

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51047 / January 14, 2005

Admin. Proc. File No. 3-11522

In the Matter of the Application of

GUANG LU
7 Silver Kettle Court
Gaithersburg, MD 20878

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Rules of Fair Practice

Failure to Give Notice to Member and Executing Firm

Failure to Obtain Written Authorization Before Discretionary Trading

False Answer on Form U-4

Alleged Unsuitable Transactions

Registered representative of member firm of registered securities association (i) exercised discretion in a customer's account not maintained by his employer member and failed to notify his employer and the executing member firm in writing of his trading; (ii) failed to obtain written authorization from a discretionary account customer; and (iii) provided a false answer on his Form U-4. Held, association's findings of violations and the sanctions it imposed are sustained in part.

APPEARANCES:

Guang Lu, pro se.

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

Appeal filed: June 15, 2004

Last brief received: November 5, 2004

I.

Guang Lu appeals from NASD disciplinary action. At the time of the events in question, Lu was registered as a general securities representative and investment company and variable contract products representative of member firm New York Life Securities, Inc. (“NYLIFE”). NASD found that Lu: (1) exercised discretionary authority in trading an account maintained by member firm Charles Schwab and Co. Inc. (“Schwab”) while he was a registered representative with NYLIFE without giving prior written notice to Schwab and NYLIFE, in violation of NASD Conduct Rules 3050(c) and 2110; 1/ (2) exercised discretionary authority in a customer’s account without prior written authorization from both the customer and NYLIFE, in violation of NASD Conduct Rules 2110 and 2510(b); 2/ (3) provided false information on his Form U-4 in violation of NASD Conduct Rule 2110 and Membership Rule IM-1000-1; 3/ and (4) made unsuitable trades in a customer’s accounts, in violation of NASD Conduct Rules 2110 and 2860(b). 4/ NASD barred Lu for violating Conduct Rule 3050, barred him further for providing false information on his Form U-4, and additionally barred him for exercising discretion without

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- 1/ Conduct Rule 3050(c) prohibits a person employed by one member firm from making trades in an account maintained by another member firm without notifying both firms in writing prior to making those trades. NASD Manual at 4861 (Jan. 1999). Conduct Rule 2110 requires the observance of “high standards of commercial honor and just and equitable principles of trade.” NASD Manual at 4111.
- 2/ Conduct Rule 2510(b) generally prohibits a registered representative from exercising discretion in a customer’s account without the customer’s prior written authorization and the member firm’s written acceptance. NASD Manual at 4411.
- 3/ Membership Rule IM-1000-1 prohibits the filing of misleading information in connection with membership or registration as a registered representative. NASD Manual at 3111.
- 4/ Conduct Rule 2860(b)(19) requires that a recommended options transaction not be unsuitable for a customer, based on the customer’s investment objectives, financial situation and needs, and any other relevant information about the customer. NASD Manual at 4728.

written authority and unsuitable trading. ^{5/} We base our findings on an independent review of the record.

II.

In March 1998, Lu joined New York Life Insurance Company (“New York Life”). In 1999, Lu became registered with NYLIFE, New York Life’s subsidiary, as a general securities representative.

A. The Schwab Account.

On February 15, 2000, Lu met Dr. Xuejiao Hu, a fellow immigrant from Beijing, China, at a lecture that Lu gave on options trading. ^{6/} Lu held himself out as an options expert. After the lecture, Dr. Hu approached Lu for help with her investments. Although Dr. Hu had not traded options before, she asked Lu to trade options for her in order to recoup the trading losses that she previously had incurred in her Schwab brokerage account. Dr. Hu offered to pay Lu a commission for any profits he made for her, but Lu insisted on helping her without compensation. Dr. Hu then gave Lu the online password to her Schwab account.

At the time, Dr. Hu’s Schwab brokerage account was worth approximately \$166,000. Before the Hearing Panel, Dr. Hu testified that, when she opened her Schwab account, she had an annual income of \$50,000 from her previous job, owned a Vanguard mutual fund account worth about \$30,000, and owned two houses as investment property.

Between March 3, 2000 and March 16, 2000, Lu made twenty-six options purchases in Dr. Hu’s online Schwab account. Sixteen of the twenty-six options that Lu purchased for Dr. Hu’s Schwab account expired worthless. By the end of March 2000, Dr. Hu’s Schwab account had lost over \$70,000 of its value, declining from approximately \$166,000 to \$93,000. In April 2000, Dr. Hu changed her Schwab account password to block Lu’s access to the account.

Before the Hearing Panel, Lu admitted that he traded options in Dr. Hu’s Schwab account while he was a registered representative with NYLIFE. Lu testified that, when he tried to convince Dr. Hu to trade options on her own, she insisted he do the trading. When the Hearing Panel asked Lu whether he “[u]ltimately agreed to do . . . options trading in [Dr. Hu’s] Schwab account,” he replied “[c]orrect.” When the Hearing Panel asked Lu whether he had notified either Schwab or NYLIFE that he was trading Dr. Hu’s Schwab account, he responded “[n]o.”

^{5/} NASD also assessed costs.

^{6/} Dr. Hu, a medical doctor, was then an unpaid volunteer at the National Institutes of Health (“NIH”). In July 2000, Dr. Hu obtained a paid position at NIH, and in July 2001, obtained a permanent position at another institution.

When the Hearing Panel asked Lu if he was “making the decisions of which options to buy and which options to sell” in Dr. Hu’s Schwab account, Lu replied, “[c]orrect.”

B. The NYLIFE Account.

Around the same time that Lu began trading Dr. Hu’s Schwab brokerage account, Dr. Hu submitted paperwork to open a brokerage account at NYLIFE. ^{7/} On her NYLIFE application forms, Dr. Hu claimed, among other things, annual income of \$50,000, net worth of \$200,000, an estimated tax bracket of “[o]ver 28%,” and two years of options trading experience. ^{8/}

On March 3, 2000, while the Schwab account was open, Dr. Hu opened her NYLIFE brokerage account with a \$500 check, and on April 6, 2000, transferred to the account Vanguard mutual fund shares worth over \$15,000. Around the time that she blocked Lu’s access to her Schwab account, Dr. Hu gave Lu the password to her online NYLIFE account and orally authorized him to trade her NYLIFE account. Dr. Hu did not give Lu written authorization to exercise discretion over this account, and NYLIFE prohibited its associated persons from exercising discretion in customer accounts. Dr. Hu testified that, as soon as she had funded her NYLIFE account with her Vanguard mutual fund shares, she told Lu options trading was too risky and asked him to confine his trading to covered calls.

In June 2000, Lu made approximately thirteen options trades in Dr. Hu’s NYLIFE account. Lu admitted to the Hearing Panel that he traded options in Dr. Hu’s NYLIFE account and made the decisions regarding which options to buy and sell. Lu’s options trades during June and July 2000 resulted in losses to Dr. Hu’s NYLIFE account. ^{9/}

^{7/} Dr. Hu testified that Lu asked her to open a NYLIFE brokerage account because he was more familiar with NYLIFE’s online format. Lu, however, asserted that Dr. Hu opened a NYLIFE account because the trading commissions were lower than those at Schwab.

^{8/} In her April 22, 2002 testimony before the Maryland Securities Division, Dr. Hu admitted that, in completing her NYLIFE application, “[t]he numbers I just made up because . . . if I don’t put some number you couldn’t get approved for options.” Lu testified before the Hearing Panel that he checked several boxes on the form before giving it to Dr. Hu to complete.

^{9/} As her losses mounted, Dr. Hu communicated her frustration in a series of electronic mail messages to Lu. In a June 15, 2000 message to Dr. Hu, Lu described his trading strategy for her NYLIFE account as “mainly . . . ‘writing covered calls’” and assured her that he was “still trying to make quick money on this acc.” On June 21, 2000, Dr. Hu complained that she “still [had] over thirty thousands magin [sic] debt” that forced her “to rely on borrowing money to live.” On July 11, 2000, Dr. Hu wrote, “[y]ou have lost []

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Around July 7, 2000, Lu gave Dr. Hu \$10,000 of his own money, claiming that he was “purchasing” her NYLIFE account, which by then was worth only \$7,420.87. Lu subsequently changed the account’s online password. The account, however, remained titled in Dr. Hu’s name.

On July 10, 2000, Lu liquidated several options in Dr. Hu’s NYLIFE account at a steep loss. For example, he sold a call option on PMC-Sierra Inc., which he had bought in June 2000, at a loss of \$13.75 per share. On July 21, 2000, Dr. Hu wrote in an electronic mail message to Lu, “I sent you email to let you know I don’t want you to trade my NY life account.” However, Lu continued to trade options in Dr. Hu’s NYLIFE account through the end of August 2000. As the registered representative listed on the account, Lu received a flat \$6 commission for each online trade in the account and earned approximately \$300 in commissions from those trades.

C. Lu’s Discharge and Statements on the Form U-4.

On September 18, 2000, Dr. Hu filed a letter of complaint against Lu with the Maryland Attorney General (the “AG”). On September 26, 2000, the AG’s office sent a letter to NYLIFE describing in detail the allegations set forth in Dr. Hu’s complaint letter (the “AG’s letter”). On October 2, 2000, Lu’s supervisor, James Adkins, gave Lu a copy of the AG’s letter and requested that Lu reply in writing to the allegations. The next day, Lu submitted to Adkins a letter, dated October 2, 2000 (the “October 2 Letter”), stating, among other things, that Lu “told [Dr. Hu] that I couldn’t trade her NYLIFE Securities account due to [New York Life’s] company rules . . . [but] I still felt that I should help her out” and “following with optioninvestor.com’s recommendations, I bought some options for [Dr. Hu’s Schwab] account” Lu also explained in the October 2 Letter that, when he gave Dr. Hu \$10,000 to “purchase” her NYLIFE account, “her account actually became my own account Because all money was mine, I could trade whatever I want to trade.”

NYLIFE prohibited its employees from exercising discretionary authority in customer accounts. In a NYLIFE compliance form that Lu completed on March 31, 2000, Lu checked the box marked “Yes” in response to the question “Do you understand and comply with the requirement that you may not act . . . on behalf of a client either with or without the client’s permission (e.g. exercising discretionary authority over a customer account)?” 10/ Dr. Hu

9/ (...continued)

over \$80,000” and “I told you so many times I want to close this account you insist in trading I said please don’t trade option except covered call but you will not listen.”

10/ Adkins testified that Lu’s proficiency with the English language was “[v]ery good” and that he and Lu “never had any problems communicating” with each other. Lu testified that his completion of the compliance form was “like routine work just check, check,

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testified that Lu told her he could not accept commissions because NYLIFE's policies prohibited his trading the NYLIFE account, indicating Lu's awareness that NYLIFE prohibited its representatives from exercising discretion in customer accounts. While Lu does not dispute Dr. Hu's testimony on this point, he maintains that he refused compensation from her because she was a fellow immigrant from his hometown.

On October 10, 2000, NYLIFE terminated Lu's employment. Adkins testified that he explained to Lu that Lu was being discharged for "[e]xercising discretion on [sic] a client's accounts. There were several [NYLIFE] violations, but that certainly was the most serious." ^{11/} NYLIFE subsequently paid Dr. Hu \$80,000 for the total losses she incurred as a result of Lu's options trades in both her Schwab and NYLIFE accounts.

After his discharge from NYLIFE, Lu sought employment at MetLife Insurance Company ("MetLife"), but, when he informed MetLife that he left NYLIFE "because of some complaint," MetLife refused to hire him. Lu then found employment with member firm Globalink Securities, Inc. ("Globalink"). On October 20, 2000, Lu completed a Form U-4 in connection with his registration as a representative for Globalink. In response to Question 23J(1) of Form U-4, which asked whether Lu had, among other things, "ever voluntarily resigned, been discharged or permitted to resign after allegations were made that accused" him of "violating investment-related statutes, regulations, rules, or industry standards of conduct," Lu checked the box in the column marked "No." ^{12/}

^{10/} (...continued)
check, yes, yes, yes, and no, no, no. I don't really specifically remember which rule is which, what is what."

^{11/} Adkins also testified that NYLIFE's rules and regulations generally were "more restrictive than even [NASD's] rules." Immediately before his termination, Lu submitted to Adkins a second letter, dated October 9, 2000, that denied Dr. Hu's allegations against Lu and sought to withdraw the October 2 Letter. That second letter did not affect NYLIFE's decision to terminate Lu's employment.

Lu accuses Adkins of perjury because Adkins filed a supplemental declaration on December 7, 2001 clarifying that, when he referred to "Dr. Hu's complaint" in his November 16, 2001 affidavit in a Maryland Securities Division proceeding, he was in fact referring to the AG's letter summarizing Dr. Hu's allegations rather than to the actual complaint letter that Dr. Hu sent to the AG's office. This inaccuracy is immaterial. The AG's letter fully described Dr. Hu's complaint.

^{12/} NYLIFE did not file a Form U-5 until October 30, 2000. Lu testified before NASD's National Adjudicatory Council (the "NAC") that he disclosed the nature of his termination from NYLIFE to the president of Globalink, who, Lu stated, advised Lu not
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III.

A. Failure to Give Notice to Member and Executing Firm. Conduct Rule 3050(c) requires an associated person “prior to opening an account or placing an initial order for the purchase or sale of securities with another member” to “notify both the employer member and the executing member, in writing, of his [] association with the other member.” ^{13/} Conduct Rule 3050(e) further provides that the notice requirements of Conduct Rule 3050(c) apply to any account over which the associated person has discretion. ^{14/}

Lu exercised discretionary authority to buy and sell securities in Dr. Hu’s Schwab account. ^{15/} Lu admitted in the October 2 Letter that, after Dr. Hu gave him the password to her Schwab account, “I bought some options for her account” When the Hearing Panel asked Lu if he was “making the decisions of which options to buy and which options to sell” in Dr. Hu’s Schwab account, Lu replied, “[c]orrect.”

Before trading Dr. Hu’s Schwab account, Lu did not notify either NYLIFE or Schwab. Lu contends that he did not break any rules because his trading of Dr. Hu’s online accounts was a “private matter” between himself and Dr. Hu. However, the requirements of Conduct Rule 3050(c) that a registered representative disclose the exercise of discretion in an account at another member firm to both his employing member firm and the executing member firm are designed to prevent this kind of “private matter” that could expose the member firms to risk.

Lu claims that “[a]t no time did I believe I was breaking any rules” because, he asserts, “there is no any rules or regulations regarding the online trading in an ordinary person (non-

^{12/} (...continued)
to disclose the information on the Form U-4 because the matter was pending. Lu subsequently left Globalink because his production was insufficient.

^{13/} NASD Manual at 4861.

^{14/} Id.

^{15/} See Section 3(a)(35) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(35), which provides that “[a] person exercises ‘investment discretion’ with respect to an account if” such person “. . . is authorized to determine what securities or other property shall be purchased or sold by or for the account,” or “makes decisions as to what securities or other property” to buy or sell for the account, “even though some other person may have responsibility for such investment decisions,” or “otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account”; Scott E. Wiard, Securities Exchange Act Rel. No. 50393 (Sept. 16, 2004), __ SEC Docket __ (citing Hotmar v. Lowell H. Listrom & Co., 808 F.2d 1384, 1385 (10th Cir. 1987) (comparing discretionary and non-discretionary accounts)).

stockbroker)’s private home spending private time on his/her own personal computer” In fact, Conduct Rule 3050(c) requires notice regardless of how or where the associated person effectuates the trades. 16/ We find that Lu violated Conduct Rules 3050(c) and 2110 when he failed to notify both NYLIFE and Schwab, in writing, that he was exercising discretionary authority over a Schwab account while he was associated with NYLIFE. 17/

B. Unauthorized Exercise of Discretion. Conduct Rule 2510(b), as relevant here, prohibits a registered representative from exercising any discretionary power in a customer’s account without prior written authorization from the customer and written acceptance by the member firm. 18/ This requirement enables the member firm to supervise all discretionary accounts. 19/

Lu knew that NYLIFE prohibited its registered representatives from exercising such discretion. Lu stated in the October 2 Letter that he “couldn’t trade [Dr. Hu’s] NYLIFE Securities account due to [New York Life’s] company rules.” 20/ Lu indicated on the NYLIFE compliance form that he was aware of NYLIFE’s prohibition against exercising discretionary

16/ We have previously held that ignorance of NASD rules does not excuse an associated person from compliance with those rules. See, e.g., Gilbert M. Hair, 51 S.E.C. 374, 378 (1993) (stating that ignorance of the rules is not an excuse for engaging in misconduct); Jay Frederick Keeton, 50 S.E.C. 1128, 1137 (1992) (charging associated person with knowledge of NASD’s rules); Philip S. Sirianni, 47 S.E.C. 355, 359 (1980) (finding ignorance of obligation to report securities transactions to member firm was no excuse for failing to satisfy such obligation), aff’d, Sirianni v. SEC, 677 F.2d 1284, 1288 (9th Cir. 1982).

17/ See Brian Prendergast, Exchange Act Rel. No. 44632 (Aug. 1, 2001), 75 SEC Docket 1525, 1540. NASD’s finding that Lu violated Conduct Rule 2110 along with other NASD rules is based on the recognized policy that a violation of another NASD rule constitutes a violation of just and equitable principles of trade. See, e.g., Frank Thomas Devine, Exchange Act Rel. No. 46746 (Oct. 30, 2002), 78 SEC Docket 2528, 2538 n.30 (holding that a violation of another NASD rule is also a violation of Conduct Rule 2110); Stephen J. Gluckman, Exchange Act Rel. No. 41628 (July 20, 1999), 70 SEC Docket 418, 428 (same); Steven B. Theys, 51 S.E.C. 473, 480 (1993) (same); Sirianni v. SEC, 677 F.2d 1284, 1288 (9th Cir. 1982) (ruling that failure to provide notice of private securities transactions was inconsistent with just and equitable principles of trade).

18/ NASD Manual at 4411.

19/ See Protective Group Sec. Corp., 51 S.E.C. 1233, 1240 (1994).

20/ See James Carlton McLamb, 50 S.E.C. 607, 609 (1991) (finding that respondent’s confessions to his employer established that he knew he was violating his firm’s procedures).

authority over a client's account. Despite this prohibition, Lu "still felt that I should help her out."

The record demonstrates that Lu exercised discretionary authority over Dr. Hu's NYLIFE account. Dr. Hu gave Lu the password to her NYLIFE account and orally authorized him to trade that account, but did not give him written authorization. 21/ He subsequently changed the password so only he could have access to the account. Because Lu concealed his discretionary authority over Dr. Hu's NYLIFE account, NYLIFE did not have the opportunity to enforce its policy against its registered representatives exercising discretion over customer accounts or otherwise supervise his actions.

Lu admitted to the Hearing Panel that he traded options in Dr. Hu's NYLIFE account and made the decisions regarding which options to buy and sell. Lu asserts that his options trades in Dr. Hu's NYLIFE account were not discretionary because she controlled the account and discussed with him what trades to make. Lu not only admitted making trades in this account, but also traded contrary to Dr. Hu's instructions to restrict his trades in the account to covered calls. Moreover, Lu's discretionary authority over Dr. Hu's NYLIFE account was so absolute that, after he purportedly "purchased" Dr. Hu's account, he changed Dr. Hu's NYLIFE account password without consulting her and ignored her online pleas to stop trading that account. We find that Lu possessed discretionary authority over Dr. Hu's NYLIFE account.

Lu claims that he did not consider Dr. Hu his customer because she did not purchase life insurance from him. Regardless of whether or not Dr. Hu purchased life insurance from him, Dr. Hu was, in fact, Lu's customer with respect to the trades in her NYLIFE account. He also asserts that he did not expect any compensation from trading her accounts. However, Lu was the registered representative listed on Dr. Hu's NYLIFE account. He in fact earned approximately \$300 in commissions for his options trades in that account.

Lu argues that NYLIFE's restriction against exercising discretion in a customer's account does not apply to online trading. However, NASD's prohibition against registered representatives exercising discretion without prior written authorization, which is at issue here, does not distinguish between online and other trading activity. We find that Lu violated NASD Conduct Rules 2110 and 2510(b) by exercising discretionary authority in Dr. Hu's NYLIFE account without prior written authorization from Dr. Hu and NYLIFE. 22/

C. False Answer on Form U-4. Membership Rule IM-1000-1 prohibits the filing, in connection with membership or registration as a registered representative, of information so

21/ Protective Group Sec. Corp., 51 S.E.C. 1233, 1236.

22/ See Michael F. Flannigan, Exchange Act Rel. No. 47142 (Jan. 8, 2003), 79 SEC Docket 1132, 1141 (finding that, by violating Conduct Rule 2510(b), respondent also violated Conduct Rule 2110).

incomplete or inaccurate as to be misleading. 23/ We have previously stated that the Form U-4 is used by NASD and other self-regulatory organizations to determine the fitness of applicants for registration as securities professionals. 24/ Consequently, the candor and forthrightness of applicants is critical to the effectiveness of the screening process. 25/

Question 23J(1) of the Form U-4 that Lu completed asked, among other things, whether Lu had ever “been discharged” NYLIFE discharged Lu after it informed Lu of Dr. Hu’s complaint concerning Lu’s handling of her account. Adkins explained to Lu at the time of his discharge that NYLIFE was terminating Lu primarily for “[e]xercising discretion on [sic] a client’s accounts.” After his discharge, Lu found it difficult to find another job. MetLife rejected him after he disclosed to them the reason for his discharge from NYLIFE. When he found employment at Globalink and was required to complete a new Form U-4, he answered Question 23J(1) in the negative. 26/ We fail to see how Lu could have reasonably concluded that a negative response was permitted. 27/

23/ NASD Manual at 3111.

24/ See, e.g., Daniel Richard Howard, Exchange Act Rel. No. 46269 (July 26, 2002), 78 SEC Docket 427, 431; Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996); Thomas R. Alton, 52 S.E.C. 380, 382 (1995).

25/ Id.; see also Robert E. Kauffman, 51 S.E.C. 838, 840 (1993) (asserting that “[e]very person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate”).

26/ Lu states he answered Question 23J(1) in the negative because he was not “voluntarily discharged” but rather, was “terminated” by NYLIFE. Lu states that he has difficulty understanding the English language and claims that the word “terminate” is defined differently from the word “discharge” in his Chinese dictionary. Lu reasons that, because his termination letter from NYLIFE stated that his contract was terminated, he was not discharged. However, Adkins testified Lu’s proficiency in English was “[v]ery good” and that he and Lu “never had any problems communicating” with each other.

Lu also claims that an affirmative answer is warranted only when all subparts of Question 23J(1) are true. We are not persuaded by this interpretation of the question since its various terms are separated by the word “or.”

27/ See Roy Ray Seaton, 47 S.E.C. 131, 134 (1979) (rejecting applicant’s contention that Form U-4 question regarding whether he was the subject of any investigation was so ambiguous that he could not properly respond to it).

Lu maintains that the president of Globalink advised him not to disclose the discharge on the Form U-4 because the matter was pending. However, a registered representative is responsible for his actions and cannot shift that responsibility to the firm or his supervisor. 28/

Lu also argues that he did not see Dr. Hu's actual complaint until January 2001. We note, however, that the AG's letter (a copy of which Adkins gave to Lu) fairly represented the allegations contained in Dr. Hu's complaint. Adkins explained to Lu the reasons for his discharge and identified the NYLIFE rules Lu had violated, based on the allegations in the AG's letter. We find that Lu violated Conduct Rule 2110 and Membership Rule IM-1000-1 by providing a false answer on the Form U-4 filed in connection with his association with Globalink.

D. Alleged Unsuitable Transactions. Conduct Rule 2860(b)(19) requires a registered representative to have reasonable grounds for believing, on the basis of information furnished by the customer, after reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by the representative, that the recommended transaction is not unsuitable for the customer. 29/

Before the Hearing Panel, Dr. Hu testified that she had an annual income of \$50,000 from her previous job, owned a Vanguard mutual fund account worth approximately \$30,000, and owned two houses as investment property. Dr. Hu's Schwab brokerage account alone was worth approximately \$166,000 at the time. On her NYLIFE account forms, she estimated her net worth at around \$200,000 and her tax bracket at over twenty-eight percent. She also represented that she was an experienced investor. 30/ The Hearing Panel found that the preponderance of the evidence did not support the charge of unsuitability. Lu contends that the NAC erred when it reversed the Hearing Panel's finding on the suitability issue. In light of Lu's other violations and the sanctions imposed, we need not reach the unsuitability charge.

IV.

A. Lu asserts that he is the victim of improper selective prosecution. He contends it was "unfortunate and ridiculous for the NAC to abuse their power" by finding his conduct a "serious risk" to the "investing public" and accuses "the NAC [of creating a] false charge like this[.]" To prevail on the improper selective prosecution claim, Lu must establish that he was

28/ Rafael Pinchas, Exchange Act Rel. No. 41816 (Sept. 1, 1999), 70 SEC Docket 1516, 1522.

29/ NASD Manual at 4728; see also Arthur Joseph Lewis, 50 S.E.C. 747, 748-49 (1991).

30/ NASD dismissed the allegations that Lu had encouraged Dr. Hu to falsify this information, finding Dr. Hu's testimony on this point not credible. NASD also dismissed allegations that the trading was excessive.

singled out for enforcement action while others similarly situated were not, and that his prosecution was motivated by arbitrary or unjust considerations such as his race, religion, or the desire to prevent his exercise of a constitutionally protected right. 31/ Lu has failed to substantiate any of these elements and we find that he was not the victim of impermissible selective prosecution.

B. Lu claims that NASD failed to afford him due process when the Hearing Officer denied his motion to compel the production of certain categories of documents. 32/ Exchange Act Section 15A(b)(8) requires NASD to have fair procedures. 33/ NASD Procedural Rule 9251 requires NASD's enforcement division to produce all documents prepared or obtained by it in connection with the investigation leading up to the institution of proceedings. 34/ The record indicates that NASD's Division of Enforcement ("NASD Enforcement") produced to Lu all the materials that NASD rules required it to produce. At a prehearing conference, NASD Enforcement identified the documents it had produced to Lu, including documents obtained from the Maryland Securities Division that were part of the Maryland Securities case against Lu, documents that had been produced previously by Lu in connection with that case, information about Dr. Hu's Schwab account, Dr. Hu's NYLIFE account documents, all written statements NASD Enforcement had obtained (such as any affidavits that Dr. Hu had sworn), transcripts of the Maryland Securities Division hearing, other documents received from the Maryland Securities Division, and a letter from NASD Enforcement to Lu listing documents it thought that Lu already possessed. 35/

31/ See, e.g., United States v. Huff, 959 F.2d 731, 735 (8th Cir. 1992); Barry C. Wilson, 52 S.E.C. 1070, 1074 (1996); Brian Prendergast, 75 SEC Docket at 1542.

32/ Generally, Lu sought all documents relating to: (1) Adkins' "false" affidavit; (2) all of NYLIFE's communications with Dr. Hu and NASD concerning Lu and NASD's accusations against him; (3) NYLIFE's settlement of a racial discrimination lawsuit purportedly filed by a Chinese-American former NYLIFE partner; (4) Dr. Hu; (5) NYLIFE's settlement with Dr. Hu; (6) NYLIFE's pursuit of restitution from Lu for the settlement amount; (7) NYLIFE's payment of the settlement with professional liability insurance proceeds; and (8) documents relating to the AG's investigation.

33/ 15 U.S.C. § 78o-3(b)(8).

34/ NASD Manual at 7344.

35/ When the Hearing Officer asked Lu whether Lu had any reason to think NASD Enforcement had failed to produce any information that it should have produced, Lu responded that "every document that [NASD Enforcement] send to me I already have" and that he "need[ed] to discover some kind of - - there's - - they have something behind the table or something like that."

NASD Procedural Rule 9252 further allows a respondent to request that NASD invoke NASD Rule 8210 (governing the provision of information) to compel the production of documents at the hearing. 36/ The Hearing Officer will grant the request only upon a showing that the information sought is relevant, material, and non-cumulative, and that the requesting party has previously attempted, in good faith, to obtain the information. The request will be denied if it is unreasonable, oppressive, excessive in scope, or unduly burdensome.

The Hearing Officer denied Lu's motions because he concluded that Lu's document production requests either were not specific enough and therefore unreasonable, excessive, or unduly burdensome, or were irrelevant or immaterial to the proceeding. The Hearing Officer determined, for example, that Lu's request for all documents relating to the affidavit Adkins filed in the Maryland Securities Division proceeding against Lu did not identify specific documents, but rather accused Adkins of submitting a false affidavit in that case. 37/ The Hearing Officer ruled that the Maryland Securities Division case was not material to NASD's proceeding against Lu, noting that NASD had the independent burden of proving its allegations against Lu. Lu had the affidavit and could challenge Adkins's credibility with it.

The Hearing Officer also concluded that documents relating to NYLIFE's settlement with Dr. Hu and restitution of the settlement amount from Lu, and documents related to "NYLIFE's wrongful treatment" of Lu, were immaterial to the charges at issue in the NASD proceeding. 38/ Lu further had the opportunity to cross-examine both Adkins and Dr. Hu at the hearing about the information he sought from them. The record demonstrates that Lu received fair process under NASD rules. 39/

36/ NASD Manual at 7346.

37/ At a prehearing conference, Lu claimed only that Adkins "must have some reason" for filing the affidavit and asserted that "I need to find out how it goes." He did not identify any particular documents related to the affidavit.

38/ Lu also sought documents from Dr. Hu. Under NASD Rule 8210, NASD can compel production only from members, such as NYLIFE, and their associated persons. Because Dr. Hu was not an NASD member and therefore beyond NASD's jurisdiction, NASD could not compel her to produce documents relating to her.

39/ Lu requests that we appoint an attorney to represent him in this matter. While our Rule of Practice 102(b), 17 C.F.R. § 201.102(b), authorizes an individual to appear through counsel, there is no statutory or constitutional right to counsel in these proceedings. Sheen Fin. Res., Inc., 52 S.E.C. 185, 192 (1995); Richard R. Perkins, 51 S.E.C. 380, 386 n.35 (1993).

Exchange Act Section 19(e) 40/ provides that we will sustain NASD's sanction 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. 41/ NASD concluded that Lu's violation of Conduct Rule 3050 alone warranted a bar, as did Lu's failure to complete his Form U-4 accurately. 42/ NASD concluded that Lu's misconduct was egregious. Lu objects that the sanction of a bar is unduly harsh and excessive.

NASD's sanctions fall within its Sanction Guidelines. 43/ NASD reasoned that, even if Lu had been motivated by "honorable intentions" to help a fellow immigrant, as he claimed, they were "insufficient to overcome the startling deviations from the standards imposed upon registered representatives as demonstrated by his misconduct." NASD identified as aggravating factors Lu's failure to appreciate the gravity of his misconduct, the potential threat of his actions to the public interest, his failure to accept responsibility for his conduct, and his indifference to

40/ 15 U.S.C. § 78s(e)(2).

41/ *Id.* Lu does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

42/ NASD also determined that Lu's offenses of unsuitable trading and exercising discretion without written authority, when taken together, merited a bar. However, as noted above, we did not reach the charge of unsuitable trading.

43/ For violations of Conduct Rules 2110 and 3050, the Guidelines recommend a monetary sanction of between \$1,000 and \$25,000, and in egregious cases, a suspension or bar. NASD Sanction Guidelines (2001 ed.) at 21. For violations of Conduct Rules 2110 and 2510, the Guidelines recommend a fine of between \$2,500 and \$10,000, and in egregious cases, a suspension. *Id.* at 94. For the filing of a misleading or inaccurate Form U-4, the Guidelines recommend a fine of between \$2,500 and \$50,000 and a suspension, and in egregious cases, a longer suspension or a bar. *Id.* at 77-78.

NASD's rules. Lu asserts that he has no interest in associating with NASD and wants nothing to do with the investing public for the rest of his life. 44/ Under the circumstances, we do not find NASD's sanction to be excessive nor oppressive. 45/

An appropriate order will issue. 46/

By the Commission (Chairman DONALDSON and Commissioners CAMPOS and ATKINS); Commissioners GLASSMAN and GOLDSCHMID not participating.

Jonathan G. Katz
Secretary

44/ On November 11, 2004, Lu submitted to us a letter enclosing an unpublished decision, dated November 10, 2004, of the United States Court of Appeals for the Fourth Circuit relating to an insurance dispute between Lu and his Errors and Omissions insurance carrier. In his letter, Lu requested that we suspend this appeal proceeding pending the resolution of his insurance litigation. NASD moved to strike Lu's letter and the unpublished decision as additional evidence, and opposed Lu's request to suspend this appeal proceeding.

Rule 452 of our Rules of Practice, 17 C.F.R. § 201.452, requires a showing that there were reasonable grounds for failure to adduce such evidence previously and that the additional evidence is material. Because the Fourth Circuit decision was handed down on November 10, 2004, Lu is able to show that there were reasonable grounds for his failure to adduce that decision previously. However, Lu has not shown how the unpublished Fourth Circuit decision, which deals with an insurance dispute between Lu and his Errors and Omissions insurance carrier, is material. Accordingly, we deny both his motion to adduce such evidence and his request to suspend our consideration of his appeal.

45/ Lu states he is unable to pay the costs assessed by NASD. The NAC imposed on Lu appeal costs of \$1,413.62 on top of the \$2,400.98 in hearing costs assessed by the Hearing Panel. NASD Rule 8330, as relevant here, requires the disciplined person to bear such costs of the proceeding as are fair and appropriate under the circumstances. NASD Manual at 7274. Lu, who had the burden of demonstrating inability to pay, has offered no proof of his inability to pay. We do not find the assessments unreasonable and sustain NASD's imposition of costs.

46/ 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.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51047 /

Admin. Proc. File No. 3-11522

In the Matter of the Application of

GUANG LU
7 Silver Kettle Court
Gaithersburg, MD 20878

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING IN PART AND DISMISSING IN PART DISCIPLINARY ACTION
TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the sanctions imposed by NASD on Guang Lu for his failure to give notice to New York Life Securities, Inc. and Charles Schwab and Co. Inc., his failure to obtain written authorization before transacting trades in discretionary accounts, and providing a false answer on his Form U-4, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary