

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 61449 / February 1, 2010

Admin. Proc. File No. 3-13279

In the Matter of the Application of

JANET GURLEY KATZ  
c/o Richard C. Fooshee, Esq.  
20 North Van Brunt Street, Suite 2  
Englewood, NJ 07631

For Review of Disciplinary Action Taken by

NYSE Regulation, Inc.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY  
PROCEEDINGS

Misappropriation of Customers' Funds

Misstatements to Customer

Unsuitable Trading

Unauthorized Trading

Discretionary Trading Without Written Authorization

Record Keeping Violations

Failure to Know the Customer

National securities exchange found that registered representative, while associated with member firm, misappropriated customer funds, made misstatements to a customer, made unauthorized and unsuitable trades in customer accounts, exercised discretion in customer

accounts without written authorization, and caused record keeping inaccuracies. *Held*, exchange's findings of violations are *sustained in part* and *vacated in part*, and sanctions imposed are *sustained*.

#### APPEARANCES:

*Richard C. Fooshee, Esq.*, for Janet Gurley Katz.

*Richard R. Best, Linda Riefberg, Penny J. Rosenberg, Allen Boyer, Marc B. Minor, and Bettina M. Sacklowski*, for FINRA, on behalf of NYSE Regulation, Inc.

Appeal filed: October 24, 2008

Last brief received: March 3, 2009

### I.

Janet Gurley Katz, formerly a registered representative associated with Wachovia Securities, Inc. ("Wachovia" or the "Firm"), a member of the New York Stock Exchange LLC, appeals from NYSE Regulation, Inc. ("NYSE") disciplinary action.<sup>1</sup> The NYSE found that Katz engaged in conduct that was inconsistent with just and equitable principles of trade by (i) causing customer funds to be transferred to other customers' accounts without authorization, (ii) making misstatements to a customer, (iii) effecting unsuitable transactions in customers' accounts, and (iv) engaging in unauthorized trading in customers' accounts.<sup>2</sup> The NYSE further found that Katz violated NYSE Rule 408(a) by exercising discretionary power in customer accounts without written authorization and that she violated NYSE Rule 405 by causing Wachovia to fail to learn

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<sup>1</sup> On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to Financial Industry Regulatory Authority, Inc., or FINRA. *See* Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because this proceeding was initiated by NYSE Regulation, we use the designation "NYSE" in this opinion.

<sup>2</sup> NYSE Rule 476(a)(6) provides that members and their employees may be disciplined for conduct that is "inconsistent with just and equitable principles of trade." A violation of another NYSE or Commission rule or regulation also automatically constitutes a violation of Rule 476(a). *Thomas W. Heath, III*, Exchange Act Rel. No. 59223 (Jan. 9, 2009), 94 SEC Docket 13242, 13247 n.8 ("It is well-established that a violation of another self-regulatory organization ("SRO") or Commission rule or regulation will also automatically constitute a violation of the J&E Rule [*i.e.*, NYSE Rule 476(a)(6)]."), *aff'd*, 586 F.3d 122 (2d Cir. 2009).

essential facts about certain customers.<sup>3</sup> Finally, the NYSE found that Katz caused or permitted violations of NYSE Rule 440 and Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-3 and 17a-4 thereunder by entering (or causing to be entered) inaccurate information on customers' new account forms.<sup>4</sup>

The NYSE censured Katz and imposed a permanent bar from membership, allied membership, and approved person status and from employment or association in any capacity with any member or member organization.<sup>5</sup> We base our findings on an independent review of the record.

## II.

This appeal concerns Katz's handling of accounts for seven customers at Wachovia's Morristown, New Jersey office. Katz began work in the securities industry in 1980 and, after working for several other firms, joined Wachovia in December 1997. Katz, by her own admission, "was an active manager," whose philosophy was, if customers "had very, very conservative money, that money should either stay in the bank or Treasury bills or someplace else."

### A. Wachovia's Supervisory Procedures

Katz was supervised at Wachovia by Lawrence Ennis, the Firm's office manager, and Nicole Kramlick, the Firm's operations manager. Ennis's supervision of salespersons such as Katz involved, among other things, reviewing customer documents and various daily, weekly, and monthly reports. When a Wachovia salesperson opened a new customer account, the salesperson would complete a new account form, which asked for information such as the

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<sup>3</sup> NYSE Rule 408 requires a customer's written authorization before a member or an employee thereof can exercise discretionary power in that customer's account. NYSE Rule 405 requires every member organization to use due diligence to learn the essential facts about every customer, every order, or every margin account that the member organization accepts or carries.

<sup>4</sup> 15 U.S.C. § 78q(a); 17 C.F.R. §§ 240.17a-3, -4. NYSE Rule 440 requires brokers and dealers to make and preserve books and records prescribed by the NYSE and by Exchange Act Rules 17a-3 and 17a-4. In turn, Exchange Act Rules 17a-3 and 17a-4 require brokers and dealers to keep current books and records regarding executed securities transactions and customer accounts. 17 C.F.R. §§ 240.17a-3, -4.

<sup>5</sup> On November 3, 2008, the Commission denied Katz's motion to stay the NYSE's final disciplinary sanction and the NYSE's imposition of a permanent bar. *See Order Denying Stay*, Admin. Proc. File No. 3-13279 (Nov. 3, 2008). On November 25, 2008, we denied Katz's motion for reconsideration of our order denying her request for a stay. *See Order Denying Motion for Reconsideration of Denial of Stay*, Admin. Proc. File No. 3-13279 (Nov. 25, 2008).

customer's net worth, age, income, investment objectives, and whether anyone else would have control over the account. Ennis explained that he relied on the salesperson to complete these forms accurately because the information determined whether the Firm approved certain trading levels for the customer.<sup>6</sup>

Wachovia's compliance department would periodically ask Ennis to review a customer's account more closely if, for example, the customer filed a complaint or an account was incurring unusually high commissions or an unusually high number of trades. Ennis testified that the Firm's compliance department asked him to conduct such a heightened review of Katz's customer accounts "[o]n a regular basis" because "[s]he was pretty active, from a turnover standpoint."

This heightened scrutiny first required the salesperson to complete an account questionnaire, which Ennis described as "just a review of the account at that point in time." If Wachovia concluded that a high level of trading was occurring in an account, the Firm would mail a letter asking the customer to confirm that he or she was aware of commissions paid, level of activity, and profits and losses that were occurring in the account.

If Wachovia's compliance department determined that a particular account required even greater scrutiny, Ennis would contact the customer directly. As Ennis explained at the hearing, he would "call the client and go through, speak to them about their account, speak to them about some of the issues that may have been of concern" and then memorialize the conversation on a "Client Service Dialogue." Ennis also testified that he occasionally had less formal conversations with clients, just to ensure that everything was "okay" with their accounts. At times, Ennis would also follow up these conversations with letters to the client, summarizing their conversation. Kramlick was responsible for reviewing all of the Firm's outgoing mail (such as confirmation letters), while the operations department received all incoming mail, which was supposed to be copied and then sent to the appropriate salesperson.

## **B. Investigation into Katz's Conduct**

The alleged misconduct at issue here began to come to light on November 25, 2002, when Thomas Ashbahian, the son of two of Katz's customers (Harry and Irene Ashbahian), contacted Ennis about Katz's handling of his parents' accounts. Ennis subsequently met with the

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<sup>6</sup> An element of the new account forms that received particular attention during Katz's disciplinary hearing was the investment objective section. Although several different forms were used, they typically listed ten different options that could be checked: (i) Income (quality emphasis), (ii) Income (return emphasis), (iii) Growth & Income (quality emphasis), (iv) Growth & Income (return emphasis), (v) Growth (quality emphasis), (vi) Growth (return emphasis), (vii) Trading & Speculation, (viii) Not Applicable, (ix) High Income, and (x) FundAdvantage. Most of the new account forms at issue indicated that a "page 2" provided definitions for these investment options, but that page does not appear to have been included for most of the forms in the record.

Ashbahians and Thomas, during which meeting the Ashbahians stated, among other things, that their money had been moved out of their accounts without their knowledge and that their signatures on certain documents appeared to be forged. Ennis began looking into these accusations, reported the matter to Wachovia's compliance department, and asked Katz to leave the office for a few days.

Sometime shortly thereafter, a Wachovia salesperson told Ennis that he had seen Katz the previous night removing boxes of files from the office with her daughter. The Firm, at the time, had a prohibition against taking client files, and Ennis "believed" that placing Katz on administrative leave meant "not to come into the office until further notice." Katz, however, claimed that she had removed only copies – not originals – of client files and that she had done so because her mother-in-law was concerned that her account files were missing. Ennis demanded that Katz return the files, which she did, albeit in a disorganized state.

Katz was also dealing with a series of personal issues during this time. Her stepson was diagnosed with cancer in 2000 and passed away on December 31, 2001. Katz's husband was then diagnosed with terminal cancer. Katz and her husband subsequently traveled to Scotland for what they expected to be a final vacation together, during which Katz's husband passed away on October 4, 2002.

Approximately two months after Katz's husband's death, Ennis telephoned Katz on or about December 6, 2002 to inform her that he was placing her on paid administrative leave because of concerns related to the Ashbahians' complaint. Katz voluntarily resigned from Wachovia a little over a week later.<sup>7</sup> On August 11, 2006, the NYSE initiated this disciplinary action by filing a Charge Memorandum, which alleged that Katz had engaged in actionable conduct with respect to the accounts of the Ashbahians and five other clients. These customers are described below.

### **1. Harry and Irene Ashbahian**

Harry and Irene Ashbahian (the "Ashbahians"), a married couple, met Katz through their son, Gregory ("Greg") Ashbahian, who maintained several accounts with Katz. The Ashbahians subsequently opened several accounts with Katz in or around 2000, including a joint account, individual retirement accounts ("IRAs"), individual living trust accounts and a gifting trust account. The Ashbahians were both in their mid-70s at the time and had high school educations. Harry had been retired for nearly twenty years from a career as a dry-cleaning store owner, and Irene had been a homemaker for approximately fifty years.

Several new account forms were completed when the Ashbahians opened their accounts with Katz. At least two of those forms indicated that the Ashbahians' net worth exceeded one

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<sup>7</sup> According to her attorney, Katz was working as an investment advisor registered with the state of New Jersey at the time of her NYSE disciplinary hearing.

million dollars. The Ashbahians testified that this information was incorrect, but Katz introduced an unsigned, undated document purporting to list the Ashbahian's investments as slightly more than one million dollars. Harry Ashbahian confirmed that the list was in his handwriting, but he thought it might have been created sometime after he first met Katz.<sup>8</sup>

The new account forms also showed the Ashbahians' investment objectives as, variously, "Growth (return emphasis)," "Growth (quality emphasis)," or "Growth" with a "Moderate" risk tolerance.<sup>9</sup> When asked during the disciplinary hearing what his investment goals had been when he invested with Katz, Harry testified, "There was really no goals. The main thing was to make sure that we have constant income because we didn't have any retirement at all." Harry added, "I told Janet, Ms. Katz, you have to be very careful how you invest our money because we are going to live on this. Not to make any fancy investments where we may lose money." Harry also testified, however, that he and his wife "were more concerned about getting growth" and that he was looking for a broker "who could give me the most income in investing."

Katz testified that she understood the Ashbahian's investment objective to be to "[m]ake as much money as we can" and to have "[a]s much growth as possible." Katz acknowledged, however, that Ashbahians' objective for their IRA accounts was "a little less aggressive than the joint accounts and the trusts."

Initially, the Ashbahians appeared pleased with Katz's handling of their account. Ennis testified that the Ashbahians told him during a meeting they were satisfied with their account,

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<sup>8</sup> Harry also testified that the new account form incorrectly listed his birthday as April 21, 1921, instead of his actual birthday, April 21, 1924.

<sup>9</sup> Some of the Ashbahians' new account forms are slightly different from the other account forms at issue. These forms use slightly different terminology regarding investment objectives and, unlike most of the forms, include definitions for those objectives. According to the forms, a "Growth" investment objective, as listed for the Ashbahians, "[s]eeks capital appreciation through market price increases in investments. Dividend and interest returns may be important but are not primary considerations." By comparison, an "income" objective "seeks regular and consistent returns on investment in the form of interest and dividend payments. Little consideration is given to capital appreciation."

These other forms also state that a "moderate" risk profile "[g]enerally reflects an investor who has the financial resources and investment experience to accept a modest amount of risk in order to achieve capital appreciation or higher income returns. Such an investor can accept some loss of capital in seeking to meet his or her goals." The forms state that a "conservative" profile, by comparison, "[g]enerally reflects an investor who has a low tolerance for risk. Preservation of capital is often a major consideration. Such an investor is willing to limit or forego capital appreciation opportunities or higher income returns in order to protect his or her investment capital."

and the record contains a letter dated May 13, 2002, in which the Ashbahians purportedly confirmed "that we have examined all confirmations and monthly statements relating to our accounts. We are aware of all activity, commissions and interest charges, if any, and overall profits and losses."

The May 2002 confirmation letter also contained blanks for the Ashbahians to write their total net worth, liquid net worth, and household income. Handwriting on the document listed the Ashbahians' net worth as \$1,500,000, their liquid net worth as \$900,000, and their household income as \$150,000. The Ashbahians, however, did not recall signing such a letter and claimed that the signatures did not look like theirs. Harry, for instance, testified that the letter "doesn't look like my handwriting" and added that their "[h]ousehold income is not \$150,000. Not even half."

The Ashbahians also testified that they began to notice that Katz was effecting trades in their accounts without first consulting them. They testified that, after questioning Katz about this activity, Katz responded, "[D]on't worry about it. I know what I'm doing." Katz disputed this and claimed that Harry was "very much" aware of what was going on in his account. Katz testified that she obtained the Ashbahians' approval before each trade and asserted that she spoke with the Ashbahians "185 times in a two and a half year period" and met with them eighteen or twenty times.

The Ashbahians testified that they became even more concerned after their account value began falling and that they asked their son Thomas to look into it. Sometime thereafter, the Ashbahians complained to Ennis that trades had been placed without their authorization, that certain signatures on documents were not their signatures, and that they were misled about how their investments were doing. Their complaint, as discussed earlier, led Ennis to ask Katz to leave the office for a few days.

After making their initial complaint to Ennis, the Ashbahians discovered that \$26,000 had been transferred from Irene's living trust account to their son Greg's individual account between March 2001 and October 2002. The money was transferred in twenty-six transactions, ranging in size from \$134 to \$4,000. A \$4,000 transfer was also made out of Harry's living trust account on April 12, 2002, with \$2,000 going into Greg's Roth IRA and the other \$2,000 going into an IRA of Greg's wife, Janet Ashbahian.

Katz does not dispute that these transfers occurred. She instead claims to have had nothing to do with several of them and that she had written authorization for the others. For example, Katz claims to know nothing about the trades that occurred on October 2, 4, and 8, 2002, because they occurred while she and her husband were on their trip to Scotland. Katz also denies knowing anything about a transfer out of Irene's living trust account that took place on May 7, 2002 or the transfer out of Harry's living trust account on April 12, 2002. Katz's assistant, Doreen Steup, testified, however, that Katz had "total control over the accounts" and "was always aware of everything going on in all the accounts."

As for the remaining transfers, Katz acknowledges transferring the funds to Greg's account, but claims to have made the transfers pursuant to telephonic authorization from the Ashbahians and standing letters of authorization. As Katz explained during her testimony, letters of authorization were forms that salespeople used to memorialize a client's verbal authorization to perform certain actions, such as transferring funds. Letters of authorization either could be for a specific transaction or could be "standing" letters of authorization, which, according to Katz, were valid for one year. Katz further testified that, when a client or associated person relied on a standing letter of authorization, a "journal request form" would be attached to the letter of authorization "to clearly define what was being done from what account, how much, to what account."

The record contains two letters of authorization, as Katz asserts, but the Ashbahians questioned their authenticity at the hearing. Irene did not recall signing the first letter of authorization dated May 30, 2001 (which had only one signature, for Irene Ashbahian), and her husband confirmed that the signature did not look like his wife's. The second letter of authorization, dated July 1, 2002, contained what appears on its face to be both Ashbahians' signatures, but neither Ashbahian could "recall signing anything like this." As Harry explained, "[W]e were living on the income. Why would I send my money to my son? He didn't need it. Why would I give it to that son, not the whole family? We never did anything like that." Furthermore, two of the transfers at issue (totaling \$5,000) predated either letter.<sup>10</sup>

## **2. Paul Pinajian**

Paul Pinajian opened two accounts with Katz (an individual account and IRA) after his father, Charles Pinajian, introduced him to Katz. Pinajian was thirty-three years old at the time of his initial investment and part owner and vice president of Treasure Island, a retailer of outdoor furniture and seasonal merchandise. Pinajian had a B.S. in accounting and, before working at Treasure Island, had run one of his father's dry cleaning stores for approximately three years, after which he became a merchandise controller, or department manager, at another retail business.

Pinajian's investment goals for his Wachovia accounts are somewhat unclear. Pinajian testified that he wanted to "put aside" any cash that he took out of Treasure Island's business and use it as "a safety net." He also testified, however, that the reason he invested his money with Katz was that his father was making twenty-five or thirty percent with Katz, while Pinajian had only been making a more conservative six or seven percent with his previous broker. Katz, for her part, described Pinajian as "always an aggressive investor," who shared his father's philosophy that conservative money belonged in real estate. Katz claimed not only that Pinajian

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<sup>10</sup> The record contains a third standing letter of authorization, which purports to authorize \$1,610.00 to be transferred out of Irene Ashbahian's living trust on the second of every month, beginning September 2, 2001. Only one of the transfers at issue, however, took place on the second of a month, and that was for \$134.

shared his father's investment philosophy, but also that Pinajian authorized his father to instruct Katz on what trades to make in Pinajian's account.

New account forms completed for Pinajian's accounts listed his investment objective as "Growth (return emphasis)," and Pinajian received various letters from Wachovia attempting to confirm this investment objective. For example, Pinajian received a letter in February 1999 asking him to confirm that he had examined all trade confirmations and monthly statements related to his account and that "[a]ll transactions have been made with my prior approval and in accordance with my overall investment/trading objectives." Pinajian acknowledged signing this confirmation letter, but testified that Katz, in reality, was executing "a lot" of trades in his account and that he "was not approving every single trade."

Katz acknowledged that she did not speak with Pinajian very often, but claimed that she was trading in Pinajian's account at the direction of his father pursuant to a power of attorney. The record contains a power of attorney, but it was neither witnessed nor notarized, which Ennis, Steup, and Kramlick all testified was required before the form could become effective. Pinajian also testified that he did not recognize the power of attorney and that the signature on it did not look like his. Pinajian explained that he would never have allowed his father to have a power of attorney over his account because his father was "at a different point in his life" and had a different approach to investing.

Pinajian's new account forms also indicated that Pinajian was the only person who would have authority over his account, and Kramlick confirmed that new account forms would indicate whether a power of attorney had been executed. Katz attempted to explain this discrepancy by claiming that she typically had clients complete powers of attorney sometime after their new account forms were completed. Pinajian, however, signed an updated new account form several months after the power of attorney was supposedly executed, and that form did not show that a power of attorney existed. Katz also testified that she instructed her assistant to "always" indicate "no" in response to the question of whether anyone else would exercise control over a client's account, but Wachovia's files appear to contain no indication that a power of attorney ever became effective in Pinajian's account.

Sometime around March 2000, Pinajian received another letter from Wachovia, this time purporting to summarize a meeting Ennis had with Pinajian. In that letter, Ennis wrote to confirm "that your account is a very active trading account" and that Pinajian understood "the risks associated with using margin and the interest charges that are incurred." At Katz's disciplinary hearing, however, Pinajian claimed that he had "never heard of" Ennis, although he recalled a meeting with Katz during which somebody else could "have come in and shaken my hand and said 'hello,' maybe."

Pinajian also testified that, while the March 2000 confirmation letter had mentioned "the risks associated with using margin," he did not realize until sometime around August 2000 that his account was actually being traded on margin. Pinajian explained that his account value began

"dropping drastically," which prompted him to take his account statement to one of Treasure Island's accountants. According to Pinajian, the accountant was the person who "discovered margin on my account and said, 'what are you doing with margin?'" Pinajian testified that Katz subsequently promised to take Pinajian off margin, but that she could only do so "over time."

Early the next year, Pinajian noticed that his account was still being traded on margin and that his February 2001 account statement showed an unexpected, sharp decline in his individual account from approximately \$316,719 to approximately \$217,124. Pinajian testified that he again asked Katz for an explanation, to which she allegedly responded that Wachovia was changing computer systems and several customers had received incorrect statements. Pinajian testified that Katz told him a margin debit of roughly \$74,394 had accidentally been deducted twice and that the actual value of his account should be \$291,517. Pinajian testified further that he took contemporaneous notes of Katz's explanation, writing on his statement: "SB [should be] 291,517" and "came out twice by accident."

Pinajian's next statement (for March 2001) again showed that his account was being traded on margin and that his account value had continued to decline, down to \$145,664.62. Pinajian testified that he again called Katz and that she told him that the statement was still incorrect, that the previous month's error had not yet been corrected, and that the correct balance was \$236,960. Pinajian again wrote the number Katz gave him on his account statement. According to Pinajian, Katz also told him that she would arrange for Pinajian to receive corrected statements while she straightened out the problems with the computer system.

Pinajian testified that he subsequently received another March 2001 account statement, which showed a supposedly correct balance of \$268,045.78. Although the format and color of this supposedly revised statement were different from the first March 2001 statement, Pinajian said he was not concerned.<sup>11</sup> Katz had told him that the old computer system was responsible for the errors on his statements, so Pinajian assumed Katz was getting the revised statements "from another source or another computer."

According to Pinajian, he continued to receive the inaccurate account statements until he finally decided to close his accounts at Wachovia in December 2002. Although these false account statements bore Pinajian's name and account number, they were apparently altered copies of statements of one or more of Katz's other clients, with address labels showing Pinajian's home address covering the original addresses on the statements. Kramlick and Steup both recalled during their testimony that Katz had asked a receptionist to type up address labels for Pinajian's account.

Whether Pinajian also received accurate account statements during this time is unclear. The record contains several trade confirmations and account statements listing Pinajian's correct

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<sup>11</sup> Ennis agreed during his testimony that the February 2001 and June 2002 statements that Pinajian testified he had received were "obviously phony."

home address, but the record does not establish whether Pinajian actually received these documents. Pinajian testified that, regardless, he would have dismissed any statements that showed the lower – although, as it turned out, correct – balance, because he would have assumed that the supposed computer error "was not fixed yet."

The record also suggests that at least some of Pinajian's actual account statements were diverted to another of Katz's customers. Kramlick and Steup both testified that Katz had instructed them to send Pinajian's account statements to an address in Hackettstown, New Jersey, because Pinajian had moved there with a girlfriend. That address, however, was for another of Katz's clients, who also occasionally cleaned Katz's house. Pinajian denied having any connection to that address.

Katz denies that she ever told Pinajian that his margin debit balance had been accidentally deducted twice or that his account balance was incorrect. Katz also denies having anything to do with the false account statements. She claims instead that Pinajian fabricated the statements to extort a settlement from Wachovia; that she was out of the office during several of the months in which Pinajian allegedly received the false statements; and that she became "irate" and "went ballistic" when she learned that Pinajian's address had been changed in the files because, she explained, "how could a client's address be changed without me being told about it." Katz claims she discussed the matter with Steup, Kramlick, and Ennis, but none of them recalled ever having such a conversation with her, nor did they recall a "ballistic" reaction by Katz to the address changes.

Pinajian eventually decided he had "had enough" and moved his Wachovia account to a different broker in early 2003. One of the last account statements he claimed to have received from Wachovia listed his account balance as \$214,067.60. When Pinajian transferred his account, however, the new firm informed him that his Wachovia account held only \$36,946.46.

Pinajian also discovered that \$8,300 had been transferred from his account to the account of his uncle, Edward Dorian, on March 15, 2001, apparently to help satisfy a margin call in Dorian's account. This transfer had appeared on Pinajian's first, allegedly incorrect, March 2001 statement, but not on the second, allegedly corrected, March 2001 statement. Pinajian testified that he neither authorized nor discussed such a transfer with Katz or his father. Instead, Pinajian described this transfer as "crazy," explaining he "had nothing to do with Ed Dorian. I never speak with him. There is no reason for any money to change hands." Although Katz was the registered representative on Dorian's account, Katz testified that she was not responsible for the transfer to Dorian's account and that the first time she heard about it was from NYSE Enforcement.

### **3. Agnes Voskian**

Agnes Voskian opened an individual account and a trust account with Katz in or about February 2000. As with the Ashbahians, Voskian was introduced to Katz by Greg Ashbahian,

who is Voskian's son-in-law. Voskian was an eighty-year-old widow and retired secretary when she opened her accounts with Katz. She had a high school education and described herself as having limited experience with investing because, she explained, her husband had always managed their finances.

Voskian's new account forms, however, showed that Voskian had twenty years of investment experience with stocks, bonds, and mutual funds. The forms also indicated that her annual income was \$100,000 - \$199,999; that her net worth (excluding residence) was \$500,000 - \$999,999; and that her net liquid assets were \$200,000 - \$499,000. Voskian testified that much of this financial information was incorrect, claiming, for instance, that her net worth before investing with Katz had only been approximately \$175,000,<sup>12</sup> and that her income consisted of Social Security and approximately \$300 per month from her husband's Air Force pension.

Voskian also testified that she considered the stock market "very dangerous" because her husband "took a tremendous loss" after selling some stock they had received from the sale of a business. As a result, Voskian emphasized to Katz that "no matter what she [Katz] did it had to be a safe investment of my principal" because "that is all I had." Voskian added that "I kept saying all the time, every time I talked to Janet Katz, the principal must be protected." Katz's recollection of Voskian's goals was that she wanted "growth with a little income" and to invest in "basically everything except individual stocks because she had been burnt that once with that one individual stock." Voskian's new account forms listed her investment objective as "Growth & Income (return emphasis)."

Katz apparently recommended a fairly aggressive investment strategy for Voskian. Although Voskian's individual account consisted primarily of mutual funds and preferred stocks, the holding periods in Voskian's account were some of the shortest of any of the investors at issue. In one instance, Katz sold a security in Voskian's account just two days after purchasing it, netting Voskian a loss of approximately two percent. When selling mutual funds in Voskian's account, Katz also made little apparent effort to replace a security with another within the same fund family, which would have avoided deferred sales charges.<sup>13</sup>

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<sup>12</sup> Voskian testified that her net worth consisted largely of a \$50,000 life insurance payment, a \$20,000 payment from the military that she received as a result of her husband's death, and \$70,000 she received from selling a condominium shortly after her husband's death. Voskian also apparently had a brokerage account with Dean Witter worth approximately \$35,000.

<sup>13</sup> Mutual funds generally consist of different classes of shares that each have different sales charges and operating expenses associated with them. *See* Rule 18f-3 under the Investment Company Act of 1940, 17 C.F.R. § 270.18f-3; Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares, 60 Fed. Reg. 11875, 11876 (Mar. 2, (continued...))

Katz also made recommendations to buy and sell below-investment-grade securities and to buy and sell securities where the newly purchased security had a lower rating than the security it replaced. The NYSE introduced charts at Katz's disciplinary hearing showing that, although the lower-rated securities sometimes yielded Voskian a higher annual dividend than the prior security, the commissions from the transaction largely offset any future gain. In some instances, Voskian would never have made up for the transaction costs, as the newly acquired security yielded a lower dividend than the previous security. In other instances, Voskian would have to hold the new securities for at least thirteen – and in one case at least twenty-three – more years to make up for the commissions charged in the transaction.

While Voskian was at least somewhat aware of the holdings in her accounts, the extent to which she was happy with that makeup is unclear. Ennis testified that he met with Voskian to discuss her account in July 2001. During this meeting, Voskian initially told Ennis that her primary goal was to preserve her capital. Ennis responded that, if she wanted to pursue such a conservative strategy, Voskian would have to give up her preferred stock holdings, but, if she wanted a greater return, she could accept more risk and keep the preferred stock. Ennis testified that, by the end of the conversation, Voskian decided she was "okay" with keeping her present, more aggressive, portfolio. Ennis later confirmed their conversation by writing to Voskian that "I understand you are comfortable with Janet Katz and her recommendations. Your primary objective is safety of principal and moderate growth."

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<sup>13</sup> (...continued)

1995). For example, the major cost associated with purchasing Class A shares is a sales charge known as a "front-end load." See, e.g., *Raghavan Sathianathan*, Exchange Act Rel. No. 54722 (Nov. 8, 2006), 89 SEC Docket 774, 775 (barring respondent for making unsuitable mutual fund recommendations and for unauthorized trading), *petition denied*, No. 07-1002, slip op. (D.C. Cir. Dec. 2, 2008) (citing Mutual Fund Regulation § 18:4.1 (Clifford E. Kirsch ed., 2d ed. 2005)). This sales charge is paid when the shares are bought and it is deducted from the amount invested (effectively reducing the quantity of mutual fund shares purchased).

By contrast, Class B shares, which are at issue here, have a back-end sales charge (the "CDSC"), but no front-end load. See *Sathianathan*, 89 SEC Docket at 776; see generally Investment Company Act Rule 6c-10, 17 C.F.R. § 270.6c-10; Exemption for Certain Open-End Management Investment Companies to Impose Contingent Deferred Sales Loads, 60 Fed. Reg. 11887 (Mar. 2, 1995). The CDSC is collected from the investor when the mutual fund shares are sold rather than at the time of purchase. *Sathianathan*, 89 SEC Docket at 776. Typically, the CDSC is reduced for each year that an investor holds Class B shares, phasing out entirely after a certain number of years. *Id.* According to the NYSE's expert witness, Katz could have deferred these sales charges by buying another Class B share within the same fund family.

Approximately a year later, in May 2002, Wachovia sent Voskian a letter asking her to confirm that she "[had] the resources to bear any losses," that she was "aware that there is risk associated with equity investments or corporate bond investments," and that she had "opted for the potential higher yield associated with such securities over more safety." The letter also asked Voskian to provide her total net worth, liquid net worth, and household income. The record contains two different, and somewhat contradictory, versions of what Voskian supposedly returned to Wachovia.

The first version contains none of the information requested about Voskian's income or assets, but instead contains a handwritten note at the bottom of the letter: "I have instructed my financial advisor Janet Katz that security of my principal is the most important part of my investment plan and I do not want that at risk for any higher yield." Voskian explained during her testimony that, instead of providing her financial information, she wrote the note because she "felt they were asking for a lot of information that they did not need to have. . . . So I just wrote this on it [referring to the note] and sent it back to them."

Ennis acknowledged receiving this letter and testified that he had a subsequent "conversation with [Voskian] telling her that her account was not invested that way." Ennis again explained to Voskian that her account was mostly invested in preferred stock and the difference between those types of investments and more conservative options. Ennis testified that, "[a]t the end of my conversation I felt that she was comfortable with the preferred, with owning the preferred."

The second version of the letter in the record does not contain Voskian's note and instead provides the information that Voskian testified that she did not feel Wachovia needed. Specifically, the second version lists Voskian's total net worth as \$200,000, her liquid net worth as \$500,000, and her household income as \$70,000. Voskian testified that she neither signed nor filled out this second letter and that the figures were not accurate.

Voskian testified that sometime after her husband died she began to receive trade confirmations from Wachovia about securities that were being bought and sold out of her account. Voskian stated that she asked Katz about these transactions, to which Katz allegedly responded that "a lot of the things that my husband had bought at the time were not the best investment for me now." Voskian testified that she otherwise spoke with Katz very rarely, noting that they met three times in person and that they spoke on the phone "two or three times, the most, that I can remember . . . [o]ver the whole span of time." Katz, by comparison, claims that she met with Voskian a total of seven times and that she had more than seventy-five telephone conversations with Voskian.

Sometime after the NYSE began investigating the Ashbahians' complaints against Katz, Voskian discovered that \$5,000 had been transferred from one of her accounts to one of Greg Ashbahian's accounts on November 27, 2000, and an additional \$4,000 had been transferred on each of January 8, 2001 and February 23, 2001.

Katz acknowledged these transfers were made, but claims they were done pursuant to standing letters of authorization. The record contains two letters of authorization, which appear on their face to authorize the \$4,000 transfers, but neither letter covers the first \$5,000 transfer. Voskian testified that, although she had a close relationship with her son-in-law, she was "shocked" to discover Greg had authority to effect transactions in her account. Voskian added that the signatures on the letters of authorization were not hers and that the letters contained two obvious mistakes: (1) they incorrectly identified Greg Ashbahian as Voskian's son rather than her son-in-law, which she testified she would never have done, and (2) one letter showed her living in a town she had not lived in for years. Katz did not dispute signing the two letters of authorization as Voskian's "Financial Advisor," but Katz could not recall anything during her disciplinary hearing about the transfers from Voskian's account or the circumstances under which the letters of authorization were created.

#### **4. Sandra Griffin**

Sandra Griffin, who is Voskian's daughter, opened an individual account and an IRA with Katz in 2000. At the time, Griffin was fifty-four years old, the single mother of two adult children, and employed by an insurance company.

Griffin testified that she told Katz that she wanted "growth, but careful growth" because she was approaching retirement age and was concerned about preserving principal. Griffin also explained that "I did not look at it as money that I was going to use . . . I just wanted it to sit and grow" (ellipses in original). Katz's recollection, by comparison, was that Griffin "really wanted growth" and that Griffin "had money in the bank if there were any emergencies." Griffin's new account forms described her investment objective as "Growth (return emphasis)."

Griffin testified that, while Katz would occasionally call her to "discuss[] things, you know, about what she maybe wanted to do," Katz did not always call her before effecting transactions in her account. At one point, Griffin noticed from an account statement that "a fund that I knew I had had previously months back, and then it was gone and now it was back again, and I called [Katz] to discuss that with her." According to Griffin, Katz explained "that at the time that I had [the security] previously, it had been doing well, and then it was not doing as well, and so she sold it off and then it came up again and she repurchased it for me." Katz disputed this testimony by denying that she ever effected a transaction in Griffin's account without first obtaining authorization.

#### **5. May Kapakjian**

May Kapakjian, who is Voskian's sister and Griffin's aunt, also had an account with Katz. Kapakjian did not testify at the disciplinary hearing because, according to Griffin, "she is 92 and

she is physically and emotionally incapable of handling this type of stress." Instead, Griffin, who had a power of attorney over her aunt's account, testified on Kapakjian's behalf.<sup>14</sup>

According to Griffin, Kapakjian was a retired hairdresser, whose income consisted of Social Security, and who had been living in a rent-controlled apartment in New York. Sometime in 2000, Kapakjian decided to move to a retirement facility in New Jersey to be closer to her family. At the time, Kapakjian was eighty-five and, according to Griffin, "a person of limited means [who] has had a very Spartan life-style." Although Griffin had never known her aunt to have had a brokerage account previously, she testified that Kapakjian decided to open an account with Katz so that her investments would be "with the same person the rest of the family was with."

Griffin was present at Kapakjian's first meeting with Katz, which took place in or around June 2000. According to Griffin, Kapakjian decided to entrust her entire savings, approximately \$130,000, with Katz. Griffin testified that her aunt's primary investment concern was preserving that capital and that her aunt told Katz she was "fearful of something going wrong" with her money because of her lack of other means of support.

Katz had a different recollection of their initial meeting. Kapakjian, according to Katz, never told her that the money she was investing was all that she had or that preserving her principal was her primary concern. Instead, Katz claims that Kapakjian told her that she was moving only half of her savings and that "she was looking to make the absolute maximum she could make on that money." Katz asserts that Kapakjian's investment goal was to receive \$1,100 per month in distributions and that Kapakjian "realized that she had to take risks in order to make the type of return she wanted on the money she was placing with me." The new account form that Katz completed for Kapakjian indicated that Kapakjian had an annual income of at least \$50,000 and net worth of at least \$200,000. The form also listed Kapakjian's investment objective as "Growth & Income (return emphasis)."

Katz described Kapakjian as an involved investor who would occasionally call with investment recommendations. Katz testified, for example, that Kapakjian called Katz sometime in 2002 to discuss "if there was some way to make some money out of this market volatility" at a time when "the corporate bond market had been hit hard and you had price differentials between corporate bonds and Treasury bonds and lesser corporate bonds." Ennis corroborated some of Katz's description of Kapakjian, as he testified that he "got the impression that [Voskian and Kapakjian] were accepting of a little bit of volatility to get a better return from preferred [stock investments]." He also acknowledged, however, that Voskian and Kapakjian "were not savvy market people, I am not going to pretend that."

Kapakjian received several confirmation letters from Wachovia, including one dated July 21, 2001, which asked Kapakjian to confirm that "[i]t is my trading objective

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<sup>14</sup> Voskian also testified briefly about her sister, Kapakjian.

(notwithstanding previously stated or recorded account objective) to effect short-term transactions in securities, recognizing that such trading involves risk of financial loss and may generate substantial commission charges." The letter also stated that "[a]ll transactions have been made with my prior approval and in accordance with my overall investment/trading objectives." The letter contains what appears to be Kapakjian's signature, but Griffin testified that it would be unusual for Kapakjian to sign such a document, because "she is not only financially, but in all walks of life she is fearful of something going wrong and this would – if she understood the whole thing, this would absolutely terrify her."

The record contains another signed confirmation letter, dated May 13, 2002, purporting to confirm that Kapakjian had "opted for the potential higher yield associated with [equity investments or corporate bond investments] over more safety and plan[ned] to continue our current strategy in the future." The letter also contained the representation that Kapakjian "was aware of all activity, commissions and interest charges, if any, and overall profits and losses." Finally, the letter contained blanks in which Kapakjian was to write her total net worth, liquid net worth, and household income, and which were filled out to indicate that Kapakjian's total net worth was "1 Million," her liquid net worth was "400 M," and her household income is "100 M."

As with Voskian's account, Katz never exchanged shares within the same mutual fund family, which would have avoided certain fees. Katz also frequently purchased or sold securities in Kapakjian's account within short periods, incurring substantial costs. For example, on February 22, 2001, Katz bought 1,000 shares of the Van Kampen Senior Income Trust for Kapakjian's account at \$8.08 per share and then sold those same shares five days later at the same price, generating approximately \$542 in commissions. In some cases, Katz bought and sold below-investment-grade securities for Kapakjian's account. For example, on April 17, 2001, Katz purchased 350 shares of a below-investment-grade bond on margin for Kapakjian's account. Katz sold the bonds ten days later for an approximately \$558 loss, which included approximately \$436 in costs related to the transaction.

All told, Katz effectuated twenty-three transactions in the two months after Kapakjian first opened her account and eighty-two total trades (not including reinvested dividends) in the approximate two and one-half years at issue. Kapakjian's account value during this time dropped from approximately \$130,000 to \$108,000, while Kapakjian paid approximately \$15,651 in costs, which represented more than 12% of Kapakjian's opening principal. Katz's expert acknowledged that the costs of trading in Kapakjian's account were "high," but Katz defended the above trading strategy by arguing that all the trades were done at Kapakjian's direction.

## **6. Mary Ann Smith**

Mary Ann Smith and her husband began investing with Katz in 1993, before Katz had joined Wachovia. When Katz changed firms to Wachovia, the Smiths also transferred their accounts, opening an individual account and an IRA. Mary Ann Smith's husband handled the family's finances while he was alive, and she testified that he did so "in a conservative manner

and that is the way he felt that our – that his retirement funds and IRAs should be handled as much as possible." The Smiths' new account forms, which were completed when they first transferred their money to Wachovia in 1997, showed an investment objective of "Growth & income (return emphasis)." When Mary Ann's husband died in 1998, she moved their joint account into an individual account in her own name, and the new account form completed as part of that transfer continued to list her investment objective as "Growth & Income (return emphasis)."

Smith testified that the information on these forms was correct, as far as she knew. She also testified that she understood her investment objectives, stating that the form was "checked in growth and income with return emphasis. I would think it says exactly what it means, does it not, growth and income?" Smith added that she believed her account "would be continued pretty much the way it had been handled in the past." She explained that she was depending on her investments to be as "conservative as possible," although later added, "I really didn't know whether they were, nor did I ask, whether they were conservative or not."

Sometime after her husband passed away, Smith began to notice that Katz was trading in her account without her approval. Smith testified, for example, that Katz made nine trades in her account in June 1999 and eight trades in her account in April 2001, but that Smith had not spoken with Katz a corresponding number of times. Smith claimed that she asked Katz at one point about why she had executed so many trades, to which Katz responded "that she was repositioning the accounts, slowly but surely."

Smith testified that she "just took it for granted" that Katz would execute trades without Smith's express authorization and that "I didn't know you were supposed to contact with each issue." Smith added, "I really just was not – financially this was not my bailiwick and so I was busy doing other things and as I said before, I trusted Mrs. Katz to take care of my – take care of my account."

By 2001, Smith noticed that her account had begun to lose value. Smith testified that she asked Katz about this drop, but "Katz assured me that this correction would be over with soon and not to worry about it." When her account value continued to fall, Smith asked Katz to "stop buying and selling in order to keep a certain amount of income coming in to my account." According to Smith, Katz nevertheless continued to buy and sell securities without her permission, which caused Smith to worry that "I was going to lose absolutely everything." Smith contacted Larry Ennis and "asked him to tell [Katz] to please stop," and Katz eventually complied.

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An NYSE hearing panel (the "Hearing Panel") conducted a sixteen-day hearing between October 30, 2007 and March 4, 2008. The Hearing Panel found that Katz (i) misappropriated funds from the Ashbahians, Voskian, and Pinajian, (ii) made misstatements to Pinajian,

(iii) effected unsuitable transactions in Voskian's and Kapakjian's accounts, (iv) engaged in unauthorized trading in the Ashbahians', Voskian's, Griffin's, and Smith's accounts, and (v) engaged in discretionary trading in Voskian's, Kapakjian's, Griffin's, Pinajian's, and Smith's accounts without written authorization. The Hearing Panel also found, with respect to all of the investors at issue, that Katz caused or permitted the Firm's books and records to reflect inaccurate information and that she caused the Firm to fail to learn essential facts about its customers. In making these findings, the Hearing Panel largely discredited Katz's testimony, while crediting her customers' testimony. The Hearing Panel censured Katz and imposed a permanent bar from membership, allied membership, and approved person status and from employment or association in any capacity with any member or member organization. On October 15, 2008, the NYSE Board of Directors affirmed the Hearing Panel's decision in all respects. This appeal followed.

### III.

Pursuant to Section 19(e) of the Exchange Act, we will sustain the NYSE's decision if the record shows that Katz engaged in the alleged violative conduct and that the NYSE applied its rules in a manner consistent with the purposes of the Exchange Act.<sup>15</sup>

Katz argues that the standard of proof we should apply in reviewing the NYSE's decision is "substantial evidence" by pointing to our holdings that, "where the record contains 'substantial evidence' providing a basis for disregarding a credibility determination we will do so."<sup>16</sup> "Substantial evidence," however, is the standard Katz must meet when asking us to disregard the Hearing Panel's credibility findings.<sup>17</sup> "Preponderance of the evidence" is the standard we use to review the underlying disciplinary violations.<sup>18</sup>

In asking us to set aside the NYSE's decision, Katz also appears to misinterpret the nature of our review. Her opening brief consists primarily of sixty-six "exceptions" to the NYSE's

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<sup>15</sup> 15 U.S.C. § 78s(e).

<sup>16</sup> *Warren R. Schreiber*, 53 S.E.C. 912, 914 (1998) (citing *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993), and cases cited therein).

<sup>17</sup> *Schreiber*, 53 S.E.C. at 914.

<sup>18</sup> *See, e.g., David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003) (holding that preponderance of the evidence is the standard of proof in self-regulatory organization disciplinary proceedings); *Kirk A. Knapp*, 51 S.E.C. 115, 130 n.65 (1992) (stating that "[t]he correct standard is preponderance of the evidence" in an NASD proceeding); *cf. David Disner*, 52 S.E.C. 1217, 1221 & n.13 (1997) (noting that law judge's credibility determinations may be overcome only by "substantial evidence" while underlying violation must be demonstrated by "a preponderance of the evidence").

decision. The substantial majority of these exceptions complain only that the NYSE's decision failed to consider certain evidence, but Katz does not explain the significance of that evidence. Any such error by the NYSE is not grounds for reversal, because our *de novo* review of the NYSE's decision cures any failure by the NYSE to consider evidence.<sup>19</sup>

Where possible, this opinion groups Katz's remaining, related arguments together. Based on our independent review of the record, we find that a preponderance of the evidence supports the NYSE's findings of violation, with certain exceptions noted below.

## A. Just and Equitable Principles of Trade

NYSE Rule 476(a)(6) prohibits persons under the NYSE's jurisdiction from engaging in conduct inconsistent with just and equitable principles of trade.<sup>20</sup> The NYSE concluded that Katz violated these principles by (i) causing customer funds to be transferred to other customers' accounts without authorization, (ii) making misstatements to a customer, (iii) effecting unsuitable transactions in customer accounts, and (iv) engaging in unauthorized trading in customer accounts. We discuss each in turn.

### 1. Misappropriation

Misappropriation of client funds constitutes conduct inconsistent with just and equitable principles of trade.<sup>21</sup> Here, the NYSE found that Katz misappropriated funds from the Ashbahians, Voskian, and Pinajian by causing funds to be transferred, without authorization, from their accounts to other accounts owned by Katz's customers.

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<sup>19</sup> See *Heath v. SEC*, 586 F.3d 122, 142 (2d Cir. 2009) ("[B]ecause the SEC conducted a thorough, *de novo* review of the record, any procedural errors that may have been committed by the [NYSE's] Chief Hearing Officer are cured."); see also *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 694 (3d Cir. 1979) (noting that NASD disciplinary decisions can be appealed to the Commission for *de novo* review); *Gregory M. Dearlove*, Exchange Act Rel. No. 57244 (Jan. 31, 2008), 92 SEC Docket 1867, 1884 & n.42 (concluding that *de novo* review cured any error by the law judge to support his findings properly), *petition denied*, 573 F.3d 801 (D.C. Cir. 2009).

<sup>20</sup> See *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19047.

<sup>21</sup> *Cathy Jean Krause Kirkpatrick*, 53 S.E.C. 918, 925 (1998) (concluding that applicant had misappropriated customer funds in violation of NYSE Rule 476(a) by withdrawing customer funds to cover losses in other customers' accounts); cf. *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976) (noting that misappropriation and misuse of customer funds is "patently antithetical" with just and equitable principles of trade).

**a. The Ashbahians to Greg Ashbahian**

Between March 2001 and September 2002, approximately \$26,357 was transferred from the Ashbahians' accounts to the accounts of their son Greg and his wife in a series of transactions ranging in size from \$500 to \$4,000. The Hearing Panel, "[b]ased on its assessment of the credibility of the witnesses . . . concluded that [Katz] made transfers from the [Ashbahians'] accounts without authorization." Although Katz challenges her customers' credibility in a number of respects, "[c]redibility determinations of an initial fact finder are entitled to considerable weight because they are based on hearing the witnesses' testimony and observing their demeanor."<sup>22</sup> We see no basis here to overturn the Hearing Panel's credibility determination.

The Ashbahians both testified that they never authorized transferring money to their son Greg and that they had no reason to do so. Katz claims this testimony is undercut by two letters of authorization purportedly giving Greg authority over their accounts, but neither Ashbahian could recall signing the letters of authorization. The Hearing Panel also reasonably expressed "grave doubts as to the validity of the documents purporting to give [Greg Ashbahian] authority over his parents' accounts," and credited the Ashbahians' testimony that they never intended for money to be transferred to Greg's account. Furthermore, the first two transfers at issue – totaling \$5,000 – took place before either letter of authorization was allegedly executed. Katz offers no explanation for these first two transfers and testified only that she was "not sure" whether a letter of authorization existed at the time.<sup>23</sup>

Katz also challenges the Ashbahians' credibility by claiming "[t]hey frequently answered that they didn't remember, and they often contradicted each other." In particular, Katz points to two documents about which she claims the Ashbahians testified inconsistently: (1) the July 1, 2002 letter of authorization and (2) a letter in which the Ashbahians asked Wachovia to remove Greg Ashbahian as power of attorney over their accounts. The alleged inconsistency regarding the confirmation letter was the Ashbahians' disagreement about whether the signatures looked like theirs (Harry testified that the signatures looked like theirs, while his wife testified that they did not). The Ashbahians were consistent, however, that regardless of whether the signatures looked like theirs, neither recalled actually signing the documents. Regarding the

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<sup>22</sup> *Joseph Abbondante*, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 n.21, *petition denied*, 209 Fed. Appx. 6 (2d Cir. 2006) (unpublished). Such determinations generally "can be overcome only where the record contains substantial evidence for doing so." *Laurie Jones Canady*, 54 S.E.C. 65, 78 (1999) (citing *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993)), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

<sup>23</sup> Katz also argues that the Hearing Panel erred by concluding that Greg Ashbahian did not have a valid power of attorney over his parents' accounts. That alleged power of attorney, however, has no apparent relevance to this proceeding. Katz admitted during the hearing that she did not rely on it to effect any of the transactions at issue.

document removing Greg as power of attorney, Katz implies that the Ashbahians' testimony that Greg never had power of attorney over their accounts is inconsistent with signing a letter to remove him as power of attorney. Harry Ashbahian testified, however, that their son Thomas had them sign such a document to make sure that Greg did not have authority over their accounts. Thus, while the Ashbahians' testimony may not match up perfectly, any inconsistencies are, at worst, minor and fall well short of the substantial evidence needed to overturn the Hearing Panel's credibility determinations.<sup>24</sup>

Katz further argues that she could not have been responsible for three of the transfers at issue because she was in Scotland at the time. The Hearing Panel, however, rejected Katz's argument, and we agree with that assessment. As the Hearing Panel explained, Katz's assistant Steup testified that Katz had "total control over the accounts," and that, even when out of the office, Katz would call in "[a]t least once a day while she was gone." Steup explained that "nothing was happening without [Katz's] knowledge" with respect to her customers' accounts. Katz's husband's illness and death while in Scotland are thus not inconsistent with the evidence suggesting that Katz effected these transactions.

We are similarly unpersuaded by Katz's argument that Thomas Ashbahian "was not happy that Greg [Ashbahian] was the POA [power of attorney] over the parent's account and started to cause some problems." As discussed above, evidence shows that Katz transferred money from the Ashbahians' accounts to their son Greg's account without proper authorization. That Thomas Ashbahian may have encouraged his parents to complain does not undermine this evidence.

#### **b. Agnes Voskian to Greg Ashbahian**

Between November 2000 and February 2001, \$13,000 was transferred from Voskian's account to the account of her son-in-law, Greg Ashbahian. In concluding that Katz was responsible for these transfers, the Hearing Panel "credited [Voskian's] testimony that she did not authorize the transfer in question and found [Katz's] testimony lacking in credibility."

In an attempt to discredit Voskian's testimony, Katz points to two standing letters of authorization purportedly giving Katz the authority necessary to effect the transfers at issue. Voskian, however, denied signing the letters and noted that they contained several obvious inaccuracies, including identifying Greg as her son, rather than her son-in-law, something she testified she would never have done. Moreover, the letters of authorization were allegedly executed after \$5,000 had already been transferred out of Voskian's account.

Katz also points to evidence that "Greg Ashbahian had a very close relationship [with] Agnes Voskian" and that Voskian made gifts from her Wachovia account to her children and

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<sup>24</sup> See *John Montelbano*, 56 S.E.C. 76, 88-89 (2003) (declining to overturn hearing panel's credibility determination regarding various witnesses whose testimony contained "minor differences").

grandchildren, including in the same month that \$4,000 was transferred to Greg. Voskian acknowledged that she had a close relationship with her son-in-law, but she also testified that she had no reason to give Greg authority to authorize transactions in her account. Voskian's relationship with various family members is not a sufficient basis to reject the Hearing Panel's decision to credit Voskian's testimony that Katz transferred money without authorization.

### **c. Paul Pinajian to Edward Dorian**

On March 15, 2001, \$8,300 was transferred from Pinajian's account to satisfy, in part, a margin call in Edward Dorian's account. This transfer appeared on Pinajian's initial March 2001 account statement, but was not included in the subsequent, false account statement that Pinajian testified he received from Wachovia. Pinajian described the transfer as "crazy," noting that he "had nothing to do with Ed Dorian. I never speak with him." Katz, for her part, denied any knowledge of the transfer.

The NYSE "accepted [Pinajian's] testimony that he did not authorize the transfer to [Dorian's] account and found incredible [Katz's] assertion that she did not know about the transfer." We find no evidence to overturn the Hearing Panel's credibility determination regarding Pinajian. Katz was responsible for both Pinajian's and Dorian's accounts, she admitted that she was aware of margin calls in Dorian's account, and, as noted earlier, Katz appeared to have "total control over the accounts" and was "aware of everything going on in all accounts." We therefore conclude that Katz misappropriated Pinajian's funds for Dorian's benefit.

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Katz argues that none of the above transfers amounted to misappropriation because (i) she derived no personal benefit from the transfers and (ii) there was "no relationship between the broker and either account." We disagree. Katz had a relationship with all of the account holders to and from whom funds were transferred: she was their registered representative. She also derived a personal benefit by keeping the clients who received the transfers happy and retaining their business. Furthermore, we have held in similar circumstances that a registered representative misappropriates funds by transferring assets from one customer account to another without authorization.<sup>25</sup> Misuse of customer funds "is serious misconduct," and Katz's conduct would violate NYSE Rule 476(a) regardless of whether she gave the money to another customer, kept it herself, or eventually gave it back to her customers.<sup>26</sup>

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<sup>25</sup> See *Kirkpatrick*, 53 S.E.C. at 921, 925 (finding that a registered representative had misappropriated \$34,000 of a customer's account "for her own purposes" where \$31,944 of those funds were used "to cover losses in the brokerage account of another customer").

<sup>26</sup> See *Bernard D. Gorniak*, 52 S.E.C. 371, 373-74 (1995) (concluding, in part, that failure to return funds promptly to a customer violated just and equitable principles of trade and warranted a bar).

Katz also argues that the NYSE lacked sufficient evidence to conclude that she misappropriated her clients' funds. She points to Wachovia's procedures for transferring funds between accounts and the NYSE's failure to produce certain letters of authorization and the related journal request forms. Katz contends that, without the above-mentioned letters of authorization and journal request forms, the NYSE lacked sufficient evidence to find her guilty of the alleged charges. In support, Katz cites *Rooney A. Sahai*, in which we found insufficient evidence to conclude that an applicant had forged signatures on certain documents.<sup>27</sup>

In *Sahai*, however, the "record [wa]s devoid of any evidence that Sahai performed any act that 'caused' the alleged forgeries."<sup>28</sup> Here, the record contains a variety of evidence that Katz effected transfers between her customers' accounts without their knowledge, such as testimony from her customers, testimony about Katz's control over her customers' accounts, and Katz's own admission that she effected certain transfers. Although testimony "may be 'circumstantial' in the sense that a witness did not actually see the respondent engage in the violative conduct," that testimony can still be persuasive evidence that the respondent engaged in the alleged conduct.<sup>29</sup> Moreover, the absence of the letters of authorization is consistent with the conclusion that Katz lacked the necessary authorization to effect the transfers at issue. Therefore, viewing the record as a whole, we conclude sufficient evidence exists to find that Katz effected unauthorized transfers from the Ashbahians', Voskian's, and Pinajian's accounts.

## 2. Misstatements

Making material misstatements is inconsistent with the just and equitable principles of trade.<sup>30</sup> The NYSE concluded that Katz made such material misstatements by telling Pinajian that his account balances were incorrect because his margin debit had accidentally been deducted twice due to a computer error. In reaching this conclusion, the NYSE considered Pinajian's testimony about his conversations with Katz and his contemporaneous notes of those conversations. Although Katz denied making these statements, the Hearing Panel did not credit

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<sup>27</sup> Exchange Act Rel. No. 51549 (Apr. 15, 2005), 85 SEC Docket 862, 871-72.

<sup>28</sup> *Id.* at 871.

<sup>29</sup> *John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8134 n.9 (citing *Donald M. Bickerstaff*, 52 S.E.C. 232, 238 (1995)); *see also Eliezer Gurfel*, 54 S.E.C. 56, 62 (1999) (concluding that applicant had forged company president's signature where the hearing panel had credited the president's testimony that he had not signed the documents at issue); *Kirkpatrick*, 53 S.E.C. at 926-27 (concluding that applicant had forged documents despite lack of direct evidence of such forgery).

<sup>30</sup> *See Stephen Michael Sohmer*, 57 S.E.C. 240, 257 (2004) (finding that material misstatements violated just and equitable principles of trade).

those denials and instead concluded that "the only reasonable conclusion the Panel could reach is that [Katz] made false statements in order to conceal the losses in [Pinajian's] account."

Katz seeks to discredit Pinajian by arguing that the trade confirmations listing Pinajian's correct home address "proved that Paul Pinajian was a liar." Katz adds that certain change of address forms and letters of notification for Pinajian's accounts are missing and that any Wachovia employee could have accessed the necessary documents to falsify Pinajian's statements. Katz goes on to allege that Pinajian "created the false monthly statements himself to extort a settlement from Wachovia."

We see no reason, however, to discredit Pinajian's claim that he received at least some fabricated account statements. Pinajian may have been wrong about receiving certain statements in the mail or about when he stopped receiving his actual monthly statements. However, as the Hearing Panel accurately noted, Katz "offered no contrary evidence or plausible explanation for how one of her customers, who happened to be losing large amounts of money through her management of his account, happened to receive statements of another of her customers with a greater amount, or why that customer would lie about her false assurances to him." Furthermore, evidence suggests Katz was misdirecting Pinajian's actual account statements, as both Steup and Kramlick testified that Katz asked them to send at least some of Pinajian's statements to an address that turned out to be that of Katz's house cleaner and to which Pinajian had no apparent connection. We thus find insufficient evidence to overturn the Hearing Panel's credibility determinations regarding Pinajian's testimony and conclude that such testimony provides sufficient evidence to find that Katz made oral misstatements.

Katz also argues that the NYSE's finding that she created the false monthly account statements amounted to finding her guilty of conduct that the NYSE had not charged in its Charge Memorandum. We disagree. The NYSE did not make additional, uncharged findings of violations. Rather, the NYSE made findings of fact about the monthly account statements, which the NYSE used to support its ultimate legal conclusion that Katz made oral misstatements. The various false account statements also suggested that Katz attempted to conceal her oral misstatements, a factor the NYSE appropriately considered when determining sanctions.<sup>31</sup> More significant, however, is that Pinajian's testimony and contemporaneous notes, along with the

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<sup>31</sup> See, e.g., *Gray*, 96 SEC Docket at 19053 (affirming the NYSE's imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct); *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8989-90 (concluding that attempting to conceal misconduct by supplying false information during an investigation presents a "risk of harm to investors and the markets" and "renders the violator presumptively unfit for employment"); *Fox & Co. Invs.*, Exchange Act Rel. No. 52697 (Oct. 28, 2005), 86 SEC Docket 1895, 1912-13 (finding imposition of a bar to be neither excessive or oppressive where applicants, among other things, concealed their conduct); *Robin Bruce McNabb*, 54 S.E.C. 917, 929 (2000) (sustaining bar where applicant attempted to conceal his misconduct), *aff'd*, 298 F.3d 1126 (9th Cir. 2002).

Hearing Panel's assessment of witness credibility, are alone sufficient evidence to conclude that Katz made oral misstatements.

### 3. Unsuitable Trading

A registered representative is obligated to make "a customer-specific determination of suitability and to tailor his recommendations to the customer's financial profile and investment objectives."<sup>32</sup> Failing to recommend such suitable transactions is inconsistent with just and equitable principles of trade.<sup>33</sup> Here, the NYSE found that Katz failed to tailor her recommendations to Voskian's and Kapakjian's profiles and concluded that her conduct, therefore, was inconsistent with just and equitable principles of trade.<sup>34</sup> We agree.

As Ennis described them, Voskian and Kapakjian "were not savvy market people." They lived on modest retirement incomes, their investments with Katz were relatively modest, and their Wachovia accounts appeared to represent a significant portion of their net worth.<sup>35</sup> All of this left them with little margin for error or loss.<sup>36</sup> Despite this, Katz recommended that Voskian and Kapakjian invest in individual securities, some of which were below-investment-grade. As the NYSE's expert witness testified, these holdings involved a much higher risk of loss than more conservative, diversified investment choices, such as high-yield or high-income mutual funds.<sup>37</sup> The NYSE's expert also noted the short holding periods in Voskian's and Kapakjian's accounts

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<sup>32</sup> *F.J. Kaufman & Co. of Virginia*, 50 S.E.C. 164, 168 (1989).

<sup>33</sup> *Luis Miguel Cespedes*, Exchange Act Rel. No. 59404 (Feb. 13, 2009), 95 SEC Docket 14272, 14280 ("By recommending unsuitable transactions, a registered representative acts inconsistently with just and equitable principles of trade."); *Clinton Hugh Holland, Jr.*, 52 S.E.C. 562, 566 (1995) (finding that applicant's unsuitable recommendations were inconsistent with just and equitable principles of trade), *aff'd*, 105 F.3d 665 (9th Cir. 1997) (Table).

<sup>34</sup> The NYSE found that Katz did not make unsuitable recommendations with respect to the Ashbahians, Griffin, Pinajian, or Smith.

<sup>35</sup> The record is unclear about whether Kapakjian invested all or half of her savings with Katz. *See* discussion *supra* pp.15-16. Katz's recommendations, however, would be unsuitable whichever amount Kapakjian invested with Katz.

<sup>36</sup> *Cespedes*, 95 SEC Docket at 14281 (noting that modest investments, which represented "all or substantially all" of a customer's liquid net worth, left "little margin for error or loss").

<sup>37</sup> *See also, e.g., Stephen Thorlief Rangen*, 52 S.E.C. 1304, 1308 (1997) (finding that investing in particular securities, rather than investing in a more diversified portfolio, was inconsistent with the objective of safe, non-speculative investing).

(often less than one year and, in some cases, as short as a few days) and that Katz failed to recommend that, when exchanging investments, Voskian and Kapakjian should do so within the same mutual fund family. As a result, Katz's strategy for Voskian's and Kapakjian's accounts generated the highest transaction costs of any of the accounts at issue. These extra expenses increased the amount by which their investments had to appreciate before they would realize a net gain.

Katz defends her investment recommendations by claiming that her rationale was to get her clients "better income with some greater risk of volatility." Katz argues, for example, that the below-investment-grade securities at issue had a default rate of only 1%; that the concentration of below-investment-grade securities in Voskian's and Kapakjian's accounts was below the concentration that the NYSE found to be unsuitable in other NYSE cases;<sup>38</sup> and that one of Katz's recommendations yielded Kapakjian a return of approximately 39%. Katz's expert witness also testified that the class of below-investment-grade bonds in Voskian's and Kapakjian's accounts had "a very stable record" with "an acceptable amount of risk with the low default rate." None of this, however, persuades us that Katz's recommendations were suitable. As Katz's expert testified when acknowledging that he could not conclusively determine the suitability of Katz's recommendations, one must "match the security and the recommendation to that person's characteristics." Here, Katz's recommendations may have yielded some positive returns, but they still represented risky and costly investment choices given Voskian's and Kapakjian's investment profiles.<sup>39</sup>

Katz also argues that Ennis confirmed Kapakjian's and Voskian's willingness to assume risk, but Kapakjian's and Voskian's apparent willingness to take on some risk does not change

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<sup>38</sup> Katz cites *Stephen M. Moore*, NYSE Hearing Board Decision 04-82 (consent) (May 19, 2004) (consenting to penalty for unsuitable recommendations where clients had between approximately 44% and 100% of their accounts in below-investment-grade or other high-risk securities); *Douglas Smith*, NYSE Hearing Panel Decision 04-60 (consent) (April 20, 2004) (consenting to finding that registered representative had made unsuitable recommendations where clients had between approximately 42% and 98% of their accounts in below-investment-grade or other high-risk securities); and *Bradley Todd Glasman*, NYSE Hearing Panel Decision 03-216 (consent) (Nov. 25, 2003) (consenting to a finding that registered representative had made unsuitable recommendations where clients had between approximately 33% and 99% of their accounts in below-investment-grade securities).

<sup>39</sup> See, e.g., *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009) 95 SEC Docket 13833, 13852 (finding that registered representative had "abdicated his responsibility for fair dealing" where the registered representative had, in part, "failed to recommend cheaper mutual fund alternatives within the same fund family"); *Sathianathan*, 89 SEC Docket at 786 (noting that "the overall performance of the stock market [did not] change the fact that Sathianathan's recommendations were unsuitable because they involved unnecessary costs and were too risky given the investment objectives and investment experience of his customers").

our conclusion that Katz's recommendations were unsuitable for Kapakjian and Voskian. A client's awareness of – or even desire for – risk does not relieve a registered representative of the obligation to tailor recommendations to each customer's financial profile.<sup>40</sup> Katz did not meet this obligation. She instead admitted that she essentially followed the same investment strategy for all of her clients, testifying that "if you are looking for safety of principal, you go to the bank, put your money in the bank, you should not be talking to me." For these reasons, we conclude that Katz's recommendations were unsuitable.

On appeal, Katz argues that the NYSE failed to produce "her extensive research files" during discovery, which documents she claims "would explain why she sold stocks at certain times." However, those documents no longer existed by the time the parties began discovery, as Wachovia only retained research files in the normal course of business for three years. Katz nevertheless argues that, because of these and "many other documents" that were never produced, she "was severely prejudiced in the defense of her case." We disagree.

When asserting prejudice because of missing documents, "[t]he burden is on a respondent to put forward evidence of actual prejudice."<sup>41</sup> Katz makes no such showing other than to assert generally that the research files would have explained her recommendations and to imply that the documents would have implicated others in the violations the NYSE accuses her of committing. Other than her own speculation, however, the record contains no evidence supporting Katz's allegations, and Katz cannot shift the blame for her violations to others or claim that others' misconduct somehow excuses her own misdeeds.<sup>42</sup> Moreover, despite the unavailability of her research files, Katz had the opportunity during the hearing to show that the NYSE failed to establish the unsuitability of her recommendations by putting on other evidence, and she

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<sup>40</sup> *Cespedes*, 95 SEC Docket at 8-9; *see also Rafael Pinchas*, 54 S.E.C. 331, 342 (1999) ("[E]ven if [the customer] had desired Pinchas to double her money, that desire would not have relieved Pinchas from his duty to recommend only those trades suitable to [the customer's] situation."); *Rangen*, 52 S.E.C. at 1307-08 (finding that, even if customers "were aware of the risks" of using margin, registered representative of NYSE member firm still made unsuitable recommendations for unsophisticated investors seeking income-producing investments); *John M. Reynolds*, 50 S.E.C. 805, 809 (1992) (concluding that even if a customer wanted to engage in aggressive and speculative trading, the representative was obligated to abstain from making recommendations inconsistent with the customer's financial situation).

<sup>41</sup> *Jacob Wonsover*, 54 S.E.C. 1, 22 (1999) (finding no merit in respondent's "generalized assertion" that the Division of Enforcement's case "relies upon faded memories, lost witnesses and discarded documents"), *aff'd*, 205 F.2d 408 (D.C. Cir. 2000).

<sup>42</sup> *See Audifferen*, 93 SEC Docket at 8141 (noting that applicant "cannot shift the blame for his violations to his firm"); *Barry C. Wilson*, 52 S.E.C. 1070, 1073 n.12 (1996) (noting that "failings on the part of certain firm personnel do not excuse misconduct by others").

presented an expert witness, cross-examined the NYSE's witnesses, elicited testimony that such research files existed, and testified about why she made certain trades.

Regarding the other documents Katz claims are missing (such as letters of authorization and the related journal request forms), the NYSE's counsel represented in a letter dated April 18, 2007 that the NYSE had provided Katz with "copies of all relevant, discoverable and non-privileged documents in the custody of Enforcement related to the [Katz] matter." This production, the NYSE attested, "included, among other things, correspondence, documents produced by Wachovia Securities LLC and transcripts of on-the-record testimony."<sup>43</sup> The record provides no reason to disbelieve the NYSE's representation, nor does the record contain any evidence to suggest that Wachovia withheld documents. We therefore find no basis to conclude that the NYSE or Wachovia improperly withheld documents or that Katz was prejudiced in the defense of her case.<sup>44</sup>

#### 4. Unauthorized Trading

"Unauthorized trades are a serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade."<sup>45</sup> This type of misconduct goes "to the heart of the trustworthiness of a securities professional,"<sup>46</sup> and "is a fundamental betrayal of the duty owed by a sales[person] to his [or her] customers" (alteration in original).<sup>47</sup> The NYSE

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<sup>43</sup> The record suggests that Katz withdrew her request for the journal request forms when Wachovia apparently represented during a conference call that such journal request forms would neither indicate which salesperson authorized the transactions at issue nor whether a customer had approved the transaction.

<sup>44</sup> *Cf. Epstein*, 95 SEC Docket at 13858 (concluding that NASD had complied with its discovery rules by attesting that it had provided all discoverable materials).

<sup>45</sup> *Wanda P. Sears*, Exchange Act Rel. No. 58075 (July 1, 2008), 93 SEC Docket 7395, 7398 (quoting *Bradley Kanode*, 49 S.E.C. 1155, 1156 (1989)), *aff'd*, 101 F.3d 108 (2d Cir. 1996) (Table)); *see also Gray*, 96 SEC Docket at 19047 (noting that it "is well established" that unauthorized trading is inconsistent with the just and equitable principles of trade contained in NYSE Rule 476(a)(6)); *Michael G. Keselica*, 52 S.E.C. 33, 37 (1994) (concluding that effecting unauthorized trades "constituted conduct inconsistent with just and equitable principles of trade").

<sup>46</sup> *Adam Stuart Levine*, 51 S.E.C. 395, 397 (1993) (affirming imposition of a bar where registered representative effected unauthorized trades in customer accounts).

<sup>47</sup> *Sears*, 93 SEC Docket at 7398 (quoting *Keith L. DeSanto*, 52 S.E.C. 316, 323 (1995)), *aff'd*, 101 F.3d 108 (2d Cir. 1996) (Table).

concluded that Katz betrayed these duties by effecting unauthorized trades in the accounts of the Ashbahians, Voskian, Griffin, and Smith, and we agree.<sup>48</sup>

The Ashbahians, Voskian, Griffin, and Smith all testified that Katz executed trades in their accounts without their prior authorization and that they were, at times, confused or alarmed to discover that Katz had been trading in their accounts. The Ashbahians and Smith also noted that, when they called to complain, Katz would be dismissive, telling them "not to worry about it." Although the Hearing Panel did not make an explicit credibility finding regarding this testimony, the Hearing Panel noted that the customers all testified similarly and that "[w]hile several of the customers were related through [Greg Ashbahian], who had introduced each of them to [Katz], [Smith] did not know any of the other customers in question." Such "substantial corroborative effect of the customers' testimony taken as a whole" is persuasive evidence that Katz effected unauthorized trades.<sup>49</sup>

Katz, for her part, claims she had authority to effect trades she made in her customers' accounts and points to the various confirmations her customers made about being satisfied with Katz's handling of their accounts. The Hearing Panel, however, refused to credit Katz's testimony, and, while the confirmations may have provided post-trade approval, ratification of a transaction after the fact does not establish that trades were authorized before being executed.<sup>50</sup>

Katz additionally points to testimony by Smith that Katz did not pressure her to accept trade recommendations. The issue, however, is not whether Smith felt pressured to accept certain recommendations. The issue is whether Katz was effecting trades without first seeking Smith's permission, which Smith testified Katz was doing. Katz also points to Griffin's testimony that Griffin would discuss her investment choices with Katz when she deposited money into her Wachovia accounts. However, not all trades occurred at the same time Griffin deposited her money, and Griffin's testimony that she had periodic conversations with Katz does

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<sup>48</sup> The NYSE also concluded that Katz exercised discretion in her customer accounts without written authorization in violation of NYSE Rule 408(a), which we discuss below. *See infra* Part III.C.

<sup>49</sup> *Frank J. Custable, Jr.*, 51 S.E.C. 643, 648 n.14 (1993) (finding similarities in customer testimony to be "compelling").

<sup>50</sup> *Justine Susan Fischer*, 53 S.E.C. 734, 742 (1998) (finding that applicant had violated Rule 408 regardless of whether the customer complained about the transactions at issue); *Neil C. Sullivan*, 51 S.E.C. 974, 976 & n.1 (1994) (finding that applicant had engaged in unauthorized trading and noting that "[t]he fact that a customer ultimately accepts an unauthorized trade does not transform it into an authorized purchase"); *Custable*, 51 S.E.C. at 650 ("As we have recently emphasized, the fact that a customer ultimately accepts an unauthorized trade by paying for it does not transform it into an authorized trade.").

not contradict Griffin's testimony that Katz nevertheless effected transactions without her approval at other times.

In addition to these factual issues, Katz also asks us to dismiss this proceeding because she "never had notice of which trades were allegedly unauthorized." We decline to do so. "As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient."<sup>51</sup> Here, the NYSE specified that Katz had engaged in unauthorized trades "in most cases" or "regularly" with respect to the Voskian, Griffin, and Ashbahian accounts (although the NYSE did not similarly characterize the number of unauthorized trades in the Smith account). Katz was thus aware that the NYSE would challenge most of the trades in her customers' accounts, and she had a full opportunity to defend against this allegation and to cross-examine the witnesses who testified that Katz had effected transactions in their accounts without proper authorization.<sup>52</sup>

## **B. Discretionary Power Without Written Authorization**

NYSE Rule 408(a) prohibits members or employees thereof from exercising discretionary power in a customer account without first obtaining written authorization from that customer.<sup>53</sup> Here, the parties do not dispute that Katz lacked written authorization to exercise discretionary

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<sup>51</sup> *Steven E. Muth*, Exchange Act Rel. No. 52551 (Oct. 3, 2005), 86 SEC Docket 1217, 1233 n.40 (finding that allegation provided sufficient notice where it alleged applicant "engaged in various sales practices," but "did not specify unauthorized trades"); *see also Rita J. McConville*, Exchange Act Rel. No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3149 (noting that, although the NYSE must inform a respondent of enough detail for the respondent to prepare a defense, the NYSE "need not disclose to the respondent the evidence upon which [it] intends to rely"); *Blair & Co.*, 7 S.E.C. 977, 980 (1940) (denying motion for bill of particulars by noting that respondents "have generally been apprised of the nature of this proceeding; any uncertainty that may exist at the present time as to particular contentions . . . will be dissipated during the course of the proceedings by the evidence introduced").

<sup>52</sup> *See William C. Piontek*, 57 S.E.C. 79, 90-91 (2003) (finding that respondent who "understood the issue[s]" and "'was afforded full opportunity' to litigate" them had sufficient notice of the charges against him (quotations and citations omitted)); *KPMG Peat Marwick*, 55 S.E.C. 1, 4 (2001) ("As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient."), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *Jonathan Feins*, 54 S.E.C. 366, 378 (1999) (holding that "[a]dministrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding").

<sup>53</sup> *See Ivan M. Kobey*, 51 S.E.C. 204, 211 (1992) ("Rule 408(a) prohibits an exchange member or an employee thereof from exercising discretionary power in a customer's account without first obtaining written authorization from the customer.").

trading in Kapakjian's, Voskian's, Griffin's, Pinajian's, and Smith's accounts. The issue is whether Katz ever exercised such discretionary power.

Regarding Voskian, Griffin, Pinajian, and Smith, we conclude the record contains sufficient evidence to find that Katz exercised discretionary power over their accounts. All four customers testified that Katz had exercised such discretionary power, and the Hearing Panel credited this testimony. We see no basis for overturning that credibility determination, and Katz does not provide any reason to do so other than to cross reference her various attempts to discredit her customers' testimony, arguments that we address and reject elsewhere in this opinion.

Regarding Kapakjian, however, we cannot find sufficient evidence that Katz exercised discretion over her account. As noted earlier, the evidence regarding Kapakjian's account comes largely from Griffin's testimony about her aunt. Although Griffin noted that authority figures intimidated Kapakjian (implying that Kapakjian may have been inclined to let Katz exercise discretion over her account), Griffin did not appear to know whether Katz actually exercised such discretionary power over her aunt's account. In fact, Griffin testified that she and her aunt never discussed what was going on in Kapakjian's account during the time at issue and that Griffin had not exercised her power of attorney to review her aunt's accounts until she began to become concerned about her own accounts at Wachovia. Griffin also testified that, even after she began reviewing Kapakjian's statements, she still did not discuss the accounts with Kapakjian for fear of upsetting her. We accordingly dismiss the NYSE's finding that Katz exercised discretion over Kapakjian's account without written authorization, but affirm the NYSE's findings with respect to Voskian, Griffin, Pinajian, and Smith.

### **C. Books and Records and Causing the Firm to Learn Inaccurate Information**

NYSE Rule 405 requires all member organizations to "use due diligence to learn the essential facts relative to every customer." A person associated with a member firm can violate this rule by failing to learn specific facts about a customer or by failing to fill out a new account form accurately.<sup>54</sup> NYSE Rule 440 and Exchange Act Rules 17a-3 and 17a-4 require brokers and

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<sup>54</sup> See, e.g., *Dan Adlai Druz*, 52 S.E.C. 416, 422 (1995) (finding that branch manager of NYSE member firm violated NYSE Rule 405 by failing to learn facts about the types of trading permitted for a firm account); *Kobey*, 51 S.E.C. at 211 (concluding that employee of NYSE member firm violated Rule 405 by falsifying information on new account forms, which caused the firm to be unable to "accurately assess the suitability of specific options trading strategies").

dealers to make and preserve books and records,<sup>55</sup> and the requirement to keep records includes the requirement that those records be accurate.<sup>56</sup>

The NYSE concluded that Katz violated these provisions with respect to all of the customers at issue by filling out new account forms (or causing such forms to be filled out) for the investors with inaccurate information, which, in turn, caused the Firm to fail to learn essential facts about those customers. For the reasons below, we agree with the NYSE's conclusion with respect to Voskian, but set aside the other findings of violations.

Regarding Voskian, her new account forms indicated that (i) her investment objectives involved some variation of "growth and income," (ii) she had twenty years of experience investing in stock, bonds and mutual funds, (iii) her annual income was between \$100,000 and \$499,999, and (iv) her net worth, excluding residence, was between \$500,000 and \$999,999. Voskian testified that none of this was true. She claimed to have told Katz that she was not seeking growth and was instead primarily concerned with preserving capital. In fact, Voskian wrote a letter to Wachovia emphasizing this point. Voskian also testified that her income consisted of Social Security payments and \$300 per month of her husband's Air Force pension (well below the \$100,000 or more indicated on her new account forms) and that her net worth had been approximately \$175,000 (also much lower than the \$500,000 or more recorded on her new account forms). Voskian also testified that she had only been managing her own finances for the approximately three years since her husband died, not for the twenty years indicated on the new account forms.

Katz disputes Voskian's testimony, claiming that the new account forms accurately reflected what Voskian told her. In doing so, Katz points to Wachovia's supervisory system and "[t]he numerous documents in which the investment objectives of [Katz's] customers were reaffirmed again and again."<sup>57</sup> In Voskian's case, however, Wachovia's mechanisms for confirming customer investment objectives – primarily confirmation letters and follow-up interviews – validate, rather than discredit, Voskian's testimony. Voskian wrote a note on her confirmation letter that "security of principal is the most important part of my investment plan and I do not want that at risk for any higher yield" and testified that she had never seen or signed

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<sup>55</sup> See *supra* note 4.

<sup>56</sup> See *Anthony A. Adonnino*, 56 S.E.C. 1273, 1288 (2003) (finding that "instances of inaccuracy and falsity . . . caused violations of Exchange Rule 440 and Exchange Act Rules 17a-3 and 17a-4").

<sup>57</sup> Katz also argues that the Hearing Panel "failed to address the impact of Wachovia's mail procedures on the Activity Letters," such as testimony that ingoing and outgoing mail was routed through Wachovia's operations department. Katz does not explain, however, what the impact of those procedures might be, and we fail to see how those mail procedures impact our conclusions.

a second confirmation letter that contained incorrect net worth and income figures. Although Voskian apparently agreed to a more aggressive investment approach after speaking with Ennis, that conversation was held after the new account forms were completed and, if anything, suggests Voskian did not want such an aggressive approach until after she spoke with Ennis. Moreover, any confirmation regarding Voskian's investment objectives does not explain the inaccuracies in the new account forms about Voskian's income and net worth.

Whether the other customers' new account forms were accurate, however, is less clear. The Ashbahians, Pinajian, and Griffin all had new account forms that listed their investment objective as one of the apparently more aggressive options: "Growth (return emphasis)." The Ashbahians, Griffin, and Pinajian all testified that, while they were concerned with preserving their principal, they also wanted growth. Pinajian testified, for instance, that while he was concerned with protecting his money, part of his reason for investing with Katz was to increase his returns. Harry Ashbahian similarly testified that he was looking for a broker "who could give me the most income in investing," and Griffin testified that she wanted her money "to sit and grow." Given the record's failure to include a definition for most of the investor objectives listed on the new account forms and the customers' stated desire to obtain at least some growth, we find insufficient evidence to conclude that their new account forms were incorrect or that Katz failed to use reasonable efforts to learn specific facts about the Ashbahians, Pinajian, or Griffin.<sup>58</sup>

We similarly find insufficient evidence to conclude that the new account forms were inaccurate for Kapakjian or Smith. Their forms listed their investment objective as "Growth & Income (return emphasis)." Again, the record does not include a definition of this term, and while Smith testified that she wanted her money handled conservatively, she added that she wanted her money handled in the same way it had been handled previously – which was a time when her account forms also indicated "Growth & Income (return emphasis)." Smith additionally testified that she wanted to continue to receive the same monthly income stream as before, without giving much thought to how that income could be achieved, and that she understood the investment objectives listed on her form.

Regarding Kapakjian, Griffin testified that her aunt "stressed preservation of principal" to Katz. Given the lack of a definition in the record of the investment goals listed on Kapakjian's new account forms, however, we cannot conclude that Griffin's testimony that her aunt "stressed preservation of principal," without more, was necessarily inconsistent with her aunt wanting "Growth & Income (return emphasis)." Kapakjian's new account form also indicated that her income was at least \$50,000 and her net worth was at least \$200,000. These amounts seem inconsistent with Griffin's description of her aunt, but Griffin also testified that "I honestly don't know" whether Kapakjian had other savings accounts at the time she opened her account with

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<sup>58</sup> As noted earlier, some of the Ashbahians' new account forms did include definitions of their investment choices. Even for those forms, however, we cannot conclude that the Ashbahians' stated desire for some growth was necessarily inconsistent with the investment objectives listed on their new account forms. *See supra* note 9.

Katz. Therefore, while we do not reject the Hearing Panel's credibility findings regarding Griffin's testimony, we conclude that testimony was insufficiently detailed to find that Kapakjian's new account forms were incorrect or that Katz failed to use reasonable efforts to learn specific facts about Kapakjian.

#### IV.

The NYSE censured Katz and imposed a permanent bar from membership, allied membership, and approved person status and from employment or association in any capacity with any member or member organization. Exchange Act Section 19(e)(2) directs us to sustain the NYSE's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive, or impose an unnecessary or inappropriate burden on competition.<sup>59</sup> Although we have not sustained each of the NYSE's findings of violation, we nevertheless sustain the NYSE's imposition of sanctions.<sup>60</sup>

In deciding that a censure and bar were appropriate sanctions, the NYSE focused almost exclusively on Katz's misappropriation of client funds and her misstatements to Pinajian. The NYSE described these actions as "extremely serious," noting that Katz's "unauthorized transfers constituted, at best, reckless misuse of customer money, and at worst, deliberate theft from one customer to benefit another" and that Katz's misstatements to Pinajian were an attempt "to conceal additional misconduct." As the NYSE noted, "many of [Katz's] actions appear to have stemmed from desperation – stealing money from one customer to cover a margin call in the account of another, creating and sending false statements to conceal the mounting losses in that customer's account, taking Firm documents out of the office under cover of night." The NYSE concluded that Katz's "clumsy attempts to hide what may have been mere incompetence caused great harm to her customer and to the trust that investors place in those who making a living in the securities industry." We agree with these characterizations of Katz's conduct.

Misappropriating client funds and making misstatements are serious misconduct, and we have sustained bars as appropriate sanctions in the past for such conduct.<sup>61</sup> Here, Katz not only

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<sup>59</sup> 15 U.S.C. § 78s(e)(2). Katz does not allege, and the record does not show, that NYSE's sanctions imposed an undue burden on competition.

<sup>60</sup> *Cf. McNabb*, 54 S.E.C. at 929 (affirming imposition of bar despite not affirming every finding of violation).

<sup>61</sup> *See, e.g., Gorniak*, 52 S.E.C. at 373 (sustaining bar where applicant delayed making trades and returning client's funds); *Ernest A. Cipriani, Jr.*, 51 S.E.C. 1004, 1006, 1008 (1994) (sustaining bar for applicant's misappropriation of at least six client payments); *Daniel Turov*, 51 S.E.C. 235, 239-40 (1992) (sustaining bar for applicant's "pattern of violations," that included misappropriation); *Stephen M. Carter*, 49 S.E.C. 988, 990 (1988) (sustaining bar for  
(continued...)

misappropriated her clients' funds, but also made unsuitable recommendations, engaged in unauthorized trades, and exercised unauthorized discretion in customer accounts. She also attempted to conceal her misconduct and caused Wachovia's books and records to reflect inaccurate information. These violations represented a pattern of dishonesty that extended over several years.

On appeal, Katz argues that the NYSE improperly based the sanctions on conduct that was not charged (particularly the NYSE's finding that Katz was responsible for falsifying documents and that she used invalid letters of authorization to effect certain transactions). For support, Katz cites *Leonard John Ialeggio*, in which we remanded NASD's finding of sanctions. There, the NASD National Committee, in determining sanctions, had "highlighted" certain alleged misconduct that was not charged in NASD's complaint and was not explored before either the hearing panel or the National Committee.<sup>62</sup> We therefore remanded *Ialeggio* to NASD "to ensure that [the National Committee's] sanction determination was confined to the record before it."<sup>63</sup>

Here, by comparison, there is no evidence that the Board of Directors considered evidence outside the record. The findings with which Katz takes issue are part of the overall facts and circumstances that the NYSE appropriately considered when imposing a censure and bar.<sup>64</sup> Moreover, neither the Hearing Panel nor the Board of Directors "highlighted" these additional findings when determining Katz's sanctions. The NYSE instead focused on Katz's misappropriation and misstatements – conduct clearly alleged in the Charge Memorandum. We therefore see no basis for remanding the NYSE's determination of sanctions.

Katz next contends that the NYSE erred by failing to address certain mitigating factors, such as Katz's claims that she was a nice person who did a good job for her clients and that she did not receive any financial benefit from the unauthorized transfers between her clients' accounts. In making this argument, Katz points to our decision in *Paul K. Grassi, Jr.*, in which we remanded a finding of violations because, in part, we were unable to determine whether the

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<sup>61</sup> (...continued)

applicant's pattern of misconduct, including misappropriation, that occurred over an approximately ten-month period); *Raymond M. Ramos*, 49 S.E.C. 868, 871 (1988) (affirming bar and stating that "[t]here can be no justification for the misappropriation of a customer's funds").

<sup>62</sup> *Leonard John Ialeggio (Ialeggio I)*, 52 S.E.C.1085, 1090 (1996).

<sup>63</sup> *Leonard John Ialeggio (Ialeggio II)*, 53 S.E.C. 601, 604 (1998) (affirming same sanctions as imposed in *Ialeggio I*), *aff'd*, 185 F.3d 867 (9th Cir. 1999) (Table).

<sup>64</sup> *See supra* note 31; *see also Paul K. Grassi, Jr.*, Exchange Act Rel. No. 52858 (Nov. 30, 2005), 86 SEC Docket 2494, 2500 ("The appropriate sanction depends on the facts and circumstances of each particular case.").

NYSE considered certain mitigating factors.<sup>65</sup> Here, however, the NYSE expressly considered – and rejected – Katz's mitigation claims, noting that "[c]ontrary to [Katz's] contention that she was acting in the best interests of her customers, she showed complete disregard for the well-being of some customers, while benefitting others and trying to cover her own misdeeds."

Moreover, we agree with the NYSE's conclusion that Katz's claims of mitigation provide no basis for leniency. Katz may not have profited directly from misappropriating some of her clients' funds, but she did benefit by keeping her clients happy and retaining their business.<sup>66</sup> Katz's assertions that she was nice person who did a good job for her clients similarly do not warrant a lesser sanction, as her misconduct demonstrated a readiness to put her own interests ahead of her clients'.

The imposition of a censure and bar are necessary here to protect the investing public.<sup>67</sup> Katz's behavior – particularly her failure to take responsibility for her misconduct and her attempt to attribute her violations to other Wachovia customers and employees – provides no assurance that she will not repeat her violations. A censure and bar will therefore prevent Katz from putting additional customers at risk and will serve as a deterrent against others in the securities industry from engaging in similar misconduct.

For the above reasons, we see no basis for concluding that the sanctions imposed by the NYSE are excessive or oppressive.

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<sup>65</sup> *Grassi*, 86 SEC Docket at 2501.

<sup>66</sup> *See* discussion *supra* p. 23; *see also Gray*, 96 SEC Docket at 19053 (affirming censure and bar where applicant had made no profit from the misconduct at issue); *Conrad P. Seghers*, Investor Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2307 (affirming bar by noting that "[a]ccepting *arguendo* that [applicant] did not profit from his violations, this fact does not negate his conduct of his fiduciary duties, and therefore does not justify a reduced sanction in the public interest"), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008); *Howard R. Perles*, 55 S.E.C. 686, 707 n.31 (2002) (noting that "the absence of profit from manipulative conduct does not negate that conduct"); *Ramos*, 49 S.E.C. at 871-72 (affirming bar despite applicant's "otherwise spotless" record and noting that "[t]here can be no justification for the misappropriation of a customer's funds, and the fact that [applicant] ultimately paid the money back does not warrant permitting his return to the securities business").

<sup>67</sup> *See, e.g., Kirkpatrick*, 53 S.E.C. at 931-32 (affirming a bar where applicant misappropriated client funds and engaged in unauthorized trades); *Gorniak*, 52 S.E.C. at 373 (affirming a bar where applicant misused customer funds).

An appropriate order will issue.<sup>68</sup>

By the Commission (Commissioners CASEY, WALTER, AGUILAR, and PAREDES;  
Chairman SHAPIRO not participating).

Elizabeth M. Murphy  
Secretary

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<sup>68</sup> We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 61449 / February 1, 2010

Admin. Proc. File No. 3-13279

In the Matter of the Application of

JANET GURLEY KATZ  
c/o Richard C. Fooshee, Esq.  
20 North Van Brunt Street, Suite 2  
Englewood, NJ 07631

For Review of Disciplinary Action Taken by

NYSE Regulation, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by the New York Stock Exchange, Inc. against Janet Gurley Katz be, and hereby is, sustained.

By the Commission.

Elizabeth M. Murphy  
Secretary