BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Perpetual Securities, Inc., Cathy Y. Huang Thornhill, Ontario, Youwei P. Xu, Thornhill, Ontario, Respondents.	DECISION Complaint No. C9B040059 Dated: August 16, 2006

Respondent firm operated a securities business while suspended. Individual respondents permitted respondent firm to operate a securities business while suspended. Respondent Huang failed to respond to NASD requests for documents and information. Held, findings affirmed in part, modified in part; sanctions modified.

Appearances

For the Complainant: Leo Orenstein, Esq., Jonathan Prytherch, Esq., Department of Enforcement, NASD

For the Respondents: Pro Se

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Decision

The Department of Enforcement ("Enforcement") appealed a July 1, 2005 Hearing Officer default decision ("Default Decision") under NASD Procedural Rule 9311(a) as to the level of sanctions imposed. Respondents Perpetual Securities, Inc. ("Perpetual Securities" or "the Firm"), Youwei P. Xu ("Xu"), and Cathy Y. Huang ("Huang") (together the "respondents") cross-appealed the Hearing Officer's findings and sanctions under Procedural Rule 9311(d). After a thorough review of the record in this proceeding, we find that the Hearing Officer's entry of default was proper and that respondents did not establish good cause for their failure to participate in two pre-hearing conferences in the proceedings before the Hearing Officer. As to the merits of the allegations in the complaint, we conclude that the evidence supports findings that: (1) Perpetual Securities conducted a securities business while its registration was suspended, in violation of NASD Conduct Rule 2110; (2) Xu and Huang, as principals of the Firm, permitted the Firm to conduct a securities business while suspended, in violation of NASD Conduct Rule 2110; and (3) Huang failed to respond to NASD requests for documents and information timely and fully, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

With respect to sanctions, we expel the Firm from NASD membership for conducting a securities business while suspended. We impose bars against Xu and Huang for permitting the Firm to conduct a securities business while suspended. We also bar Huang for failing to respond to NASD requests for documents and information.

I. Background

Perpetual Securities became a member of NASD on July 14, 1995, and filed a Uniform Request for Broker-Dealer Withdrawal ("Form BDW") on December 16, 2003. NASD approved the termination of the Firm's registration on July 11, 2005. Xu first became registered with NASD as a general securities representative with a member firm on September 22, 1993. On July 14, 1995, Xu became registered with NASD as a general securities representative, general securities principal, and registered options principal through Perpetual Securities. During the period relevant to the allegations in the complaint – December 2002 through January 14, 2003 – Xu served as Perpetual Securities' chief executive officer and president. He also held an ownership interest in the Firm. The Firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") for Xu on March 2, 2004.

Huang first became registered with NASD as a general securities representative with a member firm on September 22, 1993. On July 14, 1995, Huang became registered with NASD as a general securities representative, general securities principal, and financial and operations principal through Perpetual Securities. During the relevant period, Huang served as Perpetual Securities' chief financial officer and executive vice president. She also held an ownership interest in the Firm. The Firm filed a Form U5 with respect to Huang on February 27, 2004.

Xu and Huang, who are married to each other, are not presently working in the industry.

II. Factual and Procedural History

A. NASD Suspends Perpetual Securities from Operating a Securities Business

On June 18, 2002, NASD's Office of Dispute Resolution notified Perpetual Securities by letter that its NASD membership would be suspended for failing to pay an arbitration award that was rendered on November 14, 2000.[1] Although the Firm initially requested a hearing, the parties agreed during a pre-hearing conference with the NASD Hearing Officer assigned to the matter that the case could be decided without a hearing because there were no factual issues in dispute. The Firm challenged the enforceability of the award, contending that it was not obligated to pay the award because the arbitration claimants had not confirmed the arbitration award in a court of competent jurisdiction. The Hearing Officer rejected the Firm's argument, finding that "a member's obligation to pay an arbitration award is absolute" and is "not dependent upon its judicial enforceability." In a decision dated November 25, 2002, the Hearing Officer ordered the Firm's registration to be suspended for failing to pay the arbitration award as required under Rule 10330(h) of the Code of Arbitration Procedure ("Suspension Decision").

The Office of Hearing Officers ("OHO") served the Suspension Decision on the Firm's counsel, Kevin Tung ("Tung"), via facsimile and first class mail. Just a few days later, on November 29, 2002, Tung filed an application with the SEC to stay the Suspension Decision. OHO also served a courtesy copy of the Suspension Decision on respondents on November 25, 2002, at an NASD Central Registration Depository System ("CRD"®) address that OHO staff later learned was no longer correct. An email from OHO staff indicates that OHO contacted Huang, who provided staff with an updated address for the Firm, and that the Suspension Decision was then sent to Huang on December 2, 2002, at the address that Huang provided – [redacted] – via overnight courier and first-class mail. The record includes a confirmation from Federal Express showing that the Suspension Decision was delivered to Huang and the Firm on December 3, 2002.

The Firm's blotter and transaction confirmations show that, during the month of December 2002 through approximately January 14, 2003, the Firm conducted retail and proprietary trading business after the Suspension Decision was issued. Respondents claim that they did not receive notice of the Firm's suspension until January 14, 2003, when NASD staff advised them during an on-site audit that the Firm's membership was suspended. On or around January 14, 2003, Xu advised the compliance officer at the Firm's clearing firm that NASD had

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[1] This non-summary suspension proceeding was commenced in accordance with Article VI, Section 3 of the NASD By-Laws and Procedural Rule 9510 et seq. On June 28, 2004, the rules relating to non-summary proceedings for failure to comply with an arbitration award or related settlement agreement were relocated from the Rule 9510 Series to Rule 9554 (Failure to Comply with an Arbitration Award or Related Settlement). *See NASD Notice to Members 04-36* (May 2004).

ordered the Firm to cease operating a securities business.[2] The compliance officer stated in a letter to NASD that he promptly "closed off Perpetual Securities' access to [the clearing firm's] on-line trading system and advised [its] trading desk that Perpetual was out of business and could no longer trade" upon learning from Xu that NASD had ordered the Firm to cease operating a securities business.

B. NASD Rule 8210 Requests for Information

By letter dated February 19, 2004, NASD staff advised Huang that it was making a "formal request for information and documentation . . . [under] Rule 8210" in connection with an NASD investigation, and that a "failure to provide the requested access, information and/or documentation may result in . . . a disciplinary action against [Huang]." On March 8, 2004, NASD received a response letter from Huang that included some but not all of the requested information. For instance, instead of providing Enforcement with a copy of the Firm's supervisory procedures from December 2002 through January 2003, Huang simply stated that the Firm was in the process of closing down its business during the relevant period and described her duties in that regard.

On March 18, 2004, NASD staff sent a letter to Huang at addresses for Huang and the Firm listed in CRD requesting that she provide staff with the following documents: (1) a copy of "the Firm's written supervisory procedures as previously requested in item 8 of the [s]taff's February 19, 2004 Rule 8210 request"; and (2) "complete copies of Perpetual Securities' telephone records showing all incoming and outgoing calls for the period November 2002 through May 2003." Regarding its request for telephone records, staff instructed the Firm to obtain the records from the telephone company in the event the Firm did not have copies of them. The letter advised Huang that staff was requesting the documents under Rule 8210 in connection with its investigation of Perpetual Securities and that she and/or Perpetual Securities might be subject to disciplinary action if she failed to comply with the request for information. The letter instructed Huang to submit the requested documents to NASD on or before March 31, 2004.

After Huang failed to provide the requested documents by the March 31, 2004 deadline, NASD staff sent another letter to Huang, dated April 7, 2004, via first class and certified mail to the same addresses used for the March 18, 2004 mailing. The letter enclosed a copy of staff's March 18, 2004 Rule 8210 request for information and advised Huang that staff had not received the requested documents. The letter also warned Huang that she and/or Perpetual Securities might be subject to disciplinary action if she failed to comply with the request. NASD sent another letter to Huang, also dated April 7, 2004, requesting that Huang provide staff with the telephone numbers associated with the customer accounts listed on an attachment to the letter. Both letters indicated that the requests for information were made pursuant to Rule 8210 and directed Huang to provide the information to staff on or before April 14, 2004.

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[2] The clearing firm's compliance officer stated in a letter to NASD that Xu explained that, "he had an arbitration award go against Perpetual and that he was going to appeal the decision."

Huang failed to respond to the March 18 and April 7, 2004 requests for information until August 6, 2004, more than a month after Enforcement filed and served the complaint against her. Huang did not, however, include the documents and information requested by Enforcement. Instead of providing staff with a copy of the Firm's supervisory procedures, as requested, Huang provided a narrative of what she characterized as the Firm's "special supervisory procedure of closing business." Huang also did not provide the requested phone records, stating that the Firm "did not have facility [sic] on phone records showing incoming and outgoing calls" and that the telephone company did not have the type of service that could produce such records. With respect to staff's request for a listing of customer phone numbers, Huang claimed that she was unable to provide the requested numbers because the Firm's clearing firm had blocked access to this information.

C. Complaint

Enforcement's investigation of the Firm's operations led Enforcement to file, on June 29, 2004, a three-cause complaint against respondents. The first cause alleged that Perpetual Securities violated Conduct Rule 2110 by continuing to conduct a securities business after its registration had been suspended. The second cause alleged that Xu and Huang, as the Firm's principals and owners, knew or had reason to know of the Suspension Decision, and that they violated NASD Conduct Rule 2110 by allowing Perpetual Securities to conduct a securities business during its suspension. The third cause alleged that Huang did not respond to NASD staff-issued requests for information dated March 18 and April 7, 2004, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Enforcement mailed the complaint and notice of complaint on June 29, 2004, via first-class and certified mail, to the Firm's main address – [redacted] – and to its mailing address – [redacted] as listed in CRD. Enforcement also served the complaint on the Firm at [redacted], a variation of the Firm's mailing address. In addition, Enforcement served the complaint on the Firm at [redacted] the address that the Firm listed when it filed its amended Uniform Application for Broker-Dealer Registration ("Form BD") on November 5, 2002.

On September 7, 2004, respondents filed an answer to the complaint, denying the allegations and requesting a hearing.[3] With respect to the allegations that the Firm had conducted a securities business while suspended and that Xu and Huang had permitted the

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[3] Respondents' answer also included a "counter-complaint" against the staff of NASD's District 9 office, in which respondents accused staff of misconduct and fraud, blamed staff for a broad array of business and health troubles, and requested an order for damages. Deputy Chief Hearing Officer David Fitzgerald ("Hearing Officer Fitzgerald") granted Enforcement's motion to strike respondents' counter-complaint on the basis that NASD's Code of Procedure does not provide for the filing of such a pleading.

alleged violation, respondents denied that the Firm had processed any trades during the period of the suspension and further denied that they had received written notification that NASD had suspended the Firm. Respondents also specifically denied that Huang had failed to respond to Enforcement's requests for information.

D. Xu and Huang Fail to Participate in Pre-Hearing Conferences Scheduled for January 27 and February 14, 2005

This matter was assigned to Hearing Officer Fitzgerald, who scheduled an initial pre-hearing conference for September 23, 2004. The scheduling order advised the parties to be prepared to discuss and agree upon a schedule for completion of the proceedings and that a failure to appear at the conference, either personally or through a representative, could result in a finding of default. Hearing Officer Fitzgerald issued a subsequent order rescheduling the pre-hearing conference to October 21, 2004, in response to Enforcement's request that the conference be rescheduled because of a conflict that Enforcement counsel had with the earlier date.

On October 14, 2004, respondents filed a motion to adjourn the pre-hearing conference to early December 2004, asserting that they needed the adjournment so that Xu could pursue medical treatment for glaucoma. Hearing Officer Fitzgerald issued an order on October 20, 2004, in response to respondents' request, postponing the pre-hearing conference to December 10, 2004. On October 25, 2004, respondents filed a motion to disqualify Hearing Officer Fitzgerald, alleging "bias," "unfair prejudice," and "conflict of interest." On November 5, 2004, without commenting on respondents' allegations, Hearing Officer Fitzgerald issued an order notifying the parties that the case had been reassigned to Hearing Officer Sharon Witherspoon ("Hearing Officer Witherspoon").

On December 7, 2004, three days prior to the scheduled December 10, 2004 pre-hearing conference, respondents moved to adjourn the pre-hearing conference indefinitely, arguing that such move was necessary because Xu had "advanced glaucoma" and Huang had osteoarthritis, which allegedly affected her ability to walk. The next day, on December 8, 2004, respondents filed yet another request to adjourn the pre-hearing conference, arguing that Xu's "serious health condition" (glaucoma) prevented respondents from participating in the pre-hearing conference. Hearing Officer Witherspoon issued an order on December 8, 2004, denying respondents' request for an adjournment and finding that respondents had not provided sufficient credible evidence of Xu's medical condition to warrant postponement of the pre-hearing conference. The December 8 order advised respondents that Xu could appoint someone else, including co-respondent Huang, to appear on his behalf if he provided a doctor's opinion that he was "physically incapable of participating in a telephone conference call without causing harm to himself." The December 8 order also included the following bold-faced warning: "The parties are reminded that a failure to appear via telephone at the pre-hearing conference, in person or through counsel, may be deemed a default."

On December 9, 2004, respondents filed a third request to adjourn the December 10, 2004 pre-hearing conference, expressing incredulity that Hearing Officer Witherspoon had denied their previous requests for an adjournment of the proceedings. On December 9, 2004,

Hearing Officer Witherspoon issued an order affirming the decision in her December 8 order denying respondents' motion to adjourn. The December 9 order advised respondents that if Xu provided Hearing Officer Witherspoon with confirmation of his medical condition by the December 10, 2004 deadline, she would not deem Xu in default if he chose not to appear at the pre-hearing conference. Hearing Officer Witherspoon also reminded respondents that Huang was required to participate in the pre-hearing conference in person or via counsel.

On December 10, 2004, Hearing Officer Witherspoon received a facsimile signed by an individual named "SP Xu," who identified himself as a friend of respondent Xu, stating that Xu was in the hospital with a worsening health condition, and that Xu had experienced "dizziness, vomiting and coma." The letter also stated that "[a]ny mental irritation and annoying [sic] is strictly prohibited for [Xu's] advanced glaucoma." The facsimile included a letter dated November 18, 2004, on the letterhead of a "David J. Weinstock, M.D." ("Dr. Weinstock"), stating that Xu is "visually disabled secondary to his glaucoma" and that he would "require[] an . . . eye exam every 4-6 months for the rest of his life."

Despite these representations, Xu nevertheless participated by telephone in the December 10 pre-hearing conference until he abruptly ended his participation before the close of the proceeding. During the proceeding, Xu made two oral motions. In his first motion, Xu requested that Hearing Officer Witherspoon stop the pre-hearing conference and postpone it indefinitely, claiming that his health condition was not "suitable" for him to participate in a hearing. In support, Xu complained about a number of health problems that allegedly affected his ability to participate in the proceedings, including that: (1) the "eye doctor" told him that he is "almost blind"; (2) the stress of participating in the proceeding would be dangerous to his health; (3) he was "really, really weak"; (4) he was "about to throw up"; (5) he had difficulty breathing; and (6) he was in a "very, very bad mood . . . [and his] head was exploding." Hearing Officer Witherspoon denied Xu's motion to stop the proceeding and advised the parties that the November 18 letter from Dr. Weinstock that Xu had provided, stating that Xu had glaucoma, was insufficient to show that Xu could not participate in the pre-hearing conference.

Xu's second motion was a request to disqualify Hearing Officer Witherspoon. Xu asserted that Hearing Officer Witherspoon was "immoral," that she had a "non-good [sic] work ethic," and that she was "discriminating" against him as a "handicapped" person. Xu requested that his motion for disqualification serve as a basis for discontinuing the pre-hearing conference. Hearing Officer Witherspoon advised Xu that she would continue with the pre-hearing conference, but that he could file a written motion with respect to the disqualification issue. Xu complained that Hearing Officer Witherspoon had "no right to decide if she [was] eligible to be continuing with the case as a Hearing Officer," and that she was "deliberately . . . wasting [his] time." He then advised Hearing Officer Witherspoon that he would cease participating in the pre-hearing conference. Prior to Xu's leaving the conference call, Hearing Officer Witherspoon advised Xu that Huang needed to note her appearance on the conference call. The record shows that Huang failed to participate in the December 10 pre-hearing conference call in person or through counsel.

The transcript of the pre-hearing conference indicates that after Xu ceased participating in the pre-hearing conference, the Hearing Officer and Jonathan Prytherch ("Prytherch"), the attorney handling the case on behalf of Enforcement, continued discussing a few procedural

issues before ending the pre-hearing conference. Prytherch made an oral motion at the end of the pre-hearing conference asking that Huang be held in default. Hearing Officer Witherspoon advised Prytherch that she would rule on the motion at a later date.

On December 14, 2004, Hearing Officer Witherspoon issued a pre-hearing order advising the parties, among other things, that if Xu did not participate fully in the next pre-hearing conference to be scheduled for some time in January 2005, and did not provide a letter from a doctor stating that he suffered "so severely from headaches, dizziness, and vomiting that he [could not] participate in a telephone conference," he would be held in default. Hearing Officer Witherspoon explained that the letter Xu submitted previously stated only that Xu was visually disabled, not that he suffered from the numerous health conditions he raised in the December 10 conference call.[4]

On December 17, 2004, respondents filed a document with Hearing Officer Witherspoon representing that Huang had suffered a stroke "on the way" to participating in the December 10 pre-hearing conference call and that she was hospitalized for two days as a result. Respondents did not enclose any documentary evidence to support these representations. In response to respondents' filing, Hearing Officer Witherspoon issued an order on December 21, 2004, setting a second pre-hearing conference for January 27, 2005, a date agreed upon by respondents.[5] The order included the following warning in bold-faced type:

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[4] In addition, the December 14 order granted Enforcement's motion requesting that respondents be required to include the proper caption, "Department of Enforcement vs. Perpetual Securities, Inc., et al.," on their filings, rather than the names of individuals from Enforcement and District 9 as the complainant in the place of Enforcement. Respondents asserted in multiple motions in the proceedings below that Gary Liebowitz ("Liebowitz"), the NASD District Director for District 9, and Prytherch had authorized the complaint against them in their individual capacities rather than on behalf of Enforcement. It was on that basis that respondents argued that the complaint in this matter was invalid and they decided to list Liebowitz and Prytherch as the complainants in this matter rather than Enforcement. To preserve for appeal respondents' argument about the purported invalidity of the complaint, the Hearing Officer stated that respondents could add the following footnote to the disputed caption: "The Respondents dispute that the proceeding was properly initiated by the Department of Enforcement." In a pre-hearing order dated January 6, 2005, Hearing Officer Witherspoon reminded respondents that the captions in their filings needed to be set forth as described in her December 14 order. The January 6 order further advised respondents that any filings that they made after January 6, 2005, would be rejected and returned to respondents if the filings did not include the correct caption.

[5] Hearing Officer Witherspoon did not issue a ruling on the oral motion that Prytherch made at the December 10 pre-hearing conference asking that Huang be held in default for not participating in the conference. And the default decision in this matter does not include a finding that Huang was in default for not participating in the December 10 pre-hearing conference.

> Each Party is reminded that a failure to appear at the Conference, in person or through counsel, or to remain throughout the entire Conference, without the prior filing of a doctor's opinion that explicitly substantiates the Party's assertions regarding his or her inability to participate in [the] telephone call, may be deemed a default.

On January 24, 2005, respondents filed a motion to disqualify Hearing Officer Witherspoon and OHO, setting forth a litany of complaints, including a general complaint that OHO had shown a "deep-seated favoritism or antagonism" that would make "fair judgment [of the case] impossible."

On January 26, 2005, Chief Hearing Officer Linda Fienberg ("Chief Hearing Officer Fienberg") issued an order denying respondents' motion to disqualify Hearing Officer Witherspoon and OHO. The January 26 order concluded that "[n]one of Hearing Officer Witherspoon's orders denying Respondents' motions exhibit[ed] favoritism or antagonism." The order was sent to the parties via first-class mail and facsimile. The facsimile confirmation report included in the record shows that the facsimiles were sent successfully to the parties at approximately 5:30 p.m. on January 26, 2005.

At 7:19 p.m. on January 26, 2005, Xu faxed an "emergenc[y] request" to Chief Hearing Officer Fienberg and Hearing Officer Witherspoon asking that the January 27, 2005 pre-hearing conference be rescheduled. Xu based his request on the representation that Huang had to go to the hospital at 7:00 p.m. on January 26, 2005 because she "suddenly [was] spitting blood."

On January 27, 2005, the pre-hearing conference went forward as scheduled without any appearance by respondents or counsel on behalf of respondents. Hearing Officer Witherspoon noted during the pre-hearing conference that respondents had filed an "emergency motion indicating that Huang was sick, and that the motion did not include any evidence in support of the representation about Huang's purported medical condition. Enforcement attorney Prytherch made an oral motion to hold respondents in default, which Hearing Officer Witherspoon granted.

On January 28, 2005, Hearing Officer Witherspoon issued a written order deeming respondents in default and directing Enforcement to file a written motion for the issuance of a default decision and to include evidence in support of the motion. The January 28 default order also reiterated the bold-faced admonition that Hearing Officer Witherspoon had included in her December 21 order warning respondents that they would be deemed in default if they failed to participate in the scheduled pre-hearing conference. The January 28 default order was sent to respondents on the same date via Federal Express and facsimile. The facsimile was sent to respondents at approximately 3:50 p.m.

Respondents sent a response less than three hours later, at approximately 6:40 p.m. on January 28, 2005, via facsimile to Chief Hearing Officer Fienberg and Hearing Officer Witherspoon largely restating the purported health problems raised in earlier filings, including that: (1) "[r]espondents' health and life are in jeopardy"; (2) Huang started "spit[ting] large amount[s] of blood" on January 26, 2005 and was "sent to [the] hospital for emergency treatment"; (3) Huang suffered two strokes in December 2004 for which she was "sent to [the]

hospital for emergency treatment"; and (4) Xu was visually disabled and suffered from other "acute disorders." The letter also enclosed two documents presumably in support of respondents' assertion regarding Huang's medical condition and one document regarding Xu's medical condition: (1) a statement from a doctor on the letterhead of a medical clinic, dated January 26, 2005, opining that Huang had bronchitis and would not be able to work for a few days;[6] (2) a statement on the letterhead of a "Raymond S. Chan, M.D." ("Dr. Chan"), dated January 27, 2005, certifying that Huang had a "chest infection" and would not be fit to return to work until February 4, 2005; and (3) a statement from the same Dr. Chan, also dated January 27, 2005, certifying that Xu had "Acute pharyngitis," and would not be able to return to work until February 4, 2005.

On February 1, 2005, Hearing Officer Witherspoon issued an order scheduling a pre-hearing conference for February 8, 2005, to discuss whether the default order entered against respondents should be vacated.[7] In a letter to Chief Hearing Officer Fienberg and Hearing Officer Witherspoon, dated February 3, 2005, respondents represented that the February 8, 2005 pre-hearing conference date coincided with a Chinese holiday. They argued that the medical problems that they listed in documents previously filed prevented them from participating in the January 27, 2005 pre-hearing conference. Respondents' February 3 letter also enclosed medical records showing that Huang received medical services from a medical clinic on December 13, 2004 and a hospital emergency room on December 14, 2004. The letter does not explain, however, the relevance of these documents. For example, respondents did not explain how any medical treatment Huang might have received subsequent to the December 10, 2004 pre-hearing conference was relevant to her failure to participate in that conference or the January 27, 2005 pre-hearing conference.

On February 4, 2005, Hearing Officer Witherspoon issued an order treating respondents' February 3 letter as a motion to reschedule the pre-hearing conference because of the Chinese holiday. Hearing Officer Witherspoon granted the request and ordered the pre-hearing conference rescheduled from February 8 to February 14, 2005. The February 4 order stated that the purpose of the February 14 pre-hearing conference was to discuss whether Hearing Officer Witherspoon's January 28 default order should be vacated. Hearing Officer Witherspoon also stated in the February 4 order that the medical documents that respondents filed previously did not excuse their failure to appear at the January 27, 2005 pre-hearing conference.

On February 10, 2005, respondents sent a fax to Chief Hearing Officer Fienberg and Hearing Officer Witherspoon stating that they could not participate in a pre-hearing conference

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[6] The doctor's name does not appear on the document in printed form. Although the doctor's first name is legible ("Russell"), the last name is not.

[7] Hearing Officer Witherspoon noted in the order that she rescheduled the pre-hearing conference for February 8, 2005, because the medical information that respondents forwarded to her earlier indicated that both respondents would be well enough to return to work after February 4, 2005.

on February 14, 2005, because it would conflict with "medical examinations set about one month ago." Respondents followed up with another letter on February 14, 2005, to Chief Hearing Officer Fienberg, Hearing Officer Fitzgerald, and Hearing Officer Witherspoon, stating that they would not attend the February 14, 2005 pre-hearing conference because of their scheduled medical exams, and that the proceeding should therefore be dismissed. In support of their request to dismiss the case, respondents argued that "OHO framed up this grievance case. Facts and material documents have proved that it is OHO frauds."

On February 14, 2005, the pre-hearing conference went forward as scheduled. Hearing Officer Witherspoon noted on the record that respondents did not appear for the pre-hearing conference. In addition, Hearing Officer Witherspoon observed that respondents failed to provide any third-party support for their contention that they had medical appointments scheduled for February 14, 2005, that conflicted with the pre-hearing conference. Hearing Officer Witherspoon issued a written order on February 14, 2005, denying respondents' motion to reschedule the pre-hearing conference and granting Enforcement's request for an extension to file its motion for issuance of a default decision.[8]

In a letter to Chief Hearing Officer Fienberg, Hearing Officer Fitzgerald, and Hearing Officer Witherspoon, dated February 15, 2005, respondents accused Hearing Officer Witherspoon of discrimination and bias against them for scheduling the February 14, 2005 hearing without first consulting with them to ensure that they would be available. The letter also enclosed separate medical certificates in which a "Dr. Hugo K.C. Law & Associates" certified that he examined each respondent on February 14, 2005. The doctor's certificates did not, however, include a diagnosis or explanation for the alleged medical examinations.

On February 21, 2005, respondents filed a motion with Chief Hearing Officer Fienberg requesting that Hearing Officer Witherspoon be disqualified from presiding over the proceedings in this matter, alleging that Hearing Officer Witherspoon was biased against them. They also requested that Fienberg investigate Hearing Officer Witherspoon's "frauds in the proceeding and send a report to Respondents after [the] investigation."

On February 22, 2005, respondents sent a facsimile to OHO's Case Administrator, Nick Laliberte ("Laliberte"), apparently in response to a telephone call they received from Laliberte regarding Hearing Officer Witherspoon's plans to reschedule the pre-hearing conference. Respondents contended in the facsimile that the complaint against them was fraudulent, that Hearing Officer Witherspoon found them in default when they were "in hospital for medical treatments," and that it would be too inconvenient for them to participate in a pre-hearing conference because of their medical problems.

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[8] As noted above, although Hearing Officer Witherspoon's January 28 order found respondents in default for not participating in the January 27, 2005 pre-hearing conference, the order also directed Enforcement to file a motion for issuance of a default decision and to include relevant documentary support for the motion.

On February 28, 2005, Chief Hearing Officer Fienberg issued an order denying respondents' February 21 motion to disqualify Hearing Officer Witherspoon. She concluded that Hearing Officer Witherspoon did not demonstrate any favoritism or antagonism that would warrant that she be disqualified and that, "[t]o the contrary, Hearing Officer Witherspoon has shown utmost patience with the Respondents and their repeated attempts to avoid participating in the pre-hearing conferences." Chief Hearing Officer Fienberg further noted that Hearing Officer Witherspoon has "repeatedly given [respondents] opportunities to explain their failures to comply with her orders," and that "[t]he Respondents have demonstrated over and over again their clear refusal to abide by the procedures set forth in the NASD Rules and in the Hearing Officer's orders."

Enforcement filed a motion with Chief Hearing Officer Fienberg on March 4, 2005, for entry of a default decision, accompanied by exhibits in support of its request. The motion requested that Huang be deemed to be in default for failing to participate in the December 10, 2004, and the January 27 and February 14, 2005 pre-hearing conferences, and that Xu be deemed to be in default for failing to participate in the January 27 and February 14, 2005 pre-hearing conferences.

On March 8, 2005, respondents filed another motion with Chief Hearing Officer Fienberg "[s]trongly" requesting that Hearing Officer Witherspoon be disqualified from serving on the case. In support, respondents again argued that Hearing Officer Witherspoon showed "deep-seated favoritism and antagonism" towards respondents.

On April 4, 2005, Chief Hearing Officer Fienberg issued an order denying respondents' March 8 motion to disqualify Hearing Officer Witherspoon. The order stated that it was undisputed that respondents received actual notice of the January 27 and February 14, 2005 pre-hearing conferences and that they requested that the Hearing Officer cancel or reschedule them. Chief Hearing Officer Fienberg concluded that disqualification under Procedural Rule 9233(b) was not warranted because Hearing Officer Witherspoon's determination to go forward with the scheduled pre-hearing conferences was in accordance with her authority under Procedural Rule 9235, and that her rulings in this matter did "not demonstrate any bias or even an appearance of bias or unfairness on her part."[9]

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[9] On April 5, 2005, respondents filed a fourth motion to disqualify Hearing Officer Witherspoon, repeating the same arguments they made in previous filings. On April 12, 2005, respondents filed a motion for "Summary Disposition," arguing that there was "no genuine issue in the [c]omplaint." Although the motion stated that it consisted of four parts, only the "Summary of the Case Background" was included in the filing. There was a notation at the end of the document stating that it was "to be continued." There is no evidence in the record, however, that respondents ever filed the remaining parts of the document.

E. Default Decision

On July 1, 2005, Hearing Officer Witherspoon issued a Default Decision, finding that respondents defaulted by failing to appear at the January 27 and February 14, 2005 pre-hearing conferences. Hearing Officer Witherspoon found that respondents received actual notice of the January 27 and February 14, 2005 pre-hearing conferences based on their requests following issuance of the orders scheduling the conferences asking that they be postponed. As a result of the default, Hearing Officer Witherspoon held that the allegations in the complaint were admitted. She further found that the evidence Enforcement submitted supported the allegations in the complaint. Hearing Officer Witherspoon imposed a fine of $5,000, jointly and severally, against the Firm, Xu, and Huang with respect to the violations alleged in causes one and two of the complaint (conducting a business while suspended). Huang and Xu were also suspended in all capacities for 60 days for permitting the Firm to operate while suspended. For Huang's failure to timely respond to NASD staff requests for information, Hearing Officer Witherspoon imposed against Huang an additional six-month suspension in all capacities (for a total suspension of eight months against Huang).

Enforcement appealed the Default Decision on the issue of sanctions. Respondents cross-appealed the default decision, disputing the Hearing Officer's findings and sanctions.

III. Discussion

We first address whether the Hearing Officer properly determined that respondents were in default, and we find that the evidence supports the Hearing Officer's finding. We next consider whether respondents demonstrated good cause for their failure to participate in the proceedings below and find that they have not. Finally, we consider whether the allegations set forth in the complaint are substantiated in the record and conclude that the evidence supports the allegations. We analyze each of these issues in the following discussion.

A. The Hearing Officer's Entry of Default Was Appropriate

As an initial matter, we find that Enforcement complied with Procedural Rule 9134(b)(1) by mailing the complaint and notices of complaint to respondents' CRD addresses, thereby providing constructive notice of this proceeding.[10] Although actual notice is not required, we also find that respondents had actual notice of the complaint as shown by the fact that they filed an answer to the complaint.[11]

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[10] *See Dep't of Enforcement v. Verdiner*, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 n.1 & *6 (NAC Dec. 9, 2003) (finding that mailing of complaint to respondent's most recent CRD address constituted constructive service under Rule 9134(b)(1), and that respondent was therefore properly served).

[11] *See Dep't of Enforcement v. Ryan*, Complaint No. CAF010013, 2003 NASD Discip. LEXIS 2, at *17-18 (NAC Apr. 25, 2003) (finding that although actual notice of the complaint is

[Footnote continued on next page]

Under Procedural Rule 9269(a), a Hearing Officer may issue a default decision against a respondent who fails to appear at a pre-hearing conference. It is undisputed that respondents failed to appear for the rescheduled pre-hearing conferences on January 27 and February 14, 2005. The record establishes that Hearing Officer Witherspoon issued a scheduling order on December 21, 2004, advising the parties of the date and time of the January 27, 2005 pre-hearing conference, and on February 4, 2005, advising the parties of the date and time of the pre-hearing conference on February 14, 2005. The orders indicated that they were faxed and mailed to the parties. The record further shows that respondents filed an "emergency" request on January 26, 2005, to postpone the pre-hearing conference scheduled for January 27, 2005, and that they filed notices on February 10 and 14, 2005, stating that they would not participate in the February 14, 2005 pre-hearing conference because they had medical examinations scheduled for the same day. Respondents' requests to postpone the January 27 and February 14, 2005 pre-hearing conferences demonstrate unequivocally that they had actual notice of those conference dates. Further, the record shows that Enforcement complied with Hearing Officer Witherspoon's instruction to file a written motion for default by filing a motion for the entry of a default decision on March 4, 2005, and that as permitted under Procedural Rule 9146(d), respondents filed an opposition to the motion on March 11, 2005.

Moreover, the record establishes that Hearing Officers Fitzgerald and Witherspoon were exceedingly accommodating regarding respondents' numerous requests to reschedule the pre-hearing conferences in this matter, and that respondents were being asked to participate in the pre-hearing conferences by telephone. We therefore find respondents' last-minute requests for rescheduling and excuses for not participating in the pre-hearing conferences at issue to be unreasonable considering that such participation would have involved picking up a telephone and discussing issues such as the schedule for exchanging pre-hearing motions and determination of hearing dates, among other subjects. *See* Procedural Rule 9241.

Based on the foregoing, we conclude that the Default Decision was properly entered under Procedural Rule 9269(a).

Respondents raise two procedural arguments with respect to the January 27 pre-hearing conference. First, they argue that Hearing Officer Witherspoon and Enforcement engaged in ex parte communications during the January 27, 2005 pre-hearing conference, in violation of Procedural Rule 9143. Respondents' assertion is unsupported by the evidence.

The record establishes that respondents received actual notice of the pre-hearing conference that was scheduled for January 27, 2005, and that they failed to avail themselves of the opportunity to participate in the conference. The pre-hearing conference went forward as

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not required, respondent's message to Enforcement staff that he would be retrieving the second notice of the complaint and other evidence show that he received actual notice).

scheduled and was on-the-record. Thus, any discussions that occurred between Hearing Officer Witherspoon and Enforcement attorney Prytherch during such on-the-record proceeding do not constitute ex parte communications because the rule does not apply when the parties have been given notice and an opportunity to participate. *See* Procedural Rule 9143.

Second, respondents argue that Hearing Officer Witherspoon did not give them proper notice of the oral motion that Enforcement made at the January 27, 2005 pre-hearing conference and an opportunity to respond under Procedural Rule 9146 prior to granting Enforcement's motion and finding them in default for not participating in the January 27, 2005 pre-hearing conference. We first examine whether Hearing Officer Witherspoon had authority to deem respondents in default absent Enforcement's motion for default, and we find that she did have such authority. Under Procedural Rule 9241(f), failure to appear at a pre-hearing conference constitutes grounds for the issuance of a default decision. Further, Hearing Officer Witherspoon had authority to make any procedural determinations at or following the conclusion of the pre-hearing conference under Procedural Rule 9241(e). Thus, Hearing Officer Witherspoon had authority to find respondents in default during the January 27, 2005 pre-hearing conference.

We next analyze respondents' claim that Hearing Officer Witherspoon did not follow the procedures set forth in Procedural Rule 9146(b), which states that if a party makes an oral motion, an adjudicator may order that the motion be set forth in writing, after considering the facts and circumstances. Procedural Rule 9146(b)(2) also requires that the parties "be fully informed" and "have adequate notice and opportunity to respond to such motion."

During the January 27, 2005 pre-hearing conference in which respondents did not participate, Hearing Officer Witherspoon ruled on Enforcement's oral motion for default by stating that, "I am granting you that motion and I will be issuing a written order directing you to file the actual written motion for default." On January 28, 2005, one day after the January 27 pre-hearing conference, Hearing Officer Witherspoon issued an order notifying both parties that Enforcement had made an oral motion for default, that she had granted the motion, and that she was directing Enforcement to file a written motion for the issuance of a default decision After respondents failed to participate in the February 14, 2005 pre-hearing conference, Enforcement filed its written motion for entry of a default decision on March 4, 2005. On March 11, 2005, respondents filed a timely motion in opposition. On July 1, 2005, Hearing Officer Witherspoon issued the Default Decision at issue in this case. Although Hearing Officer Witherspoon stated at the January 27 pre-hearing conference and in her January 28 order that she had "granted" Enforcement's motion for default, the facts show that she did not make a final ruling on the motion until after she received the parties' written submissions on the issue. We conclude that respondents received notice of Enforcement's oral and written motions for a default, and that they had an opportunity to respond, and in fact did respond, before Hearing Officer Witherspoon made a final ruling based upon the written motions, in accordance with Procedural Rule 9146.

Thus, we conclude that: (1) Hearing Officer Witherspoon properly found respondents in default; (2) Hearing Officer Witherspoon and Prytherch's on-the-record discussion at the January 27, 2005 pre-hearing conference did not constitute improper ex parte communications under Procedural Rule 9143; (3) Hearing Officer Witherspoon had authority under Procedural Rules 9241(e) and (f) to find respondents in default during the January 27, 2005 pre-hearing

conference; and (4) Hearing Officer Witherspoon gave respondents an opportunity to respond to Enforcement's oral and written motions for default, and the respondents did respond to Enforcement's motions, before Hearing Officer Witherspoon made a final ruling on the motions in accordance with Procedural Rule 9146.

B. Respondents Failed to Show Good Cause

We next examine whether respondents had "good cause" under Rule 9344(a) for not participating in the scheduled pre-hearing conferences. Under Rule 9344(a), the NAC will consider default decision appeals on the basis of the written record without the opportunity for oral argument unless the respondent demonstrates good cause for his failure to participate in the proceedings below. If good cause is established, the rule permits the NAC to dismiss the appeal and remand the matter for further proceedings or to order the appeal to proceed.

In evaluating good cause, the NAC will take into account such factors as the reasons for the respondent's failure to participate in the proceeding before the Hearing Officer, among other factors. *See NASD Notice to Members 99-77* (Sept. 1999). Respondents argue on appeal that they had good cause for failing to attend the pre-hearing conferences at issue, citing a variety of purported health problems. Although respondents presented letters and doctor certifications stating that Xu and Huang had various medical problems that apparently coincided with the dates of the pre-hearing conferences, none of those documents included information indicating that respondents' health conditions were of a nature that would prevent Xu and Huang from participating in the pre-hearing conferences scheduled for January 27 and February 14, 2005.

The subcommittee of the NAC ("Subcommittee") that considered this matter on appeal notified the parties in writing that it had carefully reviewed the record and determined that the evidence did not support respondents' contention that they had good cause for failing to participate in the pre-hearing conferences at issue. The Subcommittee further advised the parties that, based on that finding, the matter would be considered on the basis of the written record, in accordance with Procedural Rule 9344(a). We agree with the Subcommittee's conclusions and accept its findings with respect to this issue.

Even though the Hearing Officer properly entered the Default Decision against respondents, we have conducted an independent review of the record and find that there is sufficient evidence in the record to support the Default Decision.

C. Evidentiary Basis Supporting Findings of Violation

Hearing Officer Witherspoon made findings of violation based on the allegations deemed admitted as a result of the default, admissions made in the answer to the complaint, and the evidence that Enforcement presented in support of its motion for a default decision. The SEC has indicated that when a default decision is appealed, the record should contain sufficient independent evidence to support the findings of violation to enable the SEC to discharge its

review function under Section 19 of the Securities Exchange Act of 1934.[12] We therefore have conducted an independent review of the evidence and find that the record supports the findings included in the Default Decision.

1. The Firm Conducted a Securities Business While Suspended

The record supports the findings that the Firm conducted a securities business while it was suspended and that Huang and Xu permitted the Firm to engage in such misconduct. We find that the Firm, Xu, and Huang therefore violated Conduct Rule 2110, as alleged in the complaint.

It is undisputed that the Firm continued to conduct securities transactions during the relevant period following the issuance of the Suspension Decision—from December 2002 through January 14, 2003. Indeed, respondents stated in their answer to the complaint that their clients placed unsolicited orders through the clearing firm's order platform during the relevant period. In addition, Huang stated in her August 6 response to Enforcement's requests for information that from December 2002 through January 2003, she was "arranging clients' orders through internet clearing firm's platform." Moreover, the Firm's blotter and transaction confirmations show that the Firm continued effecting securities transactions during the period of its suspension.

At the time the Suspension Decision was issued, NASD Procedural Rule 9514(g)(4) (2002) provided that non-summary suspension decisions were to be served in accordance with Procedural Rules 9132 and 9134, which provide that service is to be made on counsel when a party, whether a natural person or entity, is represented by counsel. *See Dep't of Enforcement v. Douglas,* Complaint No. C10000026, 2002 NASD Discip. LEXIS 3, at *11-12 (NAC Mar. 25, 2002) (holding that when counsel represents a party, service on counsel is effective service). Here, the Suspension Decision noted that a copy of the Suspension Decision had been sent to Tung, who was serving as the Firm's counsel, via facsimile and first-class mail. The record shows that Tung received actual notice of the Suspension Decision by his filing of a motion with the SEC to stay the suspension only a few days after the Suspension Decision was issued. Under Procedural Rule 9527, the filing of an application for review with the SEC "shall not stay the effectiveness of final action by the Association, unless the Commission otherwise orders." Here, there was no stay in effect because the SEC denied the stay request on December 12, 2002.

The record establishes therefore that the Firm conducted a securities business after a copy of the Suspension Decision was properly served on the Firm's counsel. The NAC has held that

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[12] *See James M. Russen, Jr.*, 51 S.E.C. 675, 678 & n.12 (1993) (noting approvingly in default case that NASD, rather than simply basing its conclusions on the allegations in the complaint, had reviewed the record evidence and determined that it supported a finding of violation); *Troy A. Wetter*, 51 S.E.C. 763, 767-68 (1993) (ruling in default case that the SEC could "conclude, on this record, that [the firm] effected only 5, rather than 30, securities transactions" and reducing the sanctions).

failure to comply with an NASD suspension order "manifests a fundamental disregard for the authority of the NASD" and violates Conduct Rule 2110. *See Dep't of Enforcement v. Usher*, Complaint No. C3A9800069, 2000 NASD Discip. LEXIS 5, at *13 (NAC Apr. 18, 2000). We therefore find that Perpetual Securities violated Conduct Rule 2110's requirement to observe high standards of commercial honor and just and equitable principles of trade when it continued to effect securities trades after it received proper notice of the suspension.

Having established that the Firm transacted a securities business while suspended, we now address Xu and Huang's roles relevant to the misconduct. Cause two of the complaint alleges that Xu and Huang, as the Firm's principals and owners, knew or had reason to know that the Firm was suspended, and that they violated Conduct Rule 2110 by permitting the Firm to conduct a securities business while it was suspended. Xu and Huang both held an ownership interest in the Firm and were registered as general securities principals of the Firm. Xu was the Firm's chief executive officer and president, and Huang was the Firm's chief financial officer and executive vice president. As the sole principals of the Firm, Xu and Huang were responsible for ensuring that the Firm complied with the Suspension Decision.[13]

Respondents asserted in their answer to the complaint that they were not properly served with a copy of the Suspension Decision and were not aware of the suspension. Respondents have based their argument on the incorrect premise that service on counsel does not constitute proper service. Respondents' argument is patently incorrect. Procedural Rule 9132(c) requires service to be made upon a person's counsel when that counsel has filed a notice of appearance pursuant to Rule 9141. The record under review in this matter shows that a "Notice of Appearance" was entered relevant to the suspension proceeding on July 12, 2002. Moreover, the Suspension Decision and the "Certification of the Record" for the non-summary suspension proceeding specifically list Tung as the attorney of record to whom the documents were sent by facsimile and first-class mail. Although this record does not include a copy of the notice of appearance from the non-summary suspension proceeding, the implication we draw from these documents is that Tung was the attorney of record in the non-summary suspension proceeding. As noted above, we conclude that Tung received actual notice of the Suspension Decision as evidenced by his prompt appeal of the decision to the SEC.[14]

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[13] Membership & Registration Rule 1021(b) defines a principal as a person associated with a member who actively engages in the management of the member's securities business. The record shows that both Xu and Huang were actively engaged in managing the Firm. As the president of Perpetual Securities, Xu was primarily responsible for ensuring that the Firm did not conduct business during the period of its suspension. *See Castle Secs. Corp.*, Exchange Act Rel. No. 39999, 1998 SEC LEXIS 998, at *6 (May 18, 1998). Even if Xu had delegated all supervisory authority with respect to the Firm's compliance with the Suspension Decision to Huang, however, he still had the "additional duty to follow-up and review that delegated authority to ensure that it [was] being properly exercised." *Id.*

[14] The record demonstrates that, on December 2, 2002, under the discretionary authority granted by Procedural Rule 9132, the Hearing Officer also sent a courtesy copy of the Suspension Decision to Huang and the Firm at the Crimson King address that was listed on the

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Respondents imply in their answer to the complaint that their counsel had no reason to contact them regarding the arbitration matter because Xu had given him prior authorization to handle any appeals with respect to the arbitration matter while Xu purportedly was out of the country for two months, starting in about mid-November 2002. Any such arrangement, however, does not excuse respondents' responsibility to comply with the Suspension Decision. *See, e.g., Justine Susan Fischer*, 53 S.E.C. 734, 741 n.4 (1998) (holding that "[a] broker has responsibility for his or her own actions and cannot blame others for [his or] her own failings").

We find that the record demonstrates that Xu and Huang knew or had reason to know of the Firm's suspension and that they did not take immediate action to ensure that the Firm complied with the suspension promptly after it was imposed. We therefore conclude that Xu and Huang permitted the Firm to conduct a securities business while suspended, in violation of Conduct Rule 2110.

2. Huang Failed to Provide Requested Information

Procedural Rule 8210 authorizes NASD to require members to provide information "with respect to any matter involved in [an] investigation." We find that Huang's failure to respond completely to NASD's requests for information in connection with Enforcement's investigation of the Firm violated Procedural Rule 8210 and Conduct Rule 2110.[15]

a. Huang Received Proper Notice of NASD Requests for Information Under Rule 8210(d)

Rule 8210(d) provides that a notice under the rule is deemed received by the member or person to whom it is directed upon mailing or otherwise transmitting to the member's or person's last known address on file in the CRD. We find that Huang received proper notice of the requests for information under Rule 8210(d). In accordance with Rule 8210(d), Enforcement sent the March 18, 2004 request for information to Huang at her residential CRD address and the

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Firm's amended Form BD that Huang had provided to OHO staff. Respondents deny receiving the mailing and contend that they did not know about the Suspension Decision until January 14, 2003, when NASD staff orally advised them about the decision during an audit. Because we find that respondents were properly served with a copy of the Suspension Decision through their counsel, in accordance with Procedural Rule 9132, respondents' denial that they received the courtesy copy of the Suspension Decision and any arguments regarding that issue are not relevant to our finding.

[15] A violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110. *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999). Additionally, NASD Rule 115 provides that NASD's rules apply to all members "and persons associated with a member" and that such persons have the same duties and obligations as a member under the rules.

Firm's CRD addresses.[16] *See Dep't of Enforcement v. Verdiner*, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5n.1 & *6 (NAC Dec. 9, 2003). Huang also received constructive service of the two requests for information dated April 7, 2004, which also were sent to Huang's CRD addresses.[17] *Id.*

Huang argues that she did not receive NASD's requests for information because she and Xu had moved to Canada on March 17, 2004. Huang's move to Canada does not excuse her failure to respond. The SEC has held that it is an associated person's responsibility to provide CRD with an address at which documents may be received. *See Ashton Noshir Gowadia*, 53 S.E.C. 786, 790 (1998).

b. Rule 8210 Violations

Huang did not acknowledge Enforcement's March 18 and April 7, 2004 requests for information until August 6, 2004, more than one month after the complaint in this matter had been issued and at least four months after the requests were mailed to Huang's CRD addresses. Moreover, Huang did not include in her response the following documents and information requested by Enforcement: (1) a copy of the Firm's written supervisory procedures; (2) a copy of the Firm's telephone records; and (3) a listing of customer telephone numbers. We analyze separately Huang's responses to each of these requests.

Instead of providing a copy of the Firm's written supervisory procedures as requested, Huang included in her response a narrative of the duties she supposedly performed relevant to closing down the Firm. As the SEC has stated, however, "an NASD member may not 'second guess' or 'impose conditions on' the NASD's request for information." *Joseph Patrick Hannan*,

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[16] The request was sent via first class and certified mail to Huang at her Crimson King CRD address, the Firm's Holmdel CRD mailing address, as varied apparently for purposes of clarity from [redacted] and the Firm's Forest Hills address, listed in CRD as its main address. The first-class mailings to the CRD addresses were not returned. The certified mailing to Huang's Crimson King CRD address was returned with the notation, "return to sender-no forward order on file-unable to forward." Staff received a signed return receipt for the certified mailing to the Holmdel address bearing the signature "John P. Zach." Staff also received a signed return receipt for the certified mailing to the Forest Hills address signed by "John Zach." Respondents stated in their answer to the complaint that "John Zach" was the owner of the mailbox service facility that they used in Buffalo, New York "for the collect and receipt of mails, [sic] including registered, insured and certified items," after they left the United States for Canada on March 17, 2004. There was no such address change, however, on record with CRD.

[17] Staff did not receive any first-class or certified mailings, or return receipts back for the mailings that were sent to the Firm's Holmdel and Crimson King addresses listed in CRD. The Postal Service returned to staff both the first-class and certified mailings made to the Firm's Forest Hills CRD address.

53 S.E.C. 854, 859 (1998) (citations omitted). Huang was obligated, as an associated person of NASD, "to abide by its [rules], which are unequivocal with respect to the obligation to cooperate with . . . NASD." *Brian L. Gibbons*, 52 S.E.C. 791, 794 n.12 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997) (table format) (citation and internal quotes omitted). Huang therefore had no authority to substitute her judgment for NASD's by giving NASD information that it did not request in lieu of requested documents.

With regard to Enforcement's Rule 8210 request for the Firm's telephone records, Huang claimed that the Firm did not keep such records and that the telephone company could not provide her with the records. The SEC's findings in *Rooney A. Sahai*, Exchange Act Rel. No. 51549, 2005 SEC LEXIS 864 (Apr. 15, 2005), *remanded on other grounds, Dep't of Enforcement v. Sahai*, Complaint No. C9B020032, 2006 NASD Discip. LEXIS 6 (NAC March 2, 2006) are instructive. In *Sahai*, the SEC found that, "[a]lthough Sahai had access to his accountant and bank (to obtain check records), there is no record evidence that he contacted either of them for information responsive to NASD's request." *Id.*, at *28. The SEC held that, "[i]f Sahai could not readily provide the information that NASD requested, he had an obligation to explain, as completely as possible, his efforts and his inability to do so." *Id.* Huang stated that she had called the telephone company, and that "they said they did not have that service." Huang, however, failed to provide any evidence of her efforts, such as proof that she had contacted the telephone company, and that the telephone company had indicated that it could not provide her with the requested documentation.

Huang also did not produce the listing of customer telephone numbers that Enforcement requested under Rule 8210, claiming that she could not provide the information because the Firm's clearing firm had blocked access to this information. Moreover, Huang did not furnish Enforcement with evidence of her efforts to obtain the requested information and her inability to provide the information. *Id.* For instance, there is no evidence in the record showing that Huang contacted the clearing firm or that the clearing firm had "blocked" her access to the requested information.[18]

We find that Huang failed to respond timely and fully to NASD's requests for information and documents under Rule 8210.[19] Huang therefore violated Procedural Rule 8210 and Conduct Rule 2110.[20]

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[18] The record includes only Huang's representation that she had contacted the clearing firm and that the clearing firm had blocked her access to the customers' telephone numbers.

[19] We therefore modify Hearing Officer Witherspoon's finding that Huang's violation constituted only a failure to respond timely to requests for information.

[20] Respondents characterized Enforcement's requests as "trivial." It is well settled, however, that respondents may not attempt to substitute their judgment regarding the relevance of information requested under Rule 8210. *See Joseph Patrick Hannan*, 53 S.E.C. at 859.

IV. Procedural Issues

Respondents have charged in numerous motions throughout these proceedings: (1) that the Hearing Officer who presided over this matter and OHO engaged in fraudulent conduct with respect to these proceedings and were biased against them; (2) that the district director for District 9 and the Enforcement attorney who signed the complaint did so in their individual capacities and that the complaint was therefore invalid; and (3) that the proceedings were not fair. These claims are entirely without support in the record. Moreover, we consider respondents' accusations to be a misguided attempt to shift any blame for their misconduct to others, and we categorically reject such tactics. *See, e.g., Justine Susan Fischer*, 53 S.E.C. 734 n.4 (1998) (holding that "[a] broker has responsibility for his or her own actions and cannot blame others for [his or] her own failings"). On appeal before the NAC, respondents continued their attempts to shift the blame by moving to disqualify the Subcommittee and the NASD attorney advisor serving as the Subcommittee's counsel after the Subcommittee ruled against respondents on several procedural issues.

We address each of these issues in turn.

A. Respondents' Allegations of Fraud Against the Hearing Officer

Respondents allege that Hearing Officer Witherspoon committed fraud by improperly excluding from the record in the proceedings below certain motions that respondents filed. This allegation is baseless. We conclude that Hearing Officer Witherspoon's decision to exclude the motions at issue from the record was proper.

Respondents refused to comply with Hearing Officer Witherspoon's December 14, 2004 and January 6, 2005 orders directing that respondents include the proper caption in their filings, despite the warning in the January 6 order that any of respondents' filings without the proper caption would be rejected. Respondents did not comply with the orders based on their claim that Liebowitz and Prytherch had signed the complaint in their individual capacities, not on behalf of Enforcement, and that the complaint was therefore invalid. This argument fails for the following reasons. Enforcement issued the complaint in accordance with its authority under Procedural Rule 9211(a)(1). Prytherch, an attorney with Enforcement, signed the complaint on behalf of Enforcement as required under Procedural Rule 9212. The fact that Liebowitz, the District Director for District 9, also signed the complaint does not have any effect on the validity of the complaint.[21] Moreover, there is nothing in the record to suggest that either Prytherch or Liebowitz signed the complaint in their individual capacities.[22]

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[21] We therefore reject any and all suggestions respondents made in these proceedings that the complaint is invalid because of the presence of Liebowtiz's signature.

[22] Respondents also accused Enforcement attorney Leo Orenstein ("Orenstein"), Enforcement's Deputy Chief Litigation Counsel, of having no standing to respond to a motion that they made on appeal. Although the basis for respondents' motion is not completely clear, it

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Enforcement stated on appeal that although Hearing Officer Witherspoon properly excluded the motions at issue, it would not object to the "motions being treated as supplemental documents under NASD Rule 9267(b)." A supplemental document, among other things, is any document submitted to the Hearing Officer that was not admitted by the Hearing Officer. *See* Procedural Rule 9267.

The Subcommittee considering this matter on appeal ruled that Hearing Officer Witherspoon's rejection of the motions at issue was not an abuse of authority under NASD Procedural Rule 9235, which permits a Hearing Officer to have authority "to do all things necessary and appropriate to discharge his or her duties." In addition, the Subcommittee ordered the excluded documents listed on pages four through five of respondents' motion entitled "Motion: Hearing Officer Witherspoon's Frauds in her 'Index to the Appealing Record,'" dated August 27, 2005, to be included in the record as supplemental documents under Rule 9267(b). We adopt this ruling.[23]

B. Respondents Argue that Hearing Officer Witherspoon Distorted the Description of One of Their Filings in the Index to the Record

Respondents assert that Hearing Officer Witherspoon incorrectly described in the index to the record their filing, dated February 10, 2005, by stating that respondents represented in the filing that they would "not provide medical records as they are privileged and confidential." Hearing Officer Witherspoon's description was derived from the following statement in respondents' filing: "Respondents' medical records are confidential. It is not proper to discuss Respondents' health on the pre-hearing conference. It is also not permitted to send the Respondents' private medical records to others."

Respondents argue that the description in the index is incorrect based on their contention that documents they provided previously to Hearing Officer Witherspoon demonstrated that, for health reasons, they were unavailable to participate in the January 27, 2005 pre-hearing conference. In an order dated February 4, 2005, rescheduling the pre-hearing conference to February 14, 2005, however, Hearing Officer Witherspoon concluded that the documents

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appears that respondents are arguing that Orenstein may not participate in these proceedings because he did not sign the complaint. This argument is meritless. As an initial matter, Enforcement properly authorized the complaint against respondents and therefore is a party in this proceeding. Moreover, there is no procedural requirement for Orenstein, an Enforcement attorney representing Enforcement on appeal in these proceedings, to be a signatory on the complaint in order to participate in the proceedings in this matter.

[23] Respondents also contend that certain copies of email messages between Enforcement and OHO with respect to service of the November 25, 2002 suspension order that respondents sought to admit were not included as part of the record. These emails, however, are included in the record as Enforcement's exhibits.

respondents provided, in fact, did "not present a good faith explanation for their failure to appear at the pre-hearing conference." Hearing Officer Witherspoon advised respondents in the February 4, 2005 order that she would consider vacating the order if respondents were able to substantiate the claims of medical emergency.

The Subcommittee concluded that Hearing Officer Witherspoon's description of the document at issue was not an abuse of authority under Rule 9235(a)(6) (authority to create and maintain the official record of the disciplinary proceeding). We agree with the Subcommittee's conclusion.

C. Fairness of the Proceedings

Respondents claim that Hearing Officer Witherspoon deprived respondents of their right to a hearing and that the fairness of the proceedings thus was compromised. The record, however, does not support respondents' claim that they were improperly deprived of a hearing. To the contrary, respondents' own actions deprived them of the opportunity to be able to offer evidence at a hearing. There is nothing in the record to suggest that the proceedings in this matter were not conducted fairly and in compliance with all applicable rules and regulations.

The Securities Exchange Act of 1934 ("Exchange Act") requires that self-regulatory organization ("SRO") rules "provide a fair procedure for the disciplining of members and persons associated with members[.]" Section 15A(b)(8) of the Exchange Act, 15 U.S.C. § 78o-3(b)(8). Section 15A(h)(1) of the Exchange Act requires that NASD proceedings be fair. The Commission's interpretations of the Exchange Act's fairness language have focused on whether the SRO followed its internal procedures and whether those procedures were fair.[24] We therefore review whether NASD followed its internal procedures and whether those procedures were fair. We find in the affirmative.

Respondents contend that they were deprived of their right to a hearing because Hearing Officer Witherspoon advised respondents in an order dated February 4, 2005, that if they filed a statement no later than February 10, 2005, confirming that they did not want an in-person hearing but would rather have the matter considered solely on the documents, she would cancel the February 14, 2005 pre-hearing conference and consider vacating the order directing Enforcement to file a default motion. The fact that the Hearing Officer offered respondents this choice does not suggest, let alone prove, that the proceeding was unfair. We find that it was respondents' decision not to participate in the two pre-hearing conferences that led to their default. Respondents thus deprived themselves of the opportunity to have a hearing on the

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[24] *See Scattered Corp.*, 53 S.E.C. 948, 958 (1998) (noting that past cases involving "fairness" analyses "have focused on the fairness of the SRO's internal procedures, including organization structure as it affects the fairness and impartiality of the course of the proceeding"); *but see U.S. Assocs., Inc.*, 51 S.E.C. 805 (1993) (performing a "fairness" analysis and finding that NASD had failed to follow its own procedural rules).

merits.[25] Moreover, we find no evidence that NASD did not comply with its internal procedures, which the SEC has found afford respondents a fair procedure.[26]

D. Motion to Disqualify NAC Subcommittee and Counsel

On March 15, 2006, respondents filed a motion asking that the NAC Subcommittee considering this matter on appeal be disqualified and that the NASD counsel[27] assigned to this matter be disqualified from serving as the Subcommittee's attorney advisor. The motion accused the Subcommittee and Hearing Officer Witherspoon of intentionally hiding essential facts of the case by excluding documents from the record. The documents at issue are motions that respondents filed that did not comply with Hearing Officer Witherspoon's orders regarding the format of the case caption and notices from OHO advising the respondents that the motions would not be accepted for filing because they were not captioned properly. Respondents' motion also reiterated their assertions that the Enforcement staff, the Hearing Officer that handled this case below, and OHO engaged in fraudulent conduct relevant to this case and that these parties were biased against them. Respondents claimed that the NAC Subcommittee and its counsel also were biased against them. Respondents' claim of bias relies entirely on the fact that the Subcommittee ruled against them on a prior motion in which they sought to include documents that Hearing Officer Witherspoon previously excluded from the record.

In accordance with Procedural Rule 9332(c), the Chair of the NAC ruled on respondents' motion to disqualify, finding that respondents demonstrated no reason for any disqualification

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[25] To the extent respondents raise due process arguments, we hold that such constitutional claims are not relevant. Numerous courts and the SEC have determined that the Due Process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution do not apply to non-governmental action, such as NASD proceedings. *See E. Magnus Oppenheim & Co., Inc.*, Exchange Act Rel. No. 51479, 2005 SEC LEXIS 764, at *10 n.15 (Apr. 6, 2005); *see also D.L. Cromwell Invs. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002), *cert. denied* 537 U.S. 1028 (2002) (Fifth Amendment does not apply to a self-regulatory organization's disciplinary proceedings); *Herbert Garrett Frey*, 53 S.E.C. 146, 153 n.17 (1977) (NASD not a government actor for purposes of the Fifth and Fourteenth Amendments).

[26] *See Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding that the NASD proceeding complied with the procedural safeguards required under Exchange Act Section 15A(h)(1) and thus was fair); *James Elderidge Cartwright*, 50 S.E.C. 1174, 1179 (1992) (finding that NASD's disciplinary proceedings are fair).

[27] In accordance with Procedural Rule 9313, counsel to the Subcommittee in this matter is an attorney from NASD's Office of General Counsel, Regulatory Policy and Oversight.

and that, therefore, the Subcommittee and its counsel in this matter would continue to serve on this case.[28] We adopt the Chair's ruling as our own.[29]

Respondents also requested in their motion to disqualify that this case be reported to the NASD Board and that the Board appoint a special committee to review the matter. We agree with the Chair's denial of this request on the basis that there is no provision in NASD's Code of Procedure for such relief and that respondents have not provided any persuasive support for their request.[30]

V. Sanctions

A. Conducting a Securities Business While Suspended

The Hearing Officer imposed a $5,000 fine, jointly and severally against respondents Perpetual Securities, Xu, and Huang, and a suspension of 60 days in all capacities against respondents Xu and Huang for permitting the Firm to conduct a securities business while suspended. Based on the nature of the violation, and other relevant factors as explained below, we have concluded that it is necessary to increase the sanctions that the Hearing Officer imposed against respondents. For conducting a securities business while suspended, we order that Perpetual Securities be expelled from NASD as a broker-dealer. We order that Xu and Huang be barred from associating with a member firm in any capacity for permitting the Firm to conduct a securities business while it was suspended. Our rationale for increasing the sanctions imposed by the Hearing Officer is explained below.

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[28] The NAC Chair determined that there were insufficient grounds under Procedural Rule 9332(b) to find a conflict of interest or circumstances where the fairness of the Subcommittee or counsel might reasonably be questioned.

[29] We exclude the exhibits that respondents included with their motion for disqualification because they did not request leave to introduce the documents as additional evidence, as required under Procedural Rule 9346. Further, respondents did not otherwise comply with the requirements of Procedural Rule 9346. In addition, we find no support in the record for allegations in a motion filed by respondents on March 6, 2006, in which they argue that the Default Decision in this matter is invalid, that the Office of Hearing Officers engaged in fraud, and that a special committee should be appointed to handle this matter. We deny this motion.

[30] After the Office of General Counsel for Regulatory Policy and Oversight sent respondents a letter advising them of the Chair's decision to deny their motion to disqualify and request for the Board to appoint a special committee to review this matter, respondents filed a second motion requesting that the Subcommittee be disqualified that reiterated arguments made previously. We also deny that motion and a similar motion that respondents filed on May 9, 2006.

There is no published sanction guideline for engaging in a securities business while suspended. Consequently, the Hearing Officer used the NASD Sanction Guidelines ("Guidelines") applicable to a firm allowing a disqualified person to associate with the firm prior to approval as a guide for determining sanctions.[31] These Guidelines recommend a fine of $5,000 to $50,000, and in egregious cases, a suspension for up to two years against the firm, a suspension against the supervisory principal in any or all capacities for up to two years or a bar against the supervisory principal. We have used these recommendations as a guide in assessing appropriate sanctions. We also are guided by a number of the general principles and principal considerations applicable to all sanction determinations included in the Guidelines.

In fashioning sanctions against the Firm, we have identified several aggravating factors. First, we consider egregious the fact that the Firm continued to operate a securities business for one and one-half months after NASD issued its suspension order. Second, we note that the Firm refused to honor NASD's suspension following a protracted effort to avoid payment of the arbitration award. The Firm did not pay the award until May 16, 2003, approximately two-and-one-half years after the arbitration award was issued and nearly six months after the Suspension Decision was issued. It is well settled that, "as a general matter, arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126, 129 (2d Cir. 2003) (citations and internal quotation marks omitted). Respondents' long delay in paying the arbitration award frustrated these important goals. Third, as instructed by the Guidelines, we also have considered the Firm's relevant disciplinary history. The Guidelines explain, among other things, that adjudicators should consider imposing more severe sanctions when a respondent's disciplinary history includes "past misconduct that evidences disregard for regulatory requirements, investor protection, or commercial integrity."[32] On November 8, 1999, the Firm and Xu submitted a Letter of Acceptance, Waiver and Consent ("AWC") in which they consented to a censure and joint and several fine of $6,000 based on allegations in the AWC that the Firm, acting thru Xu: (1) failed to file advertisements with NASD's Advertising Regulation Department; and (2) opened a branch office prior to NASD approval and without registering the branch office with NASD. The AWC also required the Firm to file advertisements with the Advertising Regulation Department 10 days prior to the Firm's use for six months.

Given this evidence, which indicates the Firm's demonstrated lack of regard for regulatory requirements, we conclude that it is essential that the Firm be permanently prohibited

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[31] *NASD Sanction Guidelines* (2005 ed.) at 46 (Disqualified Person Associating with Firm Prior to Approval; Firm Allowing Disqualified Person to Associate Prior to Approval), http://www.nasd.com/web/groups/enforcement/documents/enfrocement/nasdw_011038.pdf [hereinafter *Guidelines*].

[32] *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2).

from operating as a broker-dealer.[33] Although the Firm's registration was terminated on July 11, 2005, we have determined that it is important that an expulsion be recorded against the Firm to ensure that respondents do not attempt to resurrect the Firm and seek membership in the future.[34]

Turning to Xu and Huang's violations, we conclude that Xu and Huang, at a minimum, recklessly ignored their duty to ensure that the Firm complied promptly with the suspension order, and that their misconduct was therefore egregious.[35] Xu and Huang knew from NASD's letter dated June 18, 2002, that NASD was considering suspension proceedings against them for the Firm's failure to pay a November 14, 2000 arbitration award. In fact, although they requested a hearing, they agreed to have the Hearing Officer consider the matter on the papers. Despite the knowledge that the Hearing Officer would be making a ruling on the issue of suspension, Xu and Huang failed in their duties as principals to closely monitor through their counsel whether NASD had issued a suspension order while Xu purportedly was traveling outside of the country. The duty to comply with the suspension order rested squarely on Xu and Huang as the supervisory principals of the Firm. *See Castle Secs. Corp.*, 1998 SEC LEXIS 998, at *6. Finally, we note that respondents also have not explained why their counsel would not have told them that the SEC had issued a decision on December 12, 2002, denying their stay request.

The Guidelines direct us to consider whether respondents' misconduct resulted in their potential for monetary or other gain.[36] Huang admitted in her response to NASD requests for information that she made arrangements for customers to place their trades through the Firm's Internet trading platform during the relevant period. The statements from the Firm's clearing firm establish that the Firm was effecting retail and proprietary trades during the relevant period.

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[33] We are guided by the principle in the Guidelines that instructs adjudicators to design sanctions that are "significant enough to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices." *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

[34] As we have stated in a previous case, we find that conducting a business while suspended, although a similar violation to allowing a statutorily disqualified person to associate with a firm, is a more serious violation of NASD rules. *See Usher*, 2000 NASD Discip. LEXIS 5, at *13. Thus, although we have consulted the recommended ranges set forth in the Guidelines for permitting a disqualified person to associate with a firm prior to approval, we conclude that an expulsion against the Firm is warranted under these circumstances even though it is outside of the recommended range in the Guidelines.

[35] The Guidelines instruct us to consider whether respondents' misconduct was the result of an intentional act, recklessness, or negligence. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

[36] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 17).

Although the Firm's blotters and trade confirmations are included in the record, we are not able to determine the exact amount of commissions that respondents earned during the relevant period because the record was assembled in the context of a default. Nonetheless, the fact that respondents continued to effect securities transactions plainly gave them the opportunity for monetary gain through the commissions they would charge on the trades.

The Guidelines state that "[a]djudicators should design sanctions that are significant enough to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, to modify and improve business practices."[37] As we stated in *Usher*, "[w]hen . . . NASD takes the extraordinary step of suspending a firm or a registered person, it is entitled to require complete and precise compliance with its directive." 2000 NASD Discip. LEXIS 5, at *13. Respondents failed to comply with the Suspension Decision. The record includes overwhelming evidence establishing that respondents showed a complete lack of understanding of their duty to closely monitor the situation following their receipt of notice from NASD that the Firm faced the possibility of suspension for its failure to pay an arbitration award. Such fundamental failure to understand their principal responsibilities calls for significant sanctions to remediate Xu and Huang's misconduct and to serve as a deterrent to other industry participants.

We also address the Hearing Officer's reasoning for imposing sanctions on the low end of the recommended Guidelines and explain our reasons for increasing the sanctions in this matter. The Hearing Officer listed the following factors as being relevant to her consideration of sanctions: (1) the short period of time of the misconduct; (2) the incidental amount of income that the misconduct generated; (3) the respondents' efforts to comply with the suspension at the time they represented they first became aware of the suspension; and (4) the lack of any customer harm shown by the misconduct. Considering the relatively low sanctions that the Hearing Officer imposed, we infer from our reading of the decision that she considered these factors to be evidence of mitigation.

For the following reasons, we disagree with the Hearing Officer's analysis. We do not consider the Firm's continued operation of a securities business for more than a month after the suspension order was issued to constitute a "short period of time." As to the second factor, we find that although the receipt by respondents of large profits would have been considered an aggravating factor, the absence of such evidence does not constitute mitigation. Third, it also is not mitigating that respondents complied with the suspension order in mid-January 2003, upon allegedly first learning of the suspension order, considering that they were under a pre-existing obligation to comply with the order at the time it was issued. Any eventual adherence to the terms of the order is therefore not mitigating for purposes of assessing sanctions. Finally, although it would have been aggravating if the misconduct had resulted in customer harm, the lack of adverse consequences to Firm customers does not constitute evidence of mitigation.

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[37] *Id.*, at 2 (General Principles Applicable to all Sanctions Determinations, No.1).

For the foregoing reasons, we modify the sanctions imposed by the Hearing Officer for causes one and two and order that the Firm be expelled and that Xu and Huang be barred from associating with any NASD member firm in any capacity.

B. Failure to Respond to Requests for Information

The Hearing Officer found that Huang failed to respond timely to requests for information and imposed on Huang a six-month suspension in all capacities. As explained below, we disagree with the Hearing Officer's rationale for imposing this sanction and conclude that Huang's misconduct warrants a bar.

The Guidelines for failing to respond to Rule 8210 requests for information recommend that a bar should be standard if the individual does not respond in any manner.[38] Under that Guideline, we consider whether the requested information has been provided and, if so, we consider the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response. We find that Huang did not respond to Enforcement's requests for information until August 6, 2004, more than one month after the complaint in this matter had been issued and approximately five months after the requests had been made. The SEC has stressed repeatedly that NASD should not have to bring a disciplinary proceeding in order to obtain compliance with its rules with respect to NASD investigations. *See, e.g., Charles R. Stedman,* 51 S.E.C. 1228, 1232 (1994). We also note that Huang's response did not include a copy of the requested supervisory procedures for the relevant period, nor did it include evidence of: (1) her efforts to comply with the requests for the Firm's telephone records of incoming and outgoing calls for the relevant period and a list of the customers' phone numbers; and (2) her inability to comply with those requests. Huang's representation that she was living in Canada and had not received the requests for information in a timely manner is not a mitigating fact. As the SEC has repeatedly emphasized, associated persons, such as Xu and Huang, are obligated to keep their address records current. *See David I. Cassuto*, Exchange Act Rel. No. 48087, 2003 SEC LEXIS 1496, at *10 (June 25, 2003) (respondent who failed to comply with NASD information requests had a "responsibility to maintain a current address in the CRD").[39]

The Guideline for failing to respond to requests for information also instructs us to consider the nature of the information requested. We conclude that the requested documents and information—copies of the Firm's telephone records, the customers' telephone numbers, and the Firm's written supervisory procedures—constituted information that was important to Enforcement's investigation into respondents' possible violations following issuance of NASD's Suspension Decision. Enforcement's March 18 and April 7, 2004 letters that requested this information under Rule 8210 advised Huang that the requests were in connection with an NASD

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[38] *See Guidelines*, at 35 (Failure to Respond or Failure to Respond Truthfully, Completely or Timely to Requests Made Pursuant to NASD Procedural Rule 8210).

[39] *Id.*

investigation, and that failure to comply with such requests could result in disciplinary action against Huang and/or the Firm. It is well established that, because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate. *See, e.g., Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000).

We disagree with the analysis that the Hearing Officer used in arriving at the six-month suspension that she imposed on Huang for violating Rule 8210. In our view, the Hearing Officer mischaracterized Huang's response on August 6, 2004, as only a failure to respond "in a timely manner," suggesting that Huang had provided the requested documents and information. As noted, Huang's response did not include the requested copy of the Firm's supervisory procedures and did not include evidence of her efforts to obtain the Firm's telephone records and the customers' telephone numbers. Nor did it include evidence of her inability to produce the documents and information. Moreover, Huang's response was not received until after Enforcement had filed the complaint in this matter. Thus, the record supports the conclusion that Huang failed to produce the requested documents timely and fully. The Hearing Officer also cited as a fact favorable to Huang that she had responded to earlier Rule 8210 requests for information. On that basis, the Hearing Officer concluded that it was "possible" that Huang did not receive the requests for information. But as the evidence demonstrates, Huang received proper notice of the requests and, as an associated person of NASD, she was obligated to abide by NASD rules and provide the requested documents. *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *13-14 (Feb. 13, 2004) (finding that, "[w]hen Valentino registered with NASD, she agreed that she understood and consented to abide by its rules, including the requirement to provide information requested by NASD for its investigations"). Moreover, the fact that a respondent provided requested information in response to other Rule 8210 requests is not mitigating.[40] Therefore, Huang's responses to Rule 8210 requests for information made prior to the Rule 8210 requests dated March 18 and April 7, 2004, do not mitigate her failure to provide staff with: (1) a copy of the Firm's supervisory procedures; and (2) evidence of her efforts to comply with the request for the Firm's telephone records and the customers' telephone numbers and her inability to comply.

Additionally, in assessing sanctions, the Hearing Officer compared certain facts in this case with facts in *Dep't of Enforcement v. Van Dyk*, Complaint No. C3B020013, 2004 NASD Discip. LEXIS 12 (NAC Aug. 9, 2004). As the SEC has stated, however, sanctions depend on the "particular facts and circumstances of each case, and cannot be determined by comparison

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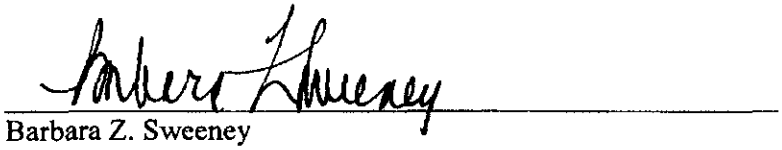
[40] *See Dep't of Enforcement v. Ryan & Co.*, Proceeding No. FPI040002, 2005 NASD Discip. LEXIS 8, at *31 (NAC Oct. 3, 2005) (providing selective responses to Rule 8210 requests does not mitigate failure to respond to all requests for information); *Manuel M. Bello*, Complaint No. CAF000030, 2002 NASD Discip. LEXIS 10, at *13-16 (NAC June 3, 2002) (imposing a bar on respondent who provided incomplete and untimely responses to Rule 8210 requests for information); *Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996) (rejecting argument that respondent's incomplete responses were mitigating and finding that members and associated persons must cooperate "fully" in providing requested information).

with the action taken in other cases." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *50 (Jan. 22, 2003).

VI. Conclusion

We affirm the Hearing Officer's findings that the Firm conducted a securities business while suspended and that Xu and Huang permitted the Firm to conduct a securities business while suspended, in violation of Conduct Rule 2110. We find that Huang failed to respond to requests for documents and information timely and fully, in violation of Procedural Rule 8210 and Conduct Rule 2110.[41] We order that the Firm be expelled for conducting a securities business while suspended. We also order that Xu and Huang be barred in all capacities from associating with any NASD member for permitting the Firm to conduct a securities business while suspended. We also impose a bar in all capacities against Huang for failing to respond to NASD staff requests for information. The bars and expulsion will be effective immediately upon service of this decision.[42]

On Behalf of the National Business Conduct Committee,



Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

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[41] We thus modify the Hearing Officer's finding that Huang only failed to respond "timely" to NASD requests for information.

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