

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54723 / November 8, 2006

Admin. Proc. File No. 3-12169

In the Matter of the Application of

PHILIPPE N. KEYES
c/o Richard A. Ruben
5850 Canoga Avenue, Suite 400
Woodland Hills, California 91367

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Failure to Provide Written Notice to, and to Obtain Prior Written Approval from,
Member Firm Employer Regarding Private Securities Transactions

Use of Misleading Sales Literature

Associated person of member firm of registered securities association engaged in private securities transactions without giving prior written notification to, or obtaining prior written approval from member. Associated person used misleading sales literature in connection with the private securities transactions. Held, association's findings of violation sustained, but proceeding remanded for reconsideration of sanctions imposed.

APPEARANCES:

Richard A. Ruben, for Philippe N. Keyes.

Marc Menchel, Carla J. Carloni, and Jennifer C. Brooks, for NASD.

Appeal filed: February 2, 2006
Last brief received: April 26, 2006

I.

Philippe N. Keyes, formerly associated with Investors Capital Corporation ("ICC"), an NASD member firm, appeals from NASD disciplinary action. NASD found that, from January 2001 through November 2001, Keyes engaged in private securities transactions without prior written notice to, and prior written approval from, his employer in violation of NASD Conduct Rules 3040 and 2110. 1/ NASD also found that Keyes used misleading sales literature in connection with these transactions in violation of NASD Conduct Rules 2210 and 2110. 2/ NASD barred Keyes from associating with any member firm in any capacity for violating the prohibition on private securities transactions. NASD also assessed costs, but declined to impose additional sanctions for the sales literature violations. We base our findings upon an independent review of the record.

II.

Keyes's Conduct

The facts in this matter are largely undisputed. Keyes began working for ICC in April 2000 as an investment company products and variable contracts limited representative. ICC terminated Keyes in November 2001 for failure to comply with the firm's policies and procedures. Keyes was last associated with a member firm in April 2002.

Ronald Wightman recruited Keyes to join ICC. Wightman was a registered principal for ICC and worked out of ICC's office of supervisory jurisdiction in Salt Lake City, Utah. Keyes worked out of an office in Valencia, California, and Wightman was his direct supervisor.

In June or July 2000, Keyes attended a sales presentation in Salt Lake City given by Dennis Wynn, the founder of the Wynn Company ("Wynn"), a Utah corporation. During this presentation, Keyes was introduced to Wynn's secured commercial note program (the "Wynn note program"). Essentially, Wynn's business was the sale of used automobiles through high-interest loans to customers with impaired credit ratings. The loans carried an interest rate of

1/ NASD Conduct Rule 3040 prohibits any person associated with a member from participating in any manner in a private securities transaction outside the regular course or scope of his or her employment without providing prior written notice to the member. If an associated person is compensated for the transactions, he must receive the firm's written permission before he engages in the transactions.

NASD Conduct Rule 2110 requires that members and associated persons "observe high standards of commercial honor and just and equitable principles of trade."

2/ NASD Conduct Rule 2210 sets forth general advertising standards for sales literature applicable for all member communications with customers or the public.

twenty-eight to thirty percent and an average term of twenty-four months. To finance its operations Wynn sold promissory notes to individual investors (the "Wynn notes"). The Wynn notes bore a twelve-month maturity date and provided an interest rate of ten to twelve percent. According to Wynn, the loan contracts between the automobile purchasers and Wynn and the titles to the automobiles were held in escrow by an escrow agent. Marketing materials for the Wynn notes stated that the notes were secured by a "portfolio of automobile contracts with titles held by an escrow agent" and that the escrow agent "monitor[ed]" the notes to ensure that the collateral was maintained at 150 percent of the notes' value. At maturity, investors could liquidate the note, repurchase it, or invest an additional amount.

During that same trip to Salt Lake City, Keyes toured Wynn's headquarters. Keyes testified that he saw Wynn's physical structure and its staff conducting business. He stated that he saw automobiles for sale, a repair shop with mechanics working on vehicles, and "one or two" checks received from automobile purchasers. Based upon these observations, Keyes concluded that Wynn was a viable operation. Keyes did not review Wynn's financial statements or the purported escrow agreement, or independently verify the existence of an escrow relationship or how the escrow agent evaluated the collateral as 150 percent of the face amount of the Wynn note.

After Keyes toured Wynn's headquarters, he met with Wightman in Wightman's Salt Lake City office. According to Keyes, he and Wightman discussed Wightman's desire to expand his sales team's annuity business and to convert existing fixed annuity contracts into variable annuity products. Keyes testified that Wightman told Keyes that part of this plan included rolling the interest earned by ICC customers from the Wynn notes into variable annuities. Keyes testified further that, when he sold Wynn notes to customers, he recommended that they roll the interest earned from the notes into variable annuities sold by ICC. According to Keyes, Wightman instructed Keyes that he should communicate only with Wightman and not with other ICC personnel.

Keyes began selling the Wynn notes in January 2001. From January 2001 through November 2001, Keyes introduced thirty-five customers to Wynn. These customers purchased Wynn notes having a total value of \$1,900,634.70. Wynn paid Keyes \$63,412 in finder's fees for referring these customers.

Keyes also introduced another person associated with ICC to the Wynn note program in 2001. At first, Keyes paid this associated person for referring customers who later purchased Wynn notes. Later, the associated person sold Wynn notes directly to customers.

Keyes admitted that he provided customers with three pieces of sales literature describing various aspects of the Wynn note program in connection with the sale of Wynn notes. Keyes received two of the pieces of sales literature from Wynn, a tri-fold brochure and an informational flyer. The third piece of sales literature was an "investment triangle" which Keyes prepared and used as a sales brochure.

The tri-fold brochure described the Wynn notes as secured by a "portfolio of automobile contracts with titles held by an escrow agent." It assured potential investors of the notes' low risk, stating that "the collateral backing [each] note is carefully managed for safety and security. . . . Note holders have enjoyed solid growth, reliable income, and peace of mind." The brochure also highlighted the Wynn notes as "suitable for IRA's, SEP's and other retirement plans."

The informational flyer contained information about Wynn and its business. It described the Wynn note program and contained a "frequently asked questions" section. The flyer described features of the Wynn notes, including an interest rate of "10% APR" with a twelve-month maturity, and the fact that interest would be paid to the note holders monthly, unless they requested that the "interest compound within the note." The flyer stated that Wynn "secures all promissory notes with real assets, equal to at least 150% value of the amount of money you are lending." The flyer explained that the collateral securing the notes consisted of two parts: the loan contracts between the consumer and Wynn and the actual titles to the automobiles. The flyer also stated that an "independent, third-party escrow agent" monitors the Wynn notes to ensure that collateral is maintained at 150 percent of the Wynn notes' value.

The investment triangle prepared by Keyes compared the rate of return and risk of the Wynn notes with other types of investments. At its apex, the triangle listed investments in stocks. The second tier listed investments in mutual funds. The Wynn notes were listed in the third tier with a rate of return of 10.5 percent. The fourth tier listed annuities with a rate of return of 5.5 percent. At its base, the triangle listed bank investments (with a 1.5 percent rate of return), money market funds (with a 1.85 percent rate of return), and certificates of deposit (with a 3.75 percent rate of return).

ICC prohibited the sale of all promissory notes, and the Wynn notes were not approved ICC products. ICC required its associated persons to submit a form entitled "Registered Representative Outside Business Activities of Associated Person" on which the associated person was to disclose outside business activity and income earned from that activity. Keyes disclosed on that form his employment as an accident and disability insurance salesperson and continuing education instructor, but did not update the form to disclose his involvement with Wynn. In addition, Keyes did not update his Uniform Application for Securities Industry Registration or Transfer Form ("Form U-4"), which requires associated persons to disclose in detail involvement in another business, to reflect his involvement with Wynn.

Wynn filed for bankruptcy in July 2002. ^{3/} Two of Keyes's customers were among the list of creditors holding the twenty largest unsecured claims that was compiled in the Wynn bankruptcy proceeding. The claims of these two customers totaled \$429,632.08.

^{3/} The Wynn bankruptcy originally was filed under Chapter 11 and was converted to a Chapter 7 petition.

Procedural History of NASD Disciplinary Action Against Keyes

On August 16, 2004, an NASD Hearing Panel (the "Hearing Panel") commenced a disciplinary hearing to consider allegations that Keyes participated in private securities transactions without giving prior written notice to and receiving prior written approval from ICC, that he used misleading sales literature in connection with those transactions, and that this conduct constituted a failure to observe high standards of commercial honor and just and equitable principles of trade. ^{4/} Keyes admitted, through written stipulations and in his testimony before the Hearing Panel, the material facts necessary to establish that he committed the alleged violations, but contended that the Wynn notes were not securities. On November 29, 2004, the Hearing Panel unanimously found that the Wynn notes were securities and that Keyes had committed the alleged violations. The Hearing Panel barred Keyes in all capacities for the private securities violations and ordered him to pay the hearing costs. The Hearing Panel declined to impose additional sanctions for the sales literature violation in light of the bar that it imposed for the private securities transactions.

On December 21, 2004, Keyes appealed the decision of the Hearing Panel to NASD's National Adjudicatory Council ("NAC"). On appeal, Keyes did not challenge the Hearing Panel's findings that the Wynn notes were securities or that Keyes had committed the alleged violations. Keyes argued only that mitigating factors warranted a reduction in the sanctions. The NAC rejected Keyes's argument, finding that the extent of his private securities transactions and numerous aggravating factors outweighed his claimed mitigating factors and warranted a bar under the relevant Sanction Guidelines.

III.

It is undisputed that Keyes failed to inform ICC in writing of his sales of more than \$1.9 million in Wynn notes to thirty-five customers over an eleven-month period. It also is undisputed that Keyes received \$63,412 in selling compensation from Wynn but failed to obtain ICC's written permission to engage in the transactions. ^{5/} Keyes has admitted that he violated Conduct Rule 3040 and has stipulated in writing to facts establishing this violation.

^{4/} NASD also named Wightman as a respondent, but prior to the hearing he settled with NASD. NASD fined him \$10,000 and suspended him for thirty days.

^{5/} The Hearing Panel determined that the Wynn notes were securities under the test developed by the United States Supreme Court in Reves v. Ernst & Young, 494 U.S. 56, 63-65 (1990), and Keyes does not dispute this finding. We concur that the Wynn notes at issue are securities within the meaning of Securities Act Section 2(a)(1), 15 U.S.C. § 77b(a)(1), and Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10). The Wynn notes do not resemble the list of financial instruments that the Supreme Court specifically excluded as securities in Reves. Nor do the four factors considered in Reves suggest that the Wynn notes should be added to the list of excluded financial instruments.

Conduct Rule 2210 governs members' communications with the public, and Rule 2210(d) prohibits a member from making any false, exaggerated, unwarranted, or misleading statements in its communications with the public. Public communications must be based upon principles of fair dealing and good faith, provide a sound basis for evaluating the facts discussed, and not omit material facts or qualifications that would cause a communication to be misleading in light of this context. ^{6/}

It is undisputed that the three pieces of sales literature distributed by Keyes were misleading. The tri-fold brochure promoted the Wynn notes' "solid growth" and "reliable income." However, these statements were misleading because the brochure did not disclose that the notes were illiquid and carried a high risk of default. The tri-fold brochure and the information flyer falsely claimed that the Wynn notes were collateralized to 150 percent of their value. The investment triangle was misleading because it compared the Wynn notes to stocks, mutual funds, and money market funds without disclosing that the Wynn notes were illiquid and carried a high risk of default. Keyes has admitted that he violated Conduct Rule 2210; his testimony before the Hearing Panel and his written stipulations establish the facts necessary to find these violations.

IV.

Although Keyes admits that he committed the violations alleged by NASD, he contends that the bar imposed for the private securities transaction is excessive in light of certain facts that he asserts mitigate his actions. Exchange Act Section 19(e) provides that we may cancel, reduce, or require the remission of a sanction if we find that it imposes an unnecessary or inappropriate burden on competition, or if it is excessive or oppressive. ^{7/} NASD Sanction Guidelines recommend imposition of a fine of between \$5,000 and \$50,000 for private securities transactions and a one-year suspension or bar where, as here, the sales exceeded \$1,000,000. ^{8/} Using these Guidelines, NASD found that Keyes's private securities transactions warranted a bar.

^{6/} NASD Conduct Rule 2210(d)(1)(A). See also Jay Michael Fertman, 51 S.E.C. 943, 950 (1994) (holding that NASD rules require that sales literature must "disclose in a balanced way the risks and rewards of the touted investment").

^{7/} 15 U.S.C. § 78s(e)(2). Keyes does not claim, and the record does not show, that NASD's action has imposed an undue burden on competition.

^{8/} NASD Special Notice to Members 03-65 (Oct. 2003). The guideline provides that the first step is to assess the extent of the selling away, including the dollar amount of sales, the number of customers, and the length of time over which the selling away occurred. The second step is to consider the other factors described in the principal considerations for the guideline and the general principles applicable to all guidelines. The presence of one or more aggravating or mitigating factors may increase or decrease sanctions.

We have held repeatedly that engaging in private securities transactions is a serious violation. ^{9/} Rule 3040 protects investors from unsupervised sales and protects the member firm from liability and loss resulting from those sales. ^{10/} Violation of this rule deprives investors of a member firm's oversight and due diligence, protections they have a right to expect. ^{11/} Here, Keyes sold more than \$1.9 million in Wynn notes to thirty-five customers over an eleven-month period. These large amounts of unapproved private securities transactions to numerous customers over an extended period warrant substantial sanctions.

NASD also identified several aggravating factors present in this case. Keyes created the impression that ICC sanctioned his conduct when he marketed the Wynn notes to customers as part of an investment plan in which they would roll the interest earned from the Wynn notes into variable annuities sold by ICC. He did so despite the fact that ICC prohibited the sale of all promissory notes and the Wynn notes were not approved ICC products.

Keyes's sale of the Wynn notes resulted in injury to the investing public. When Wynn filed for bankruptcy, customers still holding Wynn notes became unsecured creditors in Wynn's Chapter 7 bankruptcy proceeding. Two of Keyes's customers were among the twenty largest unsecured claims in the Wynn bankruptcy filing; their claims totaled \$429,632.08. ^{12/} The sale of Wynn notes also resulted in Keyes's monetary gain. Keyes earned \$63,412 in finder's fees from the sale of Wynn notes. A further aggravating factor is that Keyes recruited another person associated with ICC to sell Wynn notes. NASD also found that Keyes failed to report his involvement with the Wynn note program on his Form U-4 or in any ICC compliance materials, undercutting his contention that he did not make efforts to conceal this activity.

NASD further found that Keyes continued to refer customers to the Wynn note program even though he was on notice that Wynn was experiencing financial difficulties. NASD bases this finding on the fact that one of Keyes's customers notified Keyes in or about August 2001 that the customer's interest check from Wynn had bounced. Although Wynn subsequently issued the customer a new check that was backed by sufficient funds, NASD concluded that Keyes should have viewed the episode as a red flag and conducted further inquiry into Wynn's financial

^{9/} See, e.g., Alvin W. Gebhart, Jr., Exchange Act Rel. No. 53136 (Jan. 18, 2006), 87 SEC Docket 437, appeal filed, No. 06-71201 (9th Cir.); Chris Dinh Hartley, Securities Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1247; Stephen J. Gluckman, 54 S.E.C. 175, 192 (1999); Gerald James Stoiber, 53 S.E.C. 171, 180 (1997); Ronald W. Gibbs, 52 S.E.C. 358, 365 (1995).

^{10/} Gebhart, 87 SEC Docket at 468; Gluckman, 54 S.E.C. at 192.

^{11/} Gebhart, 87 SEC Docket at 468; Stoiber, 53 S.E.C. at 180.

^{12/} The record is silent as to whether other investors in the Wynn note program suffered any losses.

condition. We cannot conclude from this record that one bounced check, which was subsequently reissued backed by sufficient funds, should have put Keyes on notice to conduct further inquiry into Wynn's financial condition. However, independent of any red flag raised by the bounced check, Keyes's lack of inquiry, including his failure to examine Wynn's financial statements or the purported escrow agreement or to attempt to verify the existence of an escrow agreement, further supports imposition of serious sanctions. 13/

Keyes contends that the sanctions imposed upon him are too severe when compared with sanctions imposed in other NASD disciplinary proceedings. The appropriate sanction, however, depends on the facts and circumstances of each particular case. 14/ Moreover, all but one of the cases cited by Keyes involved sanctions imposed under a prior version of the Sanction Guidelines that, unlike the current version of the Guidelines, did not expressly provide for a bar in cases in which the sales of securities in question exceed \$1 million. Rather, the prior version of the Guidelines provided that the Hearing Panel consider a bar (or a suspension for longer than one year) in egregious cases, leaving it to the Hearing Panel's discretion to determine the dollar value of the sales or other factors that would meet this standard. The cases that Keyes relies on where less than a bar was imposed involved lower sales amounts (and lower selling compensation), fewer investors, or shorter time frames, and imposed a fine in addition to the suspension. 15/ In the Gebhart case, the one case cited by Keyes that was decided by NASD

13/ For this reason, we also disagree that NASD should have considered as mitigating Keyes's contention that he performed due diligence with respect to the Wynn notes when he visited Wynn's headquarters.

14/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Jonathan Feins, 54 S.E.C. 366, 380 & n.36 (1999); Christopher J. Benz, 52 S.E.C. 1280, 1285 (1997), petition denied, 168 F.3d 478 (3d Cir. 1998) (Table).

15/ See Mark H. Love, Exchange Act Rel. No. 49248 (Feb. 13, 2004), 82 SEC Docket 686, 699 (noting that a thirty-day suspension fell on the low end of the Guideline range and a \$25,000 fine fell at the mid-range where respondent referred three sets of customers to an outside program and received no compensation for the referrals); Hartley, 83 SEC Docket at 1245-48 (imposing a ninety-day suspension and \$7,500 fine where respondent sold \$255,000 worth of securities to five customers over a period of four months); Jim Newcomb, 55 S.E.C. 406 (2001) (sustaining NASD disciplinary action imposing a fine of \$32,000 and a two-year suspension where respondent sold close to \$1 million worth of promissory notes to forty-eight customers over an eighteen-month period and received \$12,000 in selling compensation); Dep't of Enforcement v. Horn, Complaint No. C06010025 (Hearing Panel decision, Sept. 13, 2002) (imposing a fine of \$10,000 and a six-month suspension on each of two respondents who sold away \$345,000 of securities to seven customers over the course of four months); Dep't of Enforcement v. Roger Hanson, 2002 NASD Discip. LEXIS 5 (NAC Mar. 28, 2002) (imposing a six-month

(continued...)

under the currently applicable version of the Guidelines, a comparable amount of improper sales activity was at issue, \$2 million, and the respondent primarily responsible for the improper sales was barred, as was Keyes. NASD specifically found that the second respondent "played a less substantial role" in the activity. 16/ Keyes's conduct in selling over \$1.9 million in Wynn notes to thirty-five customers over the course of eleven months, while receiving \$63,412 in selling compensation, is among the more egregious cases of those cited by Keyes. Therefore, we reject his claim that the sanctions imposed on him are disproportionate to those imposed in other cases.

Keyes argues that there are a number of mitigating factors that justify a reduction in the sanction imposed by NASD. 17/ With one exception, we find his claims of mitigation to be without merit. Keyes argues that he was unaware of the prohibitions on selling away contained in Conduct Rule 3040 and that he was never warned by ICC or Wightman that he should not participate in the Wynn note program. The Hearing Panel found that Keyes's testimony that he was unaware of the prohibitions on private securities transactions was not plausible given his securities industry experience. If anything, Keyes's claimed ignorance of his obligations is only aggravated in light of his fifteen years experience in the securities industry and the fact that he previously taught a preparatory class for the Series 6 qualification examination. 18/

15/ (...continued)
suspension, \$5,000 fine, and disgorgement of commissions where respondent sold \$220,500 in limited partnerships to fifteen customers over the course of three months); Dep't of Enforcement v. Carcaterra, 2001 NASD Discip. LEXIS 39 (NAC Dec. 13, 2001) (imposing a thirty-day suspension with respect to respondent's engaging in private securities transactions of \$10,000 to one customer during a two-month period); Dep't of Enforcement v. Fergus, 2001 NASD Discip. LEXIS 3 (NAC May 17, 2001) (imposing suspensions of 60, 90, and 180 days (and fines of \$8,000, \$34,825.42, \$35,000, respectively) on respondents whose respective violations involved selling away to three customers who invested 132,950.15, five customers who invested \$898,749.50, and twenty customers who invested \$1.7 million from February through March 1997).

16/ Gebhart, 87 SEC Docket at 468 n.104 (In sustaining the sanctions imposed, we noted that the record supported a finding that the respondents' "responsibility for these violations was equivalent.").

17/ Keyes also argues that we should review various findings made by the Hearing Panel. However, it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review. See 15 U.S.C. § 78s(e).

18/ We repeatedly have stated that the prohibition on private securities transactions are fundamental to an associated person's duty to his customers and his firm. See, e.g., Gluckman, 54 S.E.C. at 192; Stoiber, 53 S.E.C. at 180.

Keyes also contends that ICC's compliance and supervisory procedures were inadequate and that had ICC inquired about the Wynn note program he would have disclosed it. As a participant in the securities industry, however, Keyes is responsible for compliance with regulatory requirements and cannot shift his responsibility for compliance to his supervisors. 19/

Keyes argues that his lack of disciplinary record and the fact that he repaid some customers justifies reducing the sanction imposed by NASD. However, lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional. 20/ Keyes's claimed repayment of some customers does not support a reduced sanction because he testified that he did so contemporaneously with the initiation of NASD's investigation. 21/ Keyes also argues that a lesser sanction is justified because he cooperated with NASD in its investigation of his conduct and he testified truthfully. However, when Keyes registered with NASD he agreed to abide by its rules, which are unequivocal with respect to the obligation to cooperate with NASD, and compliance with this obligation is not a mitigating factor. 22/ Although Keyes contends that he testified truthfully, the Hearing Panel found that his testimony that he was unaware of the prohibitions on private securities transactions was not plausible. Keyes's additional assertion that he did not attempt to deceive his customers is undermined by his admitted use of misleading sales literature in connection with his violation of NASD Conduct Rule 2210.

Keyes argues that the sanctions imposed by NASD should be reduced because he did not believe the Wynn notes were securities subject to Conduct Rule 3040. In support of this claim, Keyes points to a legal opinion provided to Wynn by its counsel that the Wynn notes were not

19/ See Thomas C. Kocherhans, 52 S.E.C. 528, 531 (1995) (rejecting respondent's argument that he was not warned by his manager and therefore he could not know that his conduct was inappropriate); see also Patricia H. Smith, 52 S.E.C. 346, 348 n.8 (1995) (rejecting respondent's attempt to blame her misconduct on training received from member firm).

20/ See Daniel D. Manoff, 55 S.E.C. 1155, 1165-66 & n.15 (2002) (rejecting lack of disciplinary history as mitigating sanction of a bar); Henry E. Vail, 52 S.E.C. 339, 342, aff'd, 101 F.3d 37 (5th Cir. 1996) (per curiam) (same); Ernest A. Cipriani, 51 S.E.C. 1004, 1007 & n.15 (1994) (same).

21/ See Arthur Lipper Corp., 46 S.E.C. 78, 98 (1975) (holding that repayment made after commencement of investigation into violative conduct has minimal mitigative weight), aff'd, 547 F.2d 171 (2d Cir. 1976).

22/ Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994). NASD Guidelines provide that an associated person's "substantial assistance" to the NASD during an investigation is generally mitigating. Keyes's cooperation in the investigation was consistent with the responsibilities he agreed to when he became an associated person and does not constitute substantial assistance.

securities. However, because Keyes stipulated in writing that he did not review this opinion until March 2002, after the last of his Wynn note transactions, he cannot claim that he relied on that opinion to conclude that the Wynn notes were not securities. In any event, Keyes was not entitled to rely on the representations of the issuer or its legal counsel and had a duty to make an adequate independent investigation. ^{23/} Given these facts, Keyes's subjective belief as to whether or not the Wynn notes were securities is not a mitigating factor.

Keyes contends that future violations by him are unlikely and that he is remorseful for his conduct. We are unpersuaded by these claims, given Keyes's repeated attempts to shift some of the blame for his violations to others and his failure to appreciate the fundamental duties of a securities professional with respect to the prohibitions on private securities transactions.

As noted above, we have found most of Keyes's claims of mitigation to be without merit. However, there is one area where we find, contrary to NASD, that Keyes has demonstrated some mitigation. Keyes maintains that he provided oral notice of his involvement with the Wynn note program to Wightman, that Wightman approved of Keyes's conduct and, therefore, Keyes believed that he had permission from ICC to participate in the Wynn note program. He also asserts that Wightman instructed him to communicate only with Wightman and not with ICC about the program.

NASD found that any notice that Keyes may have given to Wightman was not mitigating in light of the significant aggravating factors present in this case. However, the record in this proceeding is sufficiently unclear as to the extent of Wightman's involvement in, or approval of, Keyes's actions with respect to the Wynn notes that we are unable to agree with NASD that Keyes has not demonstrated some mitigation with respect to this point. The only testimony concerning Wightman's role in the transactions comes from Keyes, as Wightman did not testify before the Hearing Panel and his investigative testimony is unclear. Thus, under the circumstances of the record before us in this matter, we believe that Keyes's claim that Wightman knew of and approved of the Wynn note transactions provides some mitigation.

Nevertheless, a number of factors lessen the degree to which Wightman's actions serve to mitigate Keyes's misconduct. Regardless of what Wightman told Keyes, Keyes has not shown, and the record does not indicate, that he provided Wightman with the specific information required by Conduct Rule 3040, including identification of the investors, the amount of money to be invested, Keyes's proposed role in the transactions, and that he would receive selling compensation in connection with the transactions. Moreover, because Keyes received selling

^{23/} See Gilbert M. Hair, 51 S.E.C. 374, 377 (1993) (holding that reliance by a registered representative on an issuer's representations is not sufficient for purposes of mitigating NASD's rule against private securities transactions); Frank W. Leonesio, 48 S.E.C. 544, 548 (1986) (stating that respondents may not rely on the self-serving statement of an issuer that an investment is not a security and have a duty to make an adequate independent investigation).

compensation from the Wynn note program transactions, he was required to receive written permission from ICC before offering the Wynn notes for sale. 24/ It is undisputed that ICC did not provide Keyes with written permission to participate in the Wynn note transactions. Furthermore, ICC's prohibition on the sale of all promissory notes is inconsistent with the claim that Keyes believed that Wightman, if he did approve Keyes's sale of the notes, had authority from ICC in doing so. Therefore, although we find Keyes's claim that Wightman knew of and approved his conduct to be a mitigating factor, its impact is lessened by the facts discussed above. As discussed above, Keyes's conduct was inconsistent with the fundamental duties an associated person owes his customers and his firm. Accordingly, we remand this case to NASD to determine appropriate sanctions that factor in (1) the mitigation we find above for the private securities transactions violations, and (2) the sales literature violations. 25/

An appropriate order will issue. 26/

By the Commission (Chairman COX and Commissioners CAMPOS, NAZARETH and CASEY); Commissioner ATKINS not participating.

Nancy M. Morris
Secretary

24/ See NASD Conduct Rule 3040(c).

25/ Keyes makes a number of unsupported arguments of procedural unfairness in NASD's disciplinary proceeding, none of which we find persuasive. For example, he argues that his termination from ICC and NASD's subsequent bar constitutes "double punishment," but Keyes's termination is not relevant to what sanction is appropriate for his misconduct. He claims that NASD breached a "good faith settlement deal" but offers no explanation as to how this mitigates his misconduct. He contends that NASD conducted a "protracted and inefficient investigation" that prevented him from "earning a living," but the record indicates that NASD conducted its investigation in a timely manner. Moreover, the record indicates that NASD followed its procedural rules, including bringing specific charges, notifying Keyes of those charges, and providing Keyes with an opportunity to defend those charges. Accordingly, we reject Keyes's assertion that the proceeding was procedurally unfair.

26/ We have considered all of the contentions advanced by the parties. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
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ORDER REMANDING DISCIPLINARY PROCEEDING TO REGISTERED SECURITIES
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the findings of violation made by NASD against Philippe N. Keyes, and
NASD's assessment of costs be, and they hereby are, sustained; and it is further

ORDERED that the sanctions imposed by NASD on Philippe N. Keyes be, and they
hereby are, remanded for reconsideration.

By the Commission.

Nancy M. Morris
Secretary