iv) the customer's willingness to invest a set amount on a yearly basis; (v) the customer's need for liquidity and short-term investment; (vi) the customer's immediate need for retirement income; and (vii) the customer's investment sophistication and whether he or she is able to monitor the . . . account." *Id.* at *4-5.

In addition, FINRA has told its members that "[w]hen recommending a variable life insurance policy, members and their registered representatives should make reasonable efforts to obtain comprehensive customer information, such as the customer's age, annual income, net worth, liquid net worth, number of dependents, investment objective, sources of funds for investment, investment experience, existing investments and life insurance, time horizon, and risk tolerance."[18]

3. Xagoraris Violated the Suitability Rule

Xagoraris does not challenge that a preponderance of the evidence establishes that the information Xagoraris's customers disclosed to him about their financial situation and needs did not give him reasonable grounds to conclude that it was suitable to recommend: (1) the $500,000 VUL policy to customer KM; and (2) the $600,000 VUL policy to RG. Put simply, Xagoraris recommended investments which required monthly payments that neither KM nor RG could afford given their income and financial obligations. Under these facts, we affirm the Hearing Panel's finding that Xagoraris violated the suitability rule, NASD Rule 2310, and NASD Rule 2110.[19]

B. Xagoraris Failed to Provide Prompt Written Notice of His Outside Business Activity

At the time of Xagoraris's alleged violation, NASD Rule 3030 provided:

> No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member.

It is undisputed, and Xagoraris does not challenge the Hearing Panel's findings, that he failed to provide written notice to WG Securities that he was engaged in a real estate venture

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[18] *NASD Notice to Members 00-44*, 2000 NASD LEXIS 52, at *8-9 (July 2000).

[19] We note that in addition to finding that Xagoraris's recommendation that RG purchase the $600,000 VUL policy was unsuitable, the Hearing Panel also found that Xagoraris's recommendation to RG to liquefy home equity to purchase the VUL policy and mutual fund shares was unsuitable. The complaint, however, does not appear to be crafted to include the mortgage transaction as an alleged violation of the suitability rule. Under these facts, we decline to affirm the Hearing Panel's finding that the mortgage recommendation was unsuitable. In addition, our determination of sanctions in this matter does not give any weight to the Hearing Panel's conclusion that the mortgage refinancing recommendation was unsuitable. Our determination of sanctions for Xagoraris's suitability violations is limited to a consideration of the glaringly unsuitable recommendations of the VUL policies to KM and RG.

with KM that was outside the scope of his relationship with the Firm. By failing to provide prompt written notice to the Firm of his outside business activity, Xagoraris violated NASD Rules 3030 and 2110.[20]

C. Xagoraris Provided False Information on His Firm's Compliance Questionnaires

The Commission has stated that "it is a basic duty of all securities professionals to respond truthfully and accurately to their firm's requests for information, and that the failure to do so can be inconsistent with just and equitable principles of trade, especially when the purpose of the information request is to help ensure that the associated person is in compliance with applicable laws, rules, and policies." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *45 (Feb. 10, 2012). Misrepresentations by securities professionals to member firms are "especially troubling" when they involve transactions with "a significant potential for conflicts of interest and misconduct." *Id.* Providing false information to one's member firm also violates NASD Rule 2110. *Id.* at *48.

Xagoraris provided false answers on three of his Firm's compliance questionnaires when he denied that he had accepted a check made payable to himself from any of his Firm's customers, knowing that he had accepted the $70,000 check from KM, payable to himself. Xagoraris's false answers on WG Securities' compliance questionnaires denied the Firm the opportunity to review the transaction with KM, one which involved significant potential for conflicts of interest and misconduct. The preponderance of the evidence supports, and Xagoraris does not challenge, the Hearing Panel's finding that by providing false answers on the compliance questionnaires, Xagoraris violated NASD Rule 2110.

V. Sanctions

In the proceedings below, the Hearing Panel imposed two separate bars in all capacities on Xagoraris. The first bar was the result of a unitary sanction the Hearing Panel imposed for Xagoraris's suitability violations. The second bar was the result of a unitary sanction the Hearing Panel imposed for Xagoraris's engaging in an undisclosed outside business activity and providing false information to his Firm to hide this activity. The key dispute in this appeal is whether Xagoraris's misconduct was egregious and merits a bar.[21]

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[20] A violation of NASD Rule 3030 is also a violation of NASD Rule 2110. *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *5 n.9 (Feb. 20, 2104) (stating that "Rule 2110 is violated by any conduct that violates another NASD rule").

[21] Xagoraris makes much of the fact that the Dissenting Panelist found that Xagoraris's misconduct was not egregious. In contrast, the majority of the Hearing Panel found the misconduct to be egregious and warranted a bar. Xagoraris cites no law in support of his proposition that a lack of unanimity by the Hearing Panel on the issue of egregiousness somehow precludes the imposition of a bar. In any event, we find that our de novo review of sanctions alleviates any concerns regarding the Hearing Panel's split on the issue. *See Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *25 (May 13, 2011) (stating that

[Footnote continued on next page]

We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanctions for Xagoraris's violations.[22] We have also considered the Principal Considerations in Determining Sanctions.[23] Upon consideration of all the aggravating and mitigating factors in the record, we find that Xagoraris's misconduct was egregious and that a bar is an appropriate sanction. We find that a unitary sanction should be imposed for Xagoraris's suitability violations because they are similar in nature, both involving unsuitable sales of VUL policies to unsophisticated customers who could not afford them.

A. Sanctions for Xagoraris's Suitability Violations

The Guidelines for making unsuitable recommendations in violation of NASD Rule 2310 recommend a suspension of 10 business days to one year, and a longer suspension (of up to two years) or a bar in egregious cases.[24] The Guidelines also recommend consideration of a fine of $2,500 to $75,000, increased by adding the amount of a respondent's financial benefit.[25]

There are several significant aggravating factors associated with Xagoraris's violations of the suitability rule. First, we find it aggravating that both KM and RG were not sophisticated investors and KM lost money due to Xagoraris's unsuitable recommendations.[26] We also find it aggravating that Xagoraris's misconduct was intentional and he received commissions for the

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"[w]e have repeatedly held that the NAC reviews the Hearing Panel's decision de novo and has broad discretion to modify the Hearing Panel's decisions and sanctions").

22 *FINRA Sanction Guidelines* (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter "*Guidelines*"].

23 *Id.* at 6-7.

24 *Id.* at 94.

25 *Id.*

26 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 19); *id.* at 6 (Principal Considerations in Determining Sanctions, No. 11). RG potentially lost the premium payments on her VUL policy when she stopped making payments and forfeited the policy. Although the insurance carrier refunded RG's premiums, Xagoraris's misconduct put RG at risk of suffering this financial loss.

Xagoraris argues that the record does not support a finding that KM or RG was an unsophisticated investor because: (1) KM had taken classes at WG Securities to learn how to become a securities sales person; and (2) RG had experience as an angel investor for a start-up company and had successfully enforced a promissory note she received from this investment. This argument has no merit. Both KM and RG had little to no experience investing in securities generally or VUL policies in particular.

unsuitable sales.[27] We note that Xagoraris's unsuitable recommendations were independent violations. He had an obligation to each customer to consider their financial situation and he failed twice in this regard. Next, we find it aggravating that Xagoraris blames others for his misconduct.[28] For example, he blames his customers for his faulty recommendations, asserting that they either provided false financial information to him or did not disclose all of their assets when he was shaping his recommendations. In the case of KM, Xagoraris also blames WG Securities for not being able to detect that he had already sold KM a suitable $250,000 VUL policy and consequently failing to stop him from selling her the unsuitable $500,000 policy—even though he failed to disclose the $250,000 policy on forms he submitted to the Firm.[29]

In determining sanctions, we have also examined the record for potentially mitigating factors, and we find that there are none.[30] Overall, we find that Xagoraris's misconduct was egregious. We have carefully examined the record and crafted sanctions that are consistent with the Guidelines. Moreover, the bar serves to deter others from engaging in such egregious misconduct with customers.[31] Given the significant aggravating factors and lack of mitigating factors, the bar the Hearing Panel imposed is appropriately remedial.[32] Accordingly, we find that

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27 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13). Xagoraris took several deliberate steps to sell the unsuitable VUL policies to KM and RG, including completing forms with inaccurate financial information about his customers (i.e., the customers' income, net worth, and disposable income), and in KM's case, failing to disclose that she already had life insurance. As a result, he received a commission of $2,485.67 for the $500,000 VUL policy he sold to KM. He also received a commission of $1,278.90 for the $600,000 VUL policy he sold to RG. *See id.* (Principal Considerations in Determining Sanctions, No. 17). We find each of these factors to be aggravating.

28 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

29 *See id.* (Principal Considerations in Determining Sanctions, No. 10).

30 For example, we have considered, and do not find it mitigating that Xagoraris has no disciplinary history. The Commission has "repeatedly stated that a 'lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.'" *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *25 (Feb. 24, 2012) (quoting *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *43 (Sept. 16, 2011)). This conclusion applies to both Xagoraris's suitability violations as well as the other violations.

31 *See McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (stating that "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry").

32 *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *85-86 (Dec. 10, 2009) (upholding bar FINRA imposed where FINRA carefully considered the relevant Guidelines—as well as aggravating and mitigating factors).

a bar is an appropriate sanction for Xagoraris's violations. In light of the bar, we do not impose a fine.[33]

B. Sanctions for Xagoraris's Outside Business Activity and Misrepresentations to His Firm

As an initial matter, we agree with the Hearing Panel below that a unitary sanction is appropriate for Xagoraris's violations of NASD Rules 3030 and 2110 by engaging in an outside business activity without providing prompt written notice to his Firm, and for misrepresenting to the Firm that he had not received funds directly from a client in the form of a check payable to himself. Each of these violations stemmed from Xagoraris's failure to provide notice of his outside business activities and his subsequent attempts to conceal those activities.[34]

The Guidelines for outside business activities recommend consideration of a suspension of up to 30 business days when the outside business activity does not involve aggravating conduct. When the outside business activity involves aggravating conduct, the Guidelines recommend consideration of a suspension of up to one year. In egregious cases, including those involving significant injury to customers of the firm, the Guidelines recommend consideration of a longer suspension or a bar.[35]

In addition, the Guidelines recommend consideration of a fine of $2,500 to $50,000, which may be increased by the amount of the respondent's financial benefit.[36] Finally, the Principal Considerations applicable to outside business activities include: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to customers of the firm, and if so, the nature and extent of the injury; (3) the duration of the outside activity, the number of customers and the dollar volume of the sales; (4) whether the respondent's marketing and sale of the product or service could have created the

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[33] We do not agree with the Hearing Panel's decision to deny restitution to KM for the VUL policy. We can glean from the record the losses KM sustained from Xagoraris's unsuitable recommendation of the $500,000 VUL policy. KM paid an initial premium and two annual premiums for a total of $12,500. We order Xagoraris to pay this amount to KM in restitution. We further order that Xagoraris pay interest on these amounts at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). There is no issue of restitution for RG because she was made whole.

If Xagoraris cannot locate KM to pay restitution, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of KM's last known residence.

[34] *Guidelines*, at 4 (General Principles Applicable to All Sanctions Determinations No. 4).

[35] *Id.* at 13 (Guideline applicable to FINRA Rule 3270, the successor to NASD Rule 3030).

[36] *Id.*

impression that the employer (member firm) had approved the product or service; and (5) whether the respondent misled his or her employer firm about the existence of the outside activity or otherwise concealed the activity from the firm.[37]

Here, we find it aggravating that the outside business activity involved KM, who was a customer of WG Securities, and that she lost $1,500 because of Xagoraris's outside activity.[38] We also find it aggravating that Xagoraris withheld $70,000 for approximately 17 months from a customer who was already experiencing financial hardship and needed additional income.[39] In addition, we find it aggravating that Xagoraris concealed the existence of the outside activity by failing to disclose it on the Firm's compliance questionnaires and that the outside business activity violated the Firm's policies (which specifically identified real estate as a prohibited outside business activity).[40] Next, we find it aggravating that Xagoraris failed to disclose to WG Securities that he had received a check from a customer payable to himself.[41] In addition, when asked about the real estate investment by a WG Securities compliance examiner, Xagoraris falsely represented that KM had a legitimate deed of trust for half the Arizona property when she did not.[42]

We further find it aggravating that he benefitted financially from the transaction when he used the $70,000 and the rental income he received, but did not share the rental income with KM.[43] We find it aggravating that Xagoraris blames KM for her losses, claiming that she breached their agreement by forcing him to sell the property in less than three years.[44] We further find it aggravating that Xagoraris attempted to deceive KM and assuage her fears by providing her with a bogus deed of trust.[45] In addition, we find the fact that KM's investment of

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37 *See id.*

38 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 11). We order Xagoraris to repay $1,500 to KM based on a rescissionary measure of the harm he caused her. *See Dep't of Market Regulation v. Field*, Compl. No. CMS040202, 2006 NASD Discip. LEXIS 12, *52 (NASD OHO May 15, 2006), *rev'd in part*, 2008 FINRA Discip. LEXIS 63, *44 (FINRA NAC Sept. 23, 2008) (monetary sanctions eliminated based on narrow scope of relief from bankruptcy stay); *see also Guidelines*, at 4 ("Adjudicators may order that a respondent offer rescission to an injured party.").

39 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 11).

40 *See id.*

41 *See id.* (Principal Considerations in Determining Sanctions, No. 10).

42 *See id.*

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

44 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

$70,000 was a significant one—amounting to approximately 70% of all the equity she had pulled from her home—to be aggravating.[46]

In determining sanctions, we have also examined the record for potentially mitigating factors, and we find that there are none. For example, we do not find the fact that Xagoraris repaid KM $68,500 of her investment to be mitigating, particularly in light of the fact that he returned the funds only after KM made repeated oral and written requests, he withheld the funds for 17 months, he did not return all of her investment and he used her money but did not share any of the rental income with her. We also do not find it mitigating that he acknowledged his errors, as he acknowledged them only after they were detected. *See Mark F. Mizenko*, Exchange Act Release No. 52600, 2005 SEC LEXIS 2655, at *17 (Oct. 13, 2005) (stating that the respondent's acknowledgement of his misconduct "carries little weight because it came only after he was confronted by his employer with his wrongdoing").[47] In light of the egregiousness of his actions, we find that any expressions of remorse by Xagoraris do not militate against a bar either. *Cf. Mizenko*, 2005 SEC LEXIS 2655, at *18 (stating that "[t]he record indicates that [the respondent] cooperated with the . . . investigation, expressed contrition, and harmed no customers . . . [but] [t]hese factors, although relevant to the determination of what sanctions are appropriate, do not counterbalance the egregiousness of [the respondent's] conduct").

After considering all of these factors, we find that Xagoraris's participation in an outside business activity without providing written notice to his Firm and the related misrepresentations to his Firm was egregious. Accordingly, we bar him in all capacities for this misconduct. In light of the bar, we do not impose a fine.

[Cont'd]

45 *See id.* (Principal Considerations in Determining Sanctions, No. 10).

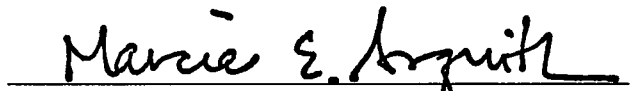
46 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 18).

47 We also reject Xagoraris's argument that we should consider it mitigating that WG Securities disciplined him prior to FINRA detecting his misconduct. The Firm disciplined him on August 5, 2008. According to Xagoraris's Central Registration Depository ("CRD"®) report, FINRA had been alerted to both KM's and RG's complaints of Xagoraris's misconduct as early as June 23, 2008. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 14) (stating that adjudicators should consider "whether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct *prior to regulatory detection*" (emphasis added)).

VI. Conclusion

We find that Xagoraris violated NASD Rules 2310 and 2110 by making unsuitable recommendations to two customers. For these violations, we bar Xagoraris in all capacities. We further find that Xagoraris violated NASD Rules 3030 and 2110 by engaging in outside business activities without providing prompt written notice to his Firm, and making misrepresentations to his Firm. For these violations we impose a separate bar in all capacities against Xagoraris. We order Xagoraris to pay KM a total of $14,000 in restitution. In light of the bars, however, we do not impose a fine. Finally, we affirm the Hearing Panel's order that Xagoraris pay hearing costs of $6,325, and we impose appeal costs of $1,185.69 (consisting of a $750 administrative fee and $435.69 in transcript costs).[48]

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

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[48] The bars are effective as of the date of this decision. We have considered and reject without discussion all other arguments advanced by the parties.