FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. AUDRA LYNN LALLEY (CRD No. 3107785), Respondent.	Disciplinary Proceeding No. 2011030072301 Hearing Officer–MC **HEARING PANEL DECISION** June 26, 2015

Respondent executed unauthorized trades, in violation of FINRA Rule 2010, and sent communications to a customer that were not fair and balanced, in violation of NASD Rules 2210(d)(1)(A), 2210(d)(1)(D), IM 2210-1(1), and FINRA Rule 2010. For these violations, this Decision will serve as a Letter of Caution. Respondent is assessed costs.

Appearances

Noel Downey, Esq., Woodbridge, New Jersey, Payne Templeton, Esq., Los Angeles, California, for the Department of Enforcement.

Michael L. Mallow, Esq., Loeb & Loeb, Santa Monica, California, and Michael A. Thurman, Thurman Legal, Pasadena, California, for Respondent Audra Lynn Lalley.

DECISION

I. Background

In September 2011, Respondent Audra Lynn Lalley, a registered representative working in the Private Wealth Management group of Morgan Stanley Smith Barney (Morgan Stanley or the "Firm") in Los Angeles, effected a set of trades pursuing a particular investment strategy for a group of her clients. For YK, one customer in the group, she sold securities on September 7 from his two accounts. Then, on September 13, she purchased different securities for the two accounts.

In an e-mail on September 13, YK protested the sales, complaining about the transaction costs and asking for an explanation of the trades. He also stated that he had not been contacted prior to the transactions and that he did not want to trade with the market at such a low point. But after a lengthy conversation with Lalley, YK decided to keep the trades.

In October 2011, when the value of these securities fell, YK renewed his complaint, explicitly stating that the trades had been unauthorized. He directed Lalley to close the accounts, and asked her to provide him with her supervisor's contact information. Lalley sent YK an e-mail and attached a spreadsheet with projections showing the potential gain to YK's accounts if he kept the trades. YK replied that he wanted the trades reversed.

On October 6, 2011, Lalley informed her branch administration manager that YK wanted to reverse the trades. Lalley said that she believed she had spoken to YK prior to executing the trades but was unable to confirm that. Nonetheless, Morgan Stanley reversed the trades and took no action against Lalley. But about a month later, when Lalley resigned her position with Morgan Stanley to work for another firm,[1] Morgan Stanley filed a Uniform Termination Notice for Securities Industry Registration (Form U5) stating that Lalley was under internal review for unauthorized transactions when she resigned.

The Form U5 triggered a FINRA investigation. Enforcement interviewed YK twice but did not ask him if he authorized the trades. YK refused to cooperate with the investigation. Nevertheless, Enforcement instituted this disciplinary proceeding, charging Lalley with unauthorized trading and sending communications that were not fair and balanced to YK.[2]

A. Complaint and Answer

The Complaint's first cause of action charges Lalley with violating FINRA Rule 2010 by failing to obtain authorization from YK before executing the sales and purchases of securities in his accounts. The second cause charges her with violating provisions of NASD Rule 2210 and IM-2210, governing communications with the public, and thereby also violating FINRA Rule 2010, when she sent YK the e-mail and spreadsheet showing the potential gain he might receive by leaving undisturbed the trading she had done on his behalf. The Complaint alleges that the information in the spreadsheet was not fair and balanced, did not provide a sound basis for evaluating the trades at issue, and contained improper price projections.

In her Answer, Lalley denies that the transactions were unauthorized, and denies that her e-mail to YK and the spreadsheet she attached violated the applicable rules concerning communications with the public.

---

[1] Lalley remained registered with her new firm until it terminated her employment on April 14, 2014, after Enforcement filed the original Complaint in this proceeding. Hearing Transcript ("Tr. __") 535. Lalley continued to be registered through a subsequent employer where she remained until September 9, 2014. Lalley has not been employed by any member firm since then. She remains subject to FINRA's jurisdiction for the purposes of this disciplinary proceeding, however, pursuant to Article V, Section 4 of FINRA's By-Laws because she was a registered person when the alleged misconduct occurred and when the Complaint was filed.

[2] Enforcement filed its Complaint on January 30, 2014. Lalley filed an Answer with a motion for a more definite statement on February 27, 2014. Prompted by the motion, on April 24, 2014, Enforcement filed a motion to amend the Complaint. The amended Complaint modified the allegations in the second cause of action by providing additional details, omitting some allegations, and withdrawing one alleged rule violation. The Hearing Officer granted Enforcement's motion on May 13, 2014. Lalley filed her Answer to the Amended Complaint on June 9, 2014. References in the text of this Decision to the Complaint and Answer are to the amended Complaint and the Answer to the Amended Complaint.

B. Summary of Findings

For the reasons given below, the Hearing Panel concludes that Lalley did not obtain authorization from YK before effecting the trades and that she therefore violated FINRA Rule 2010. The Panel also concludes that the spreadsheet Lalley sent to YK contained information that was not fair and balanced as required by NASD Rule 2210, IM-2210, and FINRA Rule 2010. For each violation, the Panel concludes that a Letter of Caution is sufficient to accomplish the remedial objectives called for by FINRA's Sanction Guidelines.

II. Facts

A. Lalley's Background

In 1998, after completing college and earning a Master of Business Administration specializing in finance and accounting, Lalley joined member firm Goldman, Sachs & Co.'s Private Wealth Management group. She underwent a year of training in New York before working with clients at Goldman's Los Angeles office. In 2002, Lalley left Goldman to join Morgan Stanley's Private Wealth Management group, also in Los Angeles.[3] By September 2011, Lalley had worked there for approximately nine years. She held Series 7, 63, and 65 registrations.[4]

In Morgan Stanley's Private Wealth Management group, Lalley devoted her energy to "management of the assets and providing advice" to approximately 35 "ultra high net worth families." Lalley explained that, compared with traditional retail brokers, she had fewer clients with larger accounts. She provided customized services to her clients, advising them on allocation of resources in investments, estate planning, taxes, and philanthropic giving.[5]

In 2005, Lalley only accepted accounts with a minimum aggregate value of $5 million. That year, however, Lalley made an exception at the request of long-time clients GK and EK, a wealthy married couple residing in India. GK and EK became her clients in 1999 when Lalley was associated with Goldman, and they transferred their accounts to Morgan Stanley when she moved there. Over a 12-year period, Lalley developed a close relationship with GK and EK. They spoke by telephone two or three times a week and met from time to time in various cities in California, as well as in France and Canada.[6]

B. Customer YK

In 2005, GK was concerned that his brother, YK, was not receiving good investment advice. Consequently, GK asked Lalley for a favor: to accept YK as a client and help him manage his family's assets. Even though the total value of those assets was "far below" Lalley's

---

[3] Tr. 485-86.

[4] Tr. 488.

[5] Tr. 486-89.

[6] Tr. 489-90.

Lalley an e-mail questioning recent trades in which the stocks sold appreciated in value and the stocks purchased declined. He also expressed displeasure over the $150 transaction costs.[17]

C. The "Best Ideas" Strategy

In September 2011 Lalley pursued what she called the "Best Ideas" strategy for some of her 35 clients.[18] The strategy was to sell underperforming securities from customer accounts and to replace them with stocks on Morgan Stanley's "Best Ideas" list, a group of stocks the Firm's research indicated might perform more favorably than the market in general in the next two or three quarters.[19]

On behalf of YK, on September 7, 2011, in what Lalley characterizes as a "single portfolio rebalancing strategy," Lalley sold five stock positions from the joint account of YK and his spouse, and six stock positions from YK's IRA account. Her purpose was to replace them with stocks on the Firm's Best Ideas list. After the sales cleared, Lalley made five purchases in the joint account, and six in YK's IRA account.[20]

The sales on September 7 yielded approximately $112,983. The purchases on September 13 cost YK $118,931. The 22 transactions yielded commissions of $2,985, and YK paid $5,947.71 more for the purchases than he earned from the sales.[21]

Lalley had authority to exercise discretion for some of her clients, but not for YK.[22] Before employing the strategy, Lalley spoke to and obtained approval from the seven to ten customers for whom she did not have discretion.[23] One of those she spoke to was YK's brother, GK.[24]

Although Lalley strongly believes that she spoke with YK, she has no specific memory of the call and therefore cannot say that they discussed each of the individual trades.[25] Lalley testified that she made a number of "similar buys and similar sells around the dates of September 7 and September 13."[26] She testified that the transactions involved "allocation of one or more executions to multiple customers."[27] According to her, it was a busy time during a year

---

[17] Tr. 503-04; CX-18, at 2.

[18] Tr. 411-12, 435-36.

[19] Tr. 481, 532-33; Answer ("Ans.") ¶ 47.

[20] Complaint ("Compl.") ¶¶ 26-29; Ans. ¶¶ 26-29; CX-5.

[21] Tr. 221; CX-5.

[22] Tr. 421, 452, 541-42.

[23] Tr. 412.

[24] Tr. 436.

[25] Tr. 413.

[26] Tr. 438-39.

[27] Tr. 456-57.

$5 million minimum, Lalley met initially with GK and YK together, then with YK alone.[7] Lalley agreed to accommodate GK and accept YK as a client.[8] She also agreed to charge YK fees at the same rate that she charged GK.[9]

In early December 2005, Lalley opened a joint account for YK and his wife and an IRA for YK alone.[10] Even though Lalley asked several times to speak with YK's wife, she only had contact with YK.[11]

YK was 54 years old at the time. He was a broadband communications engineer. On his account documents, he indicated that his annual income was $150,000, his net worth was $1 million, and his liquid net worth was $300,000. He also indicated that he had 20 years of investment experience in equities and bonds.[12]

Lalley described YK as "intense and prone to excitability." He complained on several occasions, chiefly about costs, stating that he felt he had too few trades to justify the fees he was charged. Lalley testified that YK "was very keen on making sure that he wasn't being charged more than his brother;" and that even though his accounts were smaller, he wanted Lalley to provide him with the same level of service that she provided his brother.[13]

YK brought up the subject of fees repeatedly. Lalley explained that YK could elect to pay commissions on transactions instead of their original agreed-upon fees on assets under management, but that if he did, the commission charges could be higher because the Firm charged a minimum of $150 per transaction. Notwithstanding, YK changed to commission-based billing in 2007.[14]

According to Lalley, YK often changed his mind after they discussed and made decisions about asset allocations.[15] For example, in October 2007, YK told Lalley that he wanted to place almost all of his funds in Chinese investments. Lalley advised against it, explaining the benefits of diversification and the risks of concentration. They did increase his position in Chinese investments, but not as much as he had originally requested. Five weeks later, YK wrote Lalley expressing concern that the value of Chinese investments was declining and asking if they should reduce the portion of his funds invested in them.[16] For another example, in April 2011, YK sent

---

[7] Respondent's Exhibit ("RX-__") 1; Tr. 489, 492.

[8] Tr. 403.

[9] Tr. 493.

[10] Tr. 490-92; RX-1; RX-2.

[11] Tr. 492.

[12] RX-1; Tr. 491.

[13] Tr. 493-94.

[14] Tr. 494-95.

[15] Tr. 495.

[16] Tr. 499-502; CX-15, at 1.

made difficult because the markets were "trending down."[28] There were "a lot of phone calls and a lot of people, a lot of transactions" and she does not have a "specific recollection" of the individual calls, but testified that YK was in the group of clients she called.[29] She has stated consistently, in response to a Rule 8210 request during FINRA's investigation and at the hearing, that throughout her career she has made certain to obtain authorization before trading on behalf of clients and therefore she believes that she spoke with YK by phone.[30]

D. YK's Complaint to Lalley

On September 13, 2011, Lalley made the purchases in YK's accounts. Sometime that day, YK apparently received notice of the September 7 sales from his IRA account because late that night, at 11:05 p.m., he complained in an e-mail bearing the subject line "Transactions?":

> I received in the mail notification of 6 transactions, charged $150 each. I would like to know the reason behind them, since I was neither contacted about them nor intended to have any when the markets are so low. When we talked several months ago you requested approval for investments and indicated my account was set up for no cost. When I checked after some time, I noticed that there were many transactions, each charged $150, a high cost relative to the amount. This in addition to the investments losing money relative to the previous ones. I would like to understand what happened, and make sure no transactions are carried out without my involvement and decision on whether it is worth splitting the portfolio into so many investments that end up with such high cost.[31]

Early the following afternoon, Lalley replied by e-mail stating that she had tried unsuccessfully to respond to YK by phone. She gave him her cell phone number and a good time for him to call her. Lalley wrote that she had tried to charge "less than the $150" minimum charge per transaction. She also explained that the sales moved him out of investments "that no longer seem[ed] to have potential," and the purchases moved him "into stocks that we believe have very strong potential."[32] On September 15, 2011, in a phone call that lasted about 45 minutes, they discussed both sets of trades, and YK decided to keep them.[33]

However, YK's account immediately began to decline in value.[34] On October 4, 2011, just after 10:00 a.m., he sent an e-mail announcing that he wished to close his accounts and

---

[28] Tr. 413, 439.

[29] Tr. 411-13.

[30] CX-26, at 1; Tr. 429, 435-37.

[31] CX-6.

[32] *Id.*

[33] *Id.*; Tr. 459-60.

[34] Tr. 460.

E. Lalley's Spreadsheet and the E-mail to YK

Upon returning to her office, Lalley prepared a spreadsheet and attached it to an e-mail she sent to YK. Consistent with the Firm's procedures, Lalley converted the Excel spreadsheet to a PowerPoint document.[44]

In the e-mail, Lalley wrote, "You asked about my methodology in making the trades." She explained that the stocks she sold "were those that were removed from the Best Ideas list." It pointed out that the stocks she purchased "were those with greater yields on average than those sold, and ... were added to the Best Ideas list" and to another list "composed by our research team."[45] She summarized why the trades benefited YK:

> The bottom line: If the trades had not been done in either account (commissions not charged, losses incurred on stocks not sold, losses not incurred on stocks purchased), you would be better off by $9,303.60. If you keep the trades as they are in both accounts, and if the price targets on those stocks are reached, you will get benefit by $41,348.60.[46]

The spreadsheet listed the symbol of the stocks that Lalley sold and purchased on behalf of YK. It showed the number of shares; price at the time of the transactions; the commission; the current price as of October 5, 2011; the difference in value if he had not sold; the yield; a summary of "street" research views of the company; the "street" target price; the Morgan Stanley research recommendation and price target; the growth required to reach the Morgan Stanley price target; and the gain if the stock price reached that target.[47]

Lalley's spreadsheet was not a Morgan Stanley-approved document. However, it referred to the Firm and Firm-approved research reports, and the price targets for the specific securities were taken from the research reports.[48] The research reports contained standard language regarding "Potential Risks" associated with the recommended securities.[49]

Morgan Stanley required e-mail attachments to be submitted for approval before being sent to clients. Lalley did not submit the spreadsheet. She explained that YK's e-mails expressed "escalating urgency," requiring a quick response, and it was almost 8:00 p.m. Pacific Time when she finished preparing the spreadsheet. Lalley testified that "[t]here was no way to get it approved" at that late hour before sending it. Besides, she testified, she believed there was a

---

[44] Lalley explained the purpose of the requirement was to prevent recipients from manipulating the data on the spreadsheet. Tr. 475.

[45] CX-23, at 1.

[46] CX-23, at 1.

[47] CX-23.

[48] Tr. 478-79.

[49] *E.g.*, CX-74, at 2.

directing Lalley not to "perform any transactions" in them. He also asked Lalley to give him her manager's name, phone number, and e-mail address.[35]

Approximately 20 minutes later, Lalley responded with an e-mail assuring YK that she would "not take any action" in the accounts unless he directed her to. She also asked to speak with him.[36] In what she described at the hearing as an "oversight" and "mistake," Lalley did not provide YK with her manager's contact information as he had asked.[37]

YK and Lalley talked twice before noon on October 4, for a total of approximately 18 minutes.[38] According to Lalley, YK was "upset about the markets declining ... [and] he was mad" about the $150 transaction costs. Lalley suggested to YK that it might be possible to reverse the trades although she was uncertain that this option was available. YK said that he wanted them reversed. Lalley testified that she does not remember whether during the calls YK complained that the trades were unauthorized.[39] However, she testified that at some point she told YK that an allegation of unauthorized trading was serious.[40]

The following day YK sent another e-mail demanding that Lalley either confirm that the transactions were reversed or provide her manager's contact information. This time, he clearly asserted that the trades were unauthorized:

> Yesterday before noon you asked for 24 hours to find out how you can reverse the unauthorized transactions. That time has passed and I have not heard from you. As I told you over the phone, I am not seeking to damage your career, but I am not willing to suffer the significant losses resulting from those transactions, or any charges to my account after 9/1/11. I expect a quick response on whether transactions are reversed or the requested contact info.[41]

Responded replied that she had meetings with clients that day but would respond as soon as she had gathered the necessary information.[42] Lalley recalls that it was an "extremely busy" time, that she had client meetings out of the office, and that "it was very difficult to get back to the office."[43]

---

[35] CX-20.

[36] CX-21.

[37] Tr. 462-63.

[38] Tr. 465.

[39] Tr. 467-69.

[40] Tr. 463.

[41] CX-22.

[42] CX-22, at 2.

[43] Tr. 466.

mechanism in place for obtaining approval after the fact when necessary.[50] Lalley assumed that the Firm would review the spreadsheet, based upon her understanding that all attachments to outgoing e-mail were automatically reviewed by Morgan Stanley's systems.[51]

Lalley testified that the purposes of the spreadsheet and e-mail were "to describe the transactions in detail and to show [YK] what the ramifications would be for him if he kept the trades and what the ramifications would be if he had the trades reversed."[52] The spreadsheet was "for his consideration, not to make him keep the trades, not to make him decide to reverse the trades," although she "believed it was in his benefit [sic], based on the recommendations of [her] firm, that he keep these trades."[53] In Lalley's words, the e-mail was "simply a presentation of what was done already."[54]

The e-mail and spreadsheet contained no language warning of potential conflicts of interest similar to those in the Firm's research reports, no time frame for the achievement of the target price and gain, and no discussion of risks and benefits associated with each stock.[55] However, Lalley contends that she did incorporate the Firm's "boilerplate disclosures" of risk the Firm required on any outgoing correspondence.[56] The e-mail and spreadsheet produced by Morgan Stanley and in evidence contain no such disclosures.[57] However, Morgan Stanley did not produce a duplicate of the originals and thus the documents might not accurately show what Lalley composed and sent YK.[58]

Lalley informed YK that she was going to be in San Diego the following week and that she would like to meet with him to discuss the matter and "strategy in general."[59]

F. YK's Response to Lalley's E-mail

A little more than an hour after Lalley sent the e-mail to YK, he replied that he would be unable to meet with her in San Diego. In addition, he disagreed with the calculations on her spreadsheet, adding that he did not think there was "much point in getting into a discussion over the losses resulting from unauthorized transactions." He noted that the issue of losses would be

---

[50] Lalley testified that she did not submit the e-mail and spreadsheet for approval the following day because by then the trades were reversed and the communications with YK became irrelevant. Tr. 476-77.

[51] Tr. 477.

[52] Tr. 474.

[53] Tr. 476.

[54] Tr. 482.

[55] Tr. 200-01, 478-82.

[56] Tr. 520-21.

[57] CX-23; Tr. 255-58.

[58] Tr. 316-17, 384-85.

[59] CX-23.

"irrelevant" if the trades were reversed; told her that he had lost faith in her; and again asserted that the trades were unauthorized:

> Relationships between a broker and a customer are built on trust. I lost this trust and made my decision not to stay with Morgan Stanley. If I am stuck with any losses as a result of the unauthorized transactions, I will take necessary actions to get proper compensation .... [I] would appreciate your response no later than tomorrow on if and when.[60]

G. Lalley's Disclosure to Morgan Stanley

The next day, October 6, 2011, after the markets closed, Lalley went to her immediate supervisor and branch office administration manager, Sophie Cross,[61] to request approval to reverse YK's trades. Because it did not appear to Cross that this was "your basic cancel and correct" problem, Cross decided that they should confer with Susan Tout, the regional administration manager to whom Cross reported.[62]

Tout testified that Cross and Lalley came to see her about what they called a trade error. After speaking to Cross and Lalley, Tout concluded that the client was upset because of the commissions he paid and because the securities Lalley had purchased had declined in value, and that he wanted to cancel the trades. It sounded to Tout like the client had agreed to an order and later changed his mind—a "client renege"—as opposed to an error by Lalley or Morgan Stanley, which the Firm would have to correct. So Tout asked Lalley if she had spoken to YK prior to placing the orders. Tout recalled that Lalley replied that she "was sure she did, since these were not discretionary accounts," but that YK was now "denying that they had spoken."[63] Tout suggested they check the Firm's phone logs, a computerized record of calls made to and from brokers' desk phones, to confirm that there were calls. But when Tout, Cross, and Lalley checked the phone logs, they found no record of calls on September 7 and 13 between Lalley and YK on her desk phone.[64]

Tout recalls that Lalley then asked how the Firm would handle a client renege. Tout explained to Lalley that if the client had changed his mind on a valid order to buy the stock, Lalley would not be able to use the Firm's error account to cancel the trade, but would have to sell the stock from the client's account, and any losses would be borne by YK.[65] Lalley then

---

[60] CX-24, at 2.

[61] Tr. 135. Cross's responsibilities included reviewing trades and reviewing requests to designate trades as errors. Tr. 136.

[62] Tr. 46, 135, 141.

[63] Tr. 59-62; CX-14.

[64] Tr. 63-64.

[65] Tr. 64-65, 152-53.

"asked if she could just take the error, since this client was the brother of a client with a much larger account, and she feared the brother might close his account." Tout said no.[66]

In a memorandum Tout prepared on October 10, 2011, she wrote that Lalley had said she "didn't want this to be turned into a bigger deal than it needed it [sic] to be." Lalley said she would call YK to work things out. Tout wanted to listen in on the conversation. According to Tout, Lalley at first did not want Tout to listen to the call, but agreed when Tout explained that this "seemed like a 'he said/she said' situation" and that it would be better to have a third party listening.[67]

Tout waited in her office to be linked to the call.[68] Instead, Lalley returned to Tout's office and said "perhaps she might not have spoken with the client about the trades, after all." Lalley said that the phone logs showed that she spoke with YK's brother on September 7, the day she sold stock from both YK's and his brother's accounts, and that she and YK had a conversation on September 15, after the purchases.[69]

Tout told Lalley that she "appreciated her honesty ... for expressing ... that she was no longer confident that she had spoken to the client." Tout then told Lalley that they would treat it as "a trade error."[70] Tout directed Lalley to reverse the trades the next morning.[71] Tout also told Lalley that because the "error resulted from possible unauthorized discretion, [Tout] would need to speak with ... Legal & Compliance."[72]

Later that afternoon, Lalley informed YK that the trades would be reversed the following day. That night, YK wrote to thank Lalley "for the forthcoming reversal."[73]

The next day, October 7, under Tout's supervision, Lalley reversed the trades.[74] Lalley prepared and signed a Morgan Stanley form interoffice memorandum, an "Error Control Form." Lalley typed an explanation: "The client says he did not agree to the trades. I think this is incorrect. He was upset about the commission on trades. We agreed that he will transfer his accounts." Tout wrote additionally that the amount of the error was $1,199.83, and that the

---

[66] CX-14.

[67] Tr. 65; CX-14.

[68] Tr. 66.

[69] CX-14.

[70] Tr. 67

[71] CX-14.

[72] CX-14.

[73] CX-24, at 1.

[74] Tr. 68-69.

matter was "[e]scalated to special investigations for review of alleged unauthorized trading." Both Tout and Lalley signed the form.[75]

H. Morgan Stanley's Review

Tout did not follow Morgan Stanley's procedures for handling customer complaints. The procedures required Tout as supervisor to submit all complaints through the Firm's Customer Complaint Intake System within 48 hours; to acknowledge oral complaints and written complaints within certain time limits; and to process any credits or "other monetary compensation" given to a client through the Firm's Client Litigation Unit or Client Correspondence Department.[76] When asked why she did not follow these procedures, Tout testified that she "wasn't sure" that this matter "was a complaint at all."[77] Tout never contacted YK, and she does not know if the Firm did.[78]

The Firm's procedures also required Tout to obtain approval from the Client Litigation Unit before resorting to Morgan Stanley's error account to resolve a client claim. When asked if she did so before YK's trades were reversed, Tout testified, "I don't know. I don't think so."[79]

Morgan Stanley's special investigations department investigated the matter.[80] Tout testified that her role was to answer questions and provide documentation requested by the investigator. However, she did not collect the e-mail correspondence between YK and Lalley, and she could not recall if she gathered documents related to YK's accounts.[81] Nor did she recall asking Lalley if she had retained e-mail correspondence with YK. Tout also could not recall asking Lalley for any files related to YK or looking through Lalley's file cabinets after Lalley resigned.[82]

On October 12, 2011, Lalley met with the Morgan Stanley lawyer who was investigating the matter. Tout and the branch administration manager were also present.[83] Morgan Stanley did not reprimand Lalley in writing, threaten her with discipline, or charge her any of the costs

---

[75] CX-54.

[76] CX-30, at 2, 7-11.

[77] CX-30; Tr. 96-98.

[78] Tr. 99-100.

[79] CX-30, at 12; Tr. 100-02.

[80] Tr. 82-83.

[81] Tr. 83-84.

[82] Tr. 85-87. Tout testified initially that she did not recall checking to see if the Firm's e-mail monitoring system had flagged any of Lalley's e-mails with YK on October 6. Tr. 91-92. Later she testified that she did check the system, but cannot recall the date she did so. Tr. 107-08.

[83] Tr. 523-24.

incurred in reversing YK's trades. Morgan Stanley did not penalize Lalley in any way for her handling of YK's accounts.[84]

I. Lalley's Resignation and the Firm's Form U5

On November 1, 2011, Lalley resigned her position with Morgan Stanley to take a new job with another firm.[85] She testified that her resignation was unrelated to the YK matter and that she had been exploring other employment opportunities for some time. Early in 2011, she had offers from three other firms, and the firm she joined had made an initial offer to her in the summer of 2011, before her trades on behalf of YK. [86]

On November 10, 2011, Morgan Stanley filed a Form U5. Although the Firm had taken no action against Lalley while she was employed at Morgan Stanley, the Form U5 stated that Lalley resigned while under internal review for unauthorized transactions. The Form U5 described the Firm's review:

> On or about October 6, 2011, a firm client verbally complained to Ms. Lalley that she had sold and then purchased securities in his account ... without his authorization. The client requested that the firm repurchase the shares that were sold in his account ... and sell the shares that were purchased in his account .... Without admitting liability, and as a courtesy to the client, the firm fulfilled the client's request on October 7, 2011, and also reimbursed the client's account for any market losses. Ms. Lalley maintained that the client authorized the trades at issue, although she could not recall the specific conversation with the client. In light of Ms. Lalley's voluntary departure to work for another broker-dealer, and the fact that the client's inquiry was resolved, the firm concluded its internal investigation of this matter.[87]

J. FINRA's Investigation

On the Form U5, Morgan Stanley checked "Yes" to answer the question asking whether Lalley was under investigation by the Firm when she resigned.[88] According to Robin Bednarski, a FINRA examiner, the "yes" answer on the Form U5 prompted FINRA's investigation.[89]

---

[84] Tr. 524.

[85] Lalley remained registered while employed at the new firm. That firm terminated her employment on April 14, 2014, after Enforcement filed the original Complaint in this proceeding. Tr. 535-36.

[86] Tr. 526-28.

[87] CX-1, at 5.

[88] CX-1, at 3.

[89] Tr. 205-06.

1. FINRA's Interviews of YK

In the course of the investigation, FINRA examiners interviewed YK twice. They first spoke with him on February 14, 2012. They explained the purpose of FINRA's regulatory review and the possibility of instituting a disciplinary action if they found violations. Bednarski's notes of the interview state that YK "believes it was a mistake - does not want to see further punishment. [D]oes not want to cooperate further."[90]

Examiners contacted YK again on November 12, 2012. YK said he was unable to speak because he was traveling.[91] When they finally talked to YK on November 20, the interview lasted nine minutes. YK said that the trades had been reversed and that cooperating further would provide no benefit to him. Although the examiners "explained again our mission and why we investigate broker misconduct," YK "still politely declined to cooperate."[92]

In the interviews, Bednarski did not ask YK whether he had authorized Lalley's trades.[93]

2. Morgan Stanley's Responses to FINRA's Document Requests

FINRA issued its first request for Morgan Stanley to produce documents on November 22, 2011. It asked the Firm to produce, among other documents, copies of any statements Lalley made prior to resigning. Bednarski testified that she thought that Lalley's error control memorandum, which contained a signed narrative statement, should have been produced in response to this request. But it was not produced until December 2013, more than two years later and after at least six additional document requests.[94]

FINRA asked Morgan Stanley for a copy of the e-mail and spreadsheet Lalley sent to YK. Morgan Stanley produced them in electronic format, but the e-mail and spreadsheet produced were not duplicates of the originals. FINRA did not request and Morgan Stanley did not produce them in native format. This is significant because Lalley testified that the spreadsheet she sent to YK had contained the Firm's standard boilerplate disclosures of risks, and the version Enforcement presented at hearing did not contain them.[95] Thus, the Hearing Panel cannot determine whether Lalley did or did not include boilerplate disclosures.

---

[90] CX-65, at 1; Tr. 294-95.

[91] Tr. 296-97; CX-67.

[92] CX-65, at 2; Tr. 298-99.

[93] Tr. 375-76.

[94] Tr. 301-03; CX-12.

[95] Tr. 521; CX-23.

III. Discussion

A. The First Cause of Action

1. Unauthorized Trading

Unauthorized trading has been described as executing transactions on behalf of a customer that the customer has not authorized.[96] There is no dispute that, generally, executing trades for a customer without authorization constitutes "a serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade," going to "the heart of the trustworthiness of a securities professional."[97]

Lalley recognizes this, as reflected in her candid testimony during Enforcement's questioning at the hearing when she said: "I am not saying I didn't do anything wrong. I have done a lot of things wrong in my career ..., but I have not traded without authorization. I don't do that. I can't do that in my position."[98]

Proof of unauthorized trading often comes from the testimony of customers. As the National Adjudicatory Council has observed, "a customer's testimony alone if credible, is sufficient to establish unauthorized trading."[99] Unfortunately, such testimony is unavailable here.

Although YK agreed to speak with Enforcement twice, he refused to cooperate further. Therefore Enforcement's proof that Lalley engaged in unauthorized trading is grounded in YK's e-mails to Lalley, Lalley's "admission that she may have forgotten to call [YK],"[100] and the absence of evidence that Lalley spoke with YK on her desk phone on the days of the trades.

2. Lalley's Arguments

Lalley argues that Enforcement's case is deficient because Enforcement failed to produce YK as a witness.[101] The Panel disagrees. While it is unfortunate that the Hearing Panel did not have the benefit of YK's testimony, this was beyond Enforcement's control. It is also unfortunate that, in its two interviews with YK, Enforcement did not ask if he had authorized the trades.

---

[96] *See* NASD IM-2310-2(b)(4)(iii), still in effect when Lalley executed the trades for YK. Although IM-2310-2 was subsequently superseded by FINRA Rule 2111, which does not refer to unauthorized trading, the change did not alter the "well-settled" principle that "unauthorized trading violates just and equitable principles of trade" and therefore violates FINRA Rule 2010. Securities and Exchange Commission Release No. 34-62718A, 2010 SEC LEXIS 2759 (Aug. 20, 2010).

[97] *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (internal quotations omitted).

[98] Tr. 429.

[99] *Dep't of Enforcement v. Wilson*, No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *25 (NAC Dec. 28, 2011), citing *Dist. Bus. Conduct Comm. v. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22, *21 and n.6 (NAC June 15, 1999).

[100] Enforcement's Post-Hr'g Br. at 7-8.

[101] Respondent's Post-Hr'g Br. at 2.

Enforcement could have done so. It would have been helpful to the Panel to know whether YK maintained or retracted his claim that the trades were unauthorized. But YK's e-mails establish that he believed the trades were unauthorized.

Lalley also challenges Enforcement's contention that Lalley's failure to contradict YK's first complaint of unauthorized trading in his September 13, 2011 e-mail is evidence that the trades were unauthorized.[102] Lalley argues that Enforcement's claim is unfounded because YK's e-mail "did not accuse [her] of unauthorized trading."[103] But in the e-mail, YK wrote that he had not been contacted about the trades and he wanted to "make sure no transactions are carried out without my involvement and decision,"[104] implying that the trades were unauthorized. And YK's October 5 e-mails made the complaint explicit when referred twice to "unauthorized transactions."[105] While YK was concerned about the $150 transaction costs, he clearly did not believe he had approved the trades.

Lalley criticizes the phone log evidence, contending that there are "no phone records ... to show the absence of a call to [YK]" on the crucial dates.[106] Contrary to Lalley's argument, the absence of evidence that Lalley spoke with YK on her desk phone on the days of the trades supports the unauthorized trading charge. Lalley testified that she made a number of calls in pursuing the Best Ideas strategy, and the phone log shows that she spoke with YK's brother on September 7. On October 6, 2011, close in time to the trades, when Lalley and Tout tried and failed to find records of calls with YK, Lalley said nothing to suggest that she may have used another phone to call YK. Indeed, Lalley specifically testified about speaking to YK on one occasion using a conference room phone to discuss his unauthorized trading complaint—a conversation she did not want to have within earshot of her colleagues.[107] Her testimony suggests that a routine call to a client to obtain approval to effect a trading strategy is a call she would have made from her desk phone.

3. Conclusions

The Hearing Panel concludes that Lalley mistakenly made the unauthorized trades. Lalley's testimony reflects a sincere belief that she spoke with YK before trading on his behalf because it has been her consistent practice to speak with clients with nondiscretionary accounts. We also note that when Enforcement initially interviewed YK, he described the matter as a mistake.

---

[102] Enforcement's Post-Hr'g Br. at 10.

[103] Respondent's Post-Hr'g Br. at 5.

[104] CX-6.

[105] CX-9, at 2; CX-22, at 1.

[106] Respondent's Post-Hr'g Br. at 8.

[107] Tr. 514-15. Lalley testified this was not a conversation she wished to "have from the trading floor" and thereby "share with colleagues." She testified that at her desk on the trading floor her colleagues were well within earshot, as she "sat probably 3 feet, nose to nose, from the person across from me, and if I had reached out my arm on either side, and the person on those sides did the same, we would have touched." Tr. 516.

But, as the Parties agree, scienter is not a required element of proof to establish an unauthorized trade in violation of FINRA Rule 2010.[108] As FINRA's National Adjudicatory Council has noted, there are many cases in which a registered representative under certain circumstances believed "honestly but mistakenly that he or she was authorized to trade" but nonetheless the trading was unauthorized and violative of FINRA rules.[109] Thus, despite Lalley's argument to the contrary,[110] whether or not she had a good faith belief that she had spoken to YK, if she executed the trades without authorization, she violated FINRA Rule 2010.

The Hearing Panel has carefully considered the exhibits in evidence, the testimony of the witnesses and their credibility, as well as the arguments of the Parties, in its effort to reach a fair and accurate resolution of the issues. The Hearing Panel concludes that Enforcement has met its burden of proving by a preponderance of the evidence that Lalley's September 7 and 13, 2011 trades on behalf of YK were unauthorized, as alleged in the first cause of action, and that Lalley therefore violated FINRA Rule 2010.[111]

B. The Second Cause of Action

1. Improper Communications with the Public

NASD Rule 2210 required that all of a broker's communications with the public must be fair and balanced, "based on principles of fair dealing and good faith," and give the public "a sound basis for evaluating the facts" concerning a security. Communications must not "omit any material fact or qualification if the omission ... would cause the communications to be misleading."[112] The term "communications" includes correspondence.[113] Correspondence, in turn, includes electronic mail messages sent to a single customer.[114]

The purpose of the Rule is to ensure that a broker's communications with the public are not misleading.[115] FINRA's standards for advertising materials apply to each piece of a communication. For example, inclusion of a rule-compliant disclosure of risk in a prospectus does not cure an omission of a risk disclosure in an accompanying cover letter.[116]

---

[108] Respondent's Post-Hr'g Br. at 12; Enforcement's Post Hr'g Br. at 14-17; *Dep't of Enforcement v. Puma*, No. C10000122, 2003 NASD Discip. LEXIS 22, *12 n.6 (NAC Aug. 11, 2003).

[109] *Hellen*, 1999 NASD Discip. LEXIS 22, *21 and n.6.

[110] Respondent's Post-Hr'g Br. at 12.

[111] *See, e.g.*, *Dep't of Mkt. Regulation v. Leighton*, No. CLG050021, 2010 FINRA Discip. LEXIS 3, at *34 n.15 (NAC Mar. 3, 2010) (citing *David M. Levine*, Exchange Act Release No. 48760, 2003 SEC LEXIS 2678, at *36 n.42 (Nov. 7, 2003)).

[112] NASD Rule 2210(d)(1)(A). NASD Rule 2210 was in effect in September 2011, when Lalley sent the communications at issue to YK. It was superseded by FINRA Rule 2210 on February 4, 2013.

[113] NASD Rule 2210(a)(3).

[114] NASD Rule 2211(a)(1)(A).

[115] NASD Rule 2210(d)(1)(A).

[116] Tr. 168-69.

Enforcement focuses on Lalley's e-mail representation to YK that "[i]f you keep the trades as they are in both accounts, and if the price targets on those stocks are reached, you will get benefit by $41,348.60."[117] Enforcement describes this statement as "plainly an impermissible price projection under FINRA rules."[118] Enforcement argues that Lalley erred because she did not disclose the risks that the target prices might not be reached, did not state the time period within which the price targets might be reached, did not include the detailed risk disclosures contained in the Firm's research reports on which she based her projections, and did not disclose the Firm's potential conflicts of interest in making the recommendations.[119]

2. Lalley's Arguments

Lalley argues that the communications she sent to YK merely provided her client, a seasoned investor, with a permissible "mathematical calculation of the benefits that would be obtained 'if' the research department targets" of the Firm were achieved.[120] Thus, Lalley argues, the communications gave YK "sufficient information to make a reasoned decision about the positions."[121]

Lalley also testified that she included Morgan Stanley's required boilerplate disclaimers concerning the risks of any securities on the spreadsheet that she sent to YK.[122] Lalley argues that Enforcement's failure to require Morgan Stanley to produce a duplicate original of Lalley's spreadsheet in native format deprived the Hearing Panel of evidence that the spreadsheet Lalley sent to YK contained those disclosures of risk.[123] Lalley further points out, and Enforcement concedes, that Lalley's e-mail and spreadsheet contained no inaccuracies.[124]

3. Conclusions

The Hearing Panel concludes, as Lalley contends, that the statement "If you keep the trades as they are in both accounts, and if the price targets are reached, you will benefit by $41,348.60" is not an impermissible projection. It clearly conditions the possibility of the benefit upon the reaching of price targets. Thus, on its face it is not generally misleading, and would be unlikely to mislead YK, considering his background, 20 years of investment experience, and the investment sophistication reflected in his e-mails to Lalley.

---

[117] CX-23, at 1; Enforcement's Post-Hr'g Br. at 20.

[118] Enforcement's Post-Hr'g Br. at 22.

[119] *Id.* at 20-21.

[120] Respondent's Post-Hr'g Br. at 19.

[121] *Id.* at 19.

[122] Tr. 520-21.

[123] Respondent's Post-Hr'g Br. at 17-18; Tr. 316-18.

[124] *Id.* at 18.

However, the statement is not, as Lalley contends, a permissible hypothetical mathematical calculation with "all of the conditions and assumptions fully stated."[125] It is a summary based on the data presented in the spreadsheet. Lalley created the spreadsheet based on a number of research reports, including the Firm's research reports, with price targets she took from those reports.[126]

The problem, as Enforcement points out, is that neither the spreadsheet nor the cover e-mail includes essential disclosures that are contained in the research reports on which Lalley relied for her analysis and from which she took the price targets. Those disclosures include potential conflicts of interest by the preparers of the reports and risks associated with the particular companies whose stock is analyzed, including risks from possible market developments and competition.

For example, Lalley purchased stock of Amazon.com Inc. on YK's behalf and included an analysis of the stock, with references to Morgan Stanley's own research reports and Firm-approved research reports, recommendations, and price targets for the stock.[127] Morgan Stanley's "Best Idea" research report clearly identifies various investment risks[128] and discloses possible conflicts of interest on Morgan Stanley's part.[129] The Firm-approved research report, with price targets and information Lalley used in her spreadsheet, was from a Citi Investment and Research Analysis report.[130] It, too, contained detailed disclosures of risks associated with investing in Amazon.com Inc., including possible loss of market share, negative impact from the imposition of additional sales taxes, poor third quarter revenue, and rising shipping and technology costs.[131] It also contained disclosures concerning possible conflicts of interest on the part of Morgan Stanley relating to the report itself.[132]

But, as she admits, Lalley did not include any of these risk descriptions or disclosures in her e-mail and spreadsheet.[133] Lalley drew from similar research reports for the spreadsheet summary of each of the other Best Idea stocks she purchased for YK, and the reports all contained similar explicit disclosures of risks and potential conflicts of interest.[134] But Lalley's e-mail and spreadsheet make no mention of them.

---

[125] *Id.* at 18.

[126] CX-72–CX-91; Tr. 477-78.

[127] CX-23, at 2.

[128] CX-74, at 2.

[129] CX-74, at 6.

[130] CX-73, at 1.

[131] CX-73, at 3, 5-6, 13.

[132] CX-73, at 13.

[133] Tr. 478-79.

[134] CX-77, at 5-8; CX-78, at 2, 5; CX-79, at 9-11; CX-80, at 2, 17; CX-81, at 7-10; CX-85, at 4-7; CX-86, at 2, 17-19; CX-89, at 11-14; CX-90, at 1-5.

In her testimony, Lalley essentially conceded that her e-mail and spreadsheet were not fair and balanced communications. She testified that she did not include any disclosures in the e-mail.[135]When asked if the e-mail contained a balanced discussion of benefits and risks, she answered "no." As for the spreadsheet, she testified that it is "simply a presentation of what was done .... There is no discussion of risks and benefits."[136]

Lalley claims that she inserted a boilerplate disclosure statement onto the spreadsheet before sending it to YK.[137] She contends that the spreadsheet provided by Morgan Stanley to FINRA, which is in evidence and does not contain any disclosures, is not what she sent to YK. Lalley argues that the spreadsheet in evidence is "deficient" and does not prove that her correspondence to YK violated NASD Rule 2210 because Enforcement failed to "establish whether the e-mail and spreadsheet offered into evidence included the disclaimers that were present on the versions" Lalley sent to YK that "reflected those disclosures."[138]

As noted above, the spreadsheet in evidence is not in native format.[139] The Panel cannot determine, therefore, whether or not Lalley inserted boilerplate disclosures onto the face of the spreadsheet.

But even if she had done so, nothing in Lalley's testimony suggests that the boilerplate disclosures would have provided YK with a sufficient description of the risks and potential conflicts of interest associated with the specific companies, stock price targets, and recommendations in the spreadsheet. Thus, based on the e-mail and spreadsheet in evidence and Lalley's testimony, the Hearing Panel finds that Enforcement has established by a preponderance of the evidence that the spreadsheet constitutes a communication with a client that does not comport with the requirements of fairness and balance under NASD Rules 2210(d)(1)(A) and 2210(d)(1)(D), and IM-2210-1(1), and FINRA Rule 2010.

IV. Sanctions

A. Unauthorized Trading

FINRA's Sanction Guidelines recommend a fine of $5,000 to $110,000 for effecting unauthorized transactions. The Guidelines also recommend consideration of suspending an individual respondent in any or all capacities for ten business days to one year, and in egregious cases, a suspension of up to two years or a bar. The relevant Principal Consideration is whether the trading was egregious.[140]

---

[135] Tr. 521.

[136] Tr. 482.

[137] Tr. 521-22, 544.

[138] Respondent's Post-Hr'g Br. at 17-18.

[139] Tr. 316-17.

[140] FINRA Sanction Guidelines at 98 (2015), http://www.finra.org/industry/sanction-guidelines.

The Guidelines refer to three types of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading, made egregious by the number of executed unauthorized trades; (2) unauthorized trading made egregious by aggravating factors such as customer loss, attempts to conceal misconduct or thwart investigative efforts, or a history of misconduct; and (3) qualitatively egregious unauthorized trading, measured by the strength of the evidence, and respondent's motives.[141]

1. The Recommendations of the Parties

For effecting unauthorized trades, Enforcement asks that the Hearing Panel suspend Lalley from associating with any FINRA member firm in any capacity for 18 months and impose a fine of $10,000. For sending YK communications that were not fair and balanced and contained improper projections of performance, Enforcement recommends suspension for an additional month and an additional fine of $5,000.

Enforcement asserts that Respondent's unauthorized trades were egregious in two ways: (i) they were quantitatively egregious because of "the sheer number of Lalley's 22 unauthorized trades;"[142] and (ii) there were several aggravating factors present. According to Enforcement, the aggravating factors include Respondent's attempt to conceal the trading by "falsely" marking the trades as unsolicited; failing to report YK's complaint promptly to Morgan Stanley; sending an unapproved e-mail and spreadsheet to YK to persuade him to change his mind about complaining to the Firm; and creating and sending an e-mail and spreadsheet that were not fair and balanced. In addition, Enforcement argues that Respondent has not accepted responsibility for her misconduct.[143]

In support of its recommendation, Enforcement argues that suspending Respondent for not less than 18 months in all capacities and imposing a fine of $10,000 would be "consistent with sanctions imposed in other litigated cases involving egregious unauthorized transactions."[144]

Citing the Guidelines' General Principles Applicable to all Sanction Determinations, Lalley emphasizes that sanctions should be remedial, not punitive.[145] She argues in mitigation that she acted in good faith, believing that she had obtained YK's approval for the trades, that she attempted to serve YK's interests, and that she was not motivated by an expectation of personal gain or profit.[146]

---

[141] Guidelines at 98 n.2.

[142] Enforcement's Post-Hr'g Br. at 23.

[143] *Id.* at 23-24.

[144] *Id.* at 24, n.98.

[145] Respondent's Post-Hr'g Br. at 20; Guidelines at 2.

[146] Respondent's Post-Hr'g Br. at 20-23.

Lalley also argues that she has already been sufficiently sanctioned. Lalley enumerates a number of adverse effects she has suffered as a consequence of this disciplinary action, including loss of employment and inability to earn compensation; attorney's fees and expenses; loss of her client base; and damage to her reputation and career.[147] Lalley also points out that she has no disciplinary history; she reported YK's complaint to her manager the day after receiving his October 5, 2011 e-mail explicitly accusing her of unauthorized trading; YK suffered no loss; and she acted to promote her client's interests, not her own. Lalley notes that the trades were executed on two days, as part of a single strategy, and argues that they therefore should not be deemed quantitatively egregious. Lalley concludes that imposing any sanctions at all would be punitive.[148]

2. Discussion

Neither Party presented completely persuasive arguments and recommendations.

The Hearing Panel disagrees with Enforcement's characterization of this as an egregious case. Although there were 22 executions, they were effected in essentially two batches of trades—a set of sales on one day, and a set of purchases six days later—in pursuit of the "Best Ideas" strategy. The Guidelines allow aggregation or "batching" of similar violations when the violations are, as here, unintentional or negligent, not involving fraudulent or deceptive conduct, and there is no injury to the public.[149] The Hearing Panel finds it appropriate to do so here.

The Hearing Panel also disagrees with Enforcement's assertion that Lalley attempted to conceal her misconduct. Although YK mentioned in his first e-mail that he had not been contacted about the trades, Lalley testified credibly, given YK's history of complaints about fees, that she initially construed YK's dissatisfaction to be primarily about the commissions he was charged for the trades. He decided, after their conversation on September 13, to keep the trades and did not press an unauthorized trading complaint. It was only after YK's accounts lost value in the declining market in October that he changed his mind, apparently to recover his losses, and he then sent the e-mail on October 5 explicitly asserting that the trades had been unauthorized. Respondent informed her manager of the problem, and YK's assertion that he had not approved the trades, on the following day. The Morgan Stanley error forms she submitted and signed dated October 7, 2011, state forthrightly: "The client says he did not agree to the trades. I think this is incorrect."[150] These facts lead the Hearing Panel to conclude that Lalley did not conceal the substance of YK's unauthorized trading complaint from Morgan Stanley.

Furthermore, we find no evidence that Lalley intentionally mislabeled the trades as "unsolicited" in order to conceal them. According to Lalley, she "was doing a lot of trades for clients in the same strategy," some solicited and others unsolicited, utilizing electronic tickets

---

[147] *Id.* at 21.

[148] *Id.* at 21-23.

[149] Guidelines at 4 (General Principle No. 4).

[150] CX-54.

with "a lot of fields that had to be filled in." The system did not require her to input a notation as to whether a trade was solicited or unsolicited to effect the order. Lalley testified that she should have activated a drop-down to reveal a box so she could make the appropriate solicited/unsolicited notation, but candidly admitted it "often didn't happen that way" and she did not do so here.[151] Given that there were numerous trades, "the same trades for multiple clients," Lalley testified that they would have been "grouped together,"[152] and that the system's default setting marked the trades unsolicited.[153] The Panel found her to be a credible witness, willing to admit voluntarily mistakes that she made. Thus, we conclude that the evidence does not establish that Lalley intentionally marked YK's trades as unsolicited in an effort to conceal them.

The Hearing Panel also concludes the evidence is insufficient to support Enforcement's contention that Lalley sent YK the e-mail and spreadsheet to conceal his complaint of unauthorized trading from the Firm. Lalley testified, and her e-mail states, that YK wanted her to explain her "methodology" in the two batches of trades. Based on Lalley's extensive examination by Enforcement at the hearing, when the Hearing Panel observed her demeanor and carefully considered the substance of her testimony, and the exhibits in evidence, we are not persuaded that the evidence establishes that she attempted to conceal what she had done, or tried to thwart Enforcement's investigation.

Because we have found that Lalley's unauthorized trades were not egregious and that she mistakenly thought she had spoken with YK, we conclude that the severe sanctions Enforcement recommends are unwarranted.

The Hearing Panel notes, as Enforcement correctly points out, that Lalley has consistently denied effecting unauthorized trading. Enforcement argues this shows that she has not acknowledged responsibility in a fashion that mitigates for purposes of sanctions. However, her denial is qualified. From the start, on October 6, 2011, Lalley conceded that, given the absence of a record of calls on the days she entered the orders for the trades, she might not have spoken to YK before trading on his behalf. She testified consistently at the hearing, stating that although she *thought* she had spoken with YK and obtained his approval for the trades, it was "possible" she had not.[154] As Lalley succinctly reiterates in her Post-Hearing Brief, "in the absence of documentary evidence conclusively establishing that she spoke to [YK] ..., there is a possibility that the call did not happen despite her belief that it did."[155]

While not dispositive, it is also worth noting that Morgan Stanley did not find it appropriate to discipline Lalley in response to YK's claim. Lalley's manager, Tout, an

---

[151] Tr. 540-42.

[152] Tr. 456-57.

[153] Tr. 520, 541.

[154] Tr. 435-36.

[155] Respondent's Post-Hr'g Br. at 2-3.

experienced and senior supervisor,[156] made the determination to treat the matter as a "trade error."[157] However, Morgan Stanley's procedures state that "[t]rade corrections or order errors should be confined to bona fide errors."[158] Although Tout referred the matter for review for possible unauthorized trading, she did not follow the Firm's procedure for filing customer complaints electronically, because she "wasn't sure that there was a complaint at all."[159] Tout also did not follow the procedure requiring the Firm to send YK a written acknowledgment, and did not contact YK or obtain approval from the Firm's litigation unit before authorizing reversal of the trades. According to Lalley's unrebutted testimony, the Firm did not reprimand her, inform her of any potential disciplinary action, impose any penalty, or even assess her with the costs of making YK whole.

Turning to Lalley's recommendations, we reject her argument that we should consider as mitigating the adverse economic impacts she has suffered, such as loss of income and payment of attorney's fees, or that she was not motivated by the potential for personal gain. These are not recognized mitigating factors.[160] Neither is her unblemished disciplinary record.[161]

However, as Respondent argues, and the Guidelines make clear, sanctions must be remedial, not punitive.[162] Furthermore, it is well established that "the purpose of suspension is to protect investors, not to penalize brokers."[163] As the SEC has stated, "when we suspend or bar a person, it is to protect the public from future harm at his or her hands."[164]

The Hearing Panel is satisfied that Respondent understands her obligation to obtain authority before trading on behalf of a client, and that her failure to do so in this case was an aberration, based on her mistaken assumption that she had followed her usual practice. Based on her testimony, and her demeanor throughout the hearing, we are satisfied that the experience of this disciplinary proceeding has had a profound impact upon her and that there is no reasonable likelihood that she will in the future engage in unauthorized trading. We conclude therefore that there is no need to impose a suspension and fine in this case to protect the investing public or to ensure Respondent's compliance with this important obligation.

---

[156] Tout has worked at Morgan Stanley for 16 years, starting as a sales assistant, and then branch administrative coordinator, branch administration manager, and working now as regional administration manager. Tr. 45-46.

[157] Tr. 68.

[158] CX-30, at 7.

[159] Tr. 98.

[160] *Dep't of Enforcement v. Cipriano*, No. C07050029, 2007 NASD Discip. LEXIS 23, at *40-41 (NAC July 26, 2007).

[161] *Dep't of Enforcement v. McCartney*, No. 2010023719601, 2012 FINRA Discip. LEXIS 60, at *14 (NAC Dec. 10, 2012).

[162] Guidelines at 2 (General Principle No. 1).

[163] *McCarthy v. SEC*, 406 F.3d 179, 188 (2nd Cir. 2005).

[164] *Howard F. Rubin*, Exchange Act Release No. 35179, 52 S.E.C. 126, at *126-27 (Dec. 30, 1994).

B. Communications with the Public

The Guidelines recommend a fine of $1,000 to $29,000 for failing to comply with the rules governing communications with the public. In egregious cases, the Guidelines suggest considering a suspension in any or all capacities for up to 60 days.[165]

The sole Principal Consideration in Determining Sanctions is whether the communications were circulated widely.

1. The Recommendations of the Parties

Enforcement represents that it "took into account that Lalley's e-mail and spreadsheet were not widely circulated to the public."[166] It was appropriate for Enforcement to do so, since it is undisputed that Lalley sent the communication only to YK. Nonetheless, Enforcement recommends suspension for one month and a fine of $5,000. Under the Guidelines, a suspension might be appropriate for an egregious violation.

Enforcement justifies its recommendations by citing two Principal Considerations in Determining Sanctions. Principal Consideration No. 10 focuses on whether a respondent attempted to conceal misconduct or "lull into inactivity" or mislead a customer. Principal Consideration No. 13 focuses on intentionality. Enforcement argues that Lalley sent YK the e-mail and spreadsheet to persuade him not to pursue his unauthorized trading complaint and to keep the trades.[167] Enforcement supports the recommendations by citing the sanctions imposed in two litigated cases finding similar violations.[168]

Lalley requests that the Hearing Panel, if it concludes Lalley must be sanctioned, find Lalley in violation only of "the communication claim" in the second cause of action and limit the sanction to a fine of no more than $2,500 and deem it a "minor rules violation."[169]

2. Discussion

As with the arguments of the Parties regarding the first cause of action, the Panel finds their arguments for sanctions for the second cause of action unpersuasive.

Enforcement's reliance on two other cases to support its sanction recommendation is not helpful. The SEC has "repeatedly rejected attempts by respondents to compare the sanctions imposed against them to the sanctions imposed against others" because "[t]he appropriate

---

[165] Guidelines at 79.

[166] Enforcement's Post-Hr'g Br. at 24 n.99.

[167] *Id.* at 24-25.

[168] *Id.* at 25 n.101.

[169] Tr. (Closing Argument) 124.

sanction . . . depends on the facts and circumstances of each particular case"[170] and "the appropriate sanction to be imposed in a particular case cannot be determined by reference to the facts of other cases."[171] Furthermore, an examination of the two cases Enforcement cites reveals that the imposed sanctions were predicated upon sharply inapposite factual findings. In one, a hearing panel imposed a suspension of 30 days and a $15,000 fine upon a respondent who was held responsible for four separate communications to customers, one of which consisted of 22 form letters dated over a four-month period.[172] In the other, the NAC approved a 10-day suspension and $13,500 fine for a respondent responsible for four e-mails sent to at least 105 individuals.[173] Here we have a single communication to one client who had asked Lalley about the "methodology" she employed in making the trades.

Lalley testified credibly that she prepared the e-mail and attached spreadsheet for YK's consideration "not to make him keep the trades," but because she believed it was in his best interests "based on recommendations of [Morgan Stanley], that he keep these trades."[174] And if, as Enforcement contends, the communication was designed to "lull" YK into inactivity, it failed.

As for Lalley's sanction recommendations, under the FINRA Rules governing this proceeding, the Hearing Panel has no authority to declare a violation to be a minor rule violation. Only the Departments of Enforcement and Market Regulation may prepare and offer a respondent a minor rule violation plan letter under FINRA Rule 9216.

Enforcement concedes that the information contained in the spreadsheet was accurate. We have found that it is deficient because of Lalley's failure to disclose the risks and potential conflicts of interest contained in the research reports from which she took the information she presented to YK. The Hearing Panel concludes that the deficiencies of Lalley's e-mail and spreadsheet do not require imposition of a suspension or a fine. We conclude that a letter of caution suffices to meet the remedial goals of FINRA sanctions, as set forth in the Guidelines,[175] and will deter future similar misconduct by Lalley and others.

V. Order

Respondent Audra Lynn Lalley executed unauthorized trades, in violation of FINRA Rule 2010, and sent communications to the public that were not fair and balanced, in violation of NASD Rules 2210(d)(1)(A), 2210(d)(1)(D), IM 2210-1(1), and FINRA Rule 2010. For these

---

[170] *Dep't of Enforcement v. Nicolas*, No. CAF040052, 2008 FINRA Discip. LEXIS 9, at *80 (NAC Mar. 12, 2008) (citation omitted).

[171] *Davrey Financial Services*, Exchange Act Release No. 51780, 2005 SEC LEXIS 1288, at *27 (June 2, 2005).

[172] *Dep't of Enforcement v. Aleshire*, No. C8A010060, 2002 NASD Discip. LEXIS 43, at *1, *7-8 (OHO June 12, 2002).

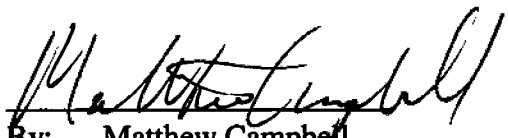
[173] *Dep't of Enforcement v. Beloyan*, No. 2005001988201, 2011 FINRA Discip. LEXIS 44, at *1, 14 (NAC Dec. 20, 2011).

[174] Tr. 476.

[175] Guidelines at 2 (General Principle No. 1).

violations, this Decision will serve as a Letter of Caution. Respondent is ordered to pay costs in the amount of $6,223.57, which includes an administrative fee of $750 and the cost of the hearing transcript. The costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[176]

HEARING PANEL



By: Matthew Campbell
Hearing Officer

Copies to:

Audra Lynn Lalley (by overnight courier and first-class mail)
Michael A. Thurman, Esq. (by e-mail and first-class mail)
Michael L. Mallow, Esq. (by e-mail)
Noel C. Downey, Esq. (by e-mail and first-class mail)
Payne Templeton, Esq. (by e-mail)
Jeffrey D. Pariser, Esq. (by e-mail)

[176] The Hearing Panel considered and rejected without discussion all other arguments of the parties.