

**NASD OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
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	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10010004
v.	:	
	:	
YAKOV (JACK) KOPPEL	:	<b>Hearing Panel Decision</b>
(CRD No. 2448735)	:	<b>on Remand</b>
Loch Sheldrake, NY,	:	
	:	Hearing Officer – SW
	:	
	:	
Respondent. <sup>1</sup>	:	Dated: July 14, 2003

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**On remand, the Hearing Panel reaffirmed its finding that Respondent Koppel violated NASD Conduct Rule 2110 by soliciting the purchase of shares of a company when no registration statement was in effect, i.e., gun jumping, in violation of Section 5 of the Securities Act of 1933. The Hearing Panel also reaffirmed its sanction of a seven-business day suspension in all capacities, explaining its reasons for not imposing a fine in addition to, or in lieu of, the suspension. In addition, Respondent Koppel is ordered to pay the \$2,063.50 hearing cost.**

**Appearances**

Philip A. Rothman, Esq., Senior Regional Attorney, New York, New York, and Jay Lippman, Esq., Assistant Chief Counsel, New York, New York, for the Department of Enforcement.

Brian Reis, Esq., New York, New York, for Respondent Yakov (Jack) Koppel.

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<sup>1</sup> The Amended Complaint included eight Respondents. Between November 1, 2001 and July 26, 2002, the National Adjudicatory Counsel accepted the settlement offers from the other seven Respondents: Thomas A. Turnure; James J. Cavaliere; Anthony Radicone; Vinson Foresta; William Scott & Co. L.L.C.; Joseph W. Glodek, Sr.; and Joseph S. Glodek, Jr. Accordingly, this Decision solely addresses the allegations involving Respondent Koppel.

## DECISION ON REMAND

### I. Procedural History

On January 5, 2001, the Department of Enforcement (“Enforcement”) filed a Complaint in this disciplinary proceeding. On April 25, 2001, with the consent of the Hearing Officer, Enforcement filed an amended eleven-count Complaint in this proceeding, naming six additional Respondents, including Respondent Yakov S. Koppel (“Respondent Koppel”). Each of the seven Respondents, except Respondent Koppel, executed a settlement offer that was approved by NASD. In the eleven-count Complaint, counts seven, eight, and nine involved Respondent Koppel.<sup>2</sup>

Count seven of the Complaint, as amended, alleges that Respondent Koppel, while associated with William Scott & Co. L.L.C. (“William Scott”), committed fraud: (1) by making false representations and material omissions to induce customer SS to purchase shares of Telmed, Inc., Saliva Diagnostics Systems, Inc., and Kushi Macrobiotics Corporation (“Kushi”); and (2) by making a false representation to induce customer MW not to sell shares of Kushi.

Count nine of the Complaint, as amended, alleges that Respondent Koppel, while associated with William Scott, engaged in fraud by executing four unauthorized purchases in the accounts of customers RB, WW, and RC.

Count eight of the Complaint alleges that Respondent Koppel committed gun jumping in 1995 by soliciting William Scott customer RC to purchase shares of stock of

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<sup>2</sup> On July 16, 2002, Enforcement filed a notice withdrawing certain allegations of counts seven and nine of the Amended Complaint.

Pet Metro, Inc. (“Pet Metro”) when no registration statement was in effect or had otherwise been approved by the Securities and Exchange Commission (“SEC”).

Following the Hearing on July 18 and 19, 2002,<sup>3</sup> the Hearing Panel issued its Decision on February 13, 2003 (the “Original Decision”), holding that Enforcement failed to prove by a preponderance of the evidence that Respondent Koppel committed fraud by making certain misrepresentations and omissions to two customers, as alleged in count seven of the Complaint, or by executing unauthorized transactions accompanied by deception in three customer accounts, as alleged in count nine of the Complaint.

The Hearing Panel did find that Respondent Koppel violated NASD Conduct Rule 2110 by soliciting the purchase of shares of a company when no registration statement was in effect, *i.e.*, gun jumping, in violation of Section 5 of the Securities Act of 1933, as alleged in count eight of the Complaint. As a sanction for the violation, the Hearing Panel ordered that Respondent be suspended for seven-business days in all capacities.

On March 21, 2003, the National Adjudicatory Council remanded the Original Decision, “to amend or supplement [the] decision by setting forth [the] basis for ordering no fine, or otherwise modifying [the] decision.”<sup>4</sup>

## **II. The Violation**

As explained in the Hearing Panel’s Original Decision, from May 1994 to August 1996, Respondent Koppel was registered as a general securities representative with

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<sup>3</sup> References to the testimony set forth in the transcript of the July 18, 2002 Hearing will be designated as “Volume I, Tr. p.,” and references to testimony set forth in the transcript of the July 19, 2002 Hearing will be designated as “Volume II, Tr. p.” References to the exhibit presented by Respondent will be designated as “RX-1,” and references to exhibits presented by Enforcement will be designated as “CX-.”

<sup>4</sup> The March 21, 2003 remand order was an amended remand order, which differed from the original remand order issued on March 18, 2003 only in a correction to the date in the case caption.

William Scott. (CX-59, p. 3). On January 26, 1995, customer RC opened an account with William Scott. (CX-10). On January 27, 1995, a check in the amount of \$3,010 was deposited into RC's account to purchase shares of Pet Metro. (CX-11). The January 1995 William Scott account statement showed customer RC holding "500" shares of Pet Metro "when and if issued," which had a market value of \$3,010, but a per share "market price" of "unpriced." (Id.). The Pet Metro offering was not completed. (Volume I, Tr. p. 279).

Count eight of the Complaint alleges that Respondent Koppel committed gun jumping by soliciting RC to purchase shares of Pet Metro when no registration statement was in effect or had otherwise been approved by the SEC, in violation of Section 5 of the Securities Act of 1933. By doing so, Respondent Koppel is alleged to have violated NASD Conduct Rule 2110's requirement to observe "high standards of commercial honor and just and equitable principles of trade."

Section 5 of the Securities Act of 1933 provides that, unless a registration is in effect as to a security, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or the mails to sell such security. A sale occurs when an investor's check is received.<sup>5</sup>

Respondent Koppel was under the misapprehension that in a best efforts mini-maxi offering "the money needs to come in beforehand so they know exactly how much money is being raised for the deal to go live." (Volume II, Tr. p. 174). However, similar to a firm

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<sup>5</sup> In re First Heritage Investment Company, Exchange Act Release No. 34-33484, 1994 SEC LEXIS 154, (January 14, 1994).

commitment underwritten offering, the sale of stock in a best efforts mini-maxi offering may not occur until after the SEC has declared the registration statement effective. In a 1970 Release, the SEC clearly stated, “During the period before effectiveness, . . . [i]t is improper for any broker-dealer to insist on any form of prepayment from the prospective purchaser, by way of deposit or otherwise for securities being offered.”<sup>6</sup> Although the registration statement must be declared effective, the stock in a best efforts mini-maxi offering is not issued until the minimum number of shares is sold. During the interim, between the registration statement for the shares being declared effective and the minimum number of shares being sold, customer funds must be held in escrow.

RC testified that Respondent Koppel solicited him to purchase shares of Pet Metro and directed him to send a check to William Scott for the purchase. (Volume I, Tr. p. 268). Pet Metro filed a registration statement, but it never became effective. (Volume II, Tr. p. 115). Respondent Koppel confirmed that he spoke with RC to make sure that everything concerning RC was correct “because my name was on the rep.” (Volume II, Tr. p. 165).

Because RC’s check was received prior to the Pet Metro registration statement becoming effective, such solicitation contravened Section 5 of the Securities Act of 1933. Accordingly, the Hearing Panel found that Respondent Koppel violated NASD Conduct Rule 2110.

### **III. Sanction**

The Sanction Guidelines for Sales of Unregistered Securities provide for fines of \$2,500 to \$50,000, and, in egregious cases, recommend suspending respondent in any or

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<sup>6</sup> Securities Act Release No. 33-5071 (June 29, 1970).

all capacities for up to two years or a bar.<sup>7</sup> The Hearing Panel finds that this was not an egregious case. It involved a single gun-jumping violation, not the actual sale of unregistered securities; the amount involved was just \$3,010; and the violation occurred, in part, because Respondent misunderstood the applicable rules. The Hearing Panel concluded that the violation warranted a sanction at the low end of the Guidelines.

In determining the appropriate sanction, the Hearing Panel considered a number of mitigating factors. Respondent did not deliberately violate Section 5 of the Securities Act of 1933; he was relatively inexperienced in best efforts mini-maxi offerings; the violation involved a single transaction and a small amount of funds; Respondent is unlikely to repeat the mistake again; and there was no customer harm. The Hearing Panel noted that the William Scott Manual contained an explicit prohibition on the sale of unregistered securities and provided that salespersons should not initiate such transactions, and that Respondent Koppel testified that he read the William Scott Manual.<sup>8</sup> (CX-34, pp. 67, 76; Volume II, Tr. p. 222). It was clear, however, that Respondent Koppel did not understand that, in a best efforts offering similar to a firm commitment underwritten offering, he was prohibited from soliciting funds, or directing RC to send in funds, before he confirmed that the Pet Metro registration statement had become effective.

Respondent testified that, in 1995, Pet Metro was the only best efforts mini-maxi offering in which he participated. (Volume II, Tr. pp. 209-210). The Hearing Panel noted

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<sup>7</sup> NASD Sanction Guidelines, p. 30 (2001).

<sup>8</sup> The William Scott Manual provided that “No security may be offered or sold unless it is registered or exempt from registration under applicable state securities laws.” (CX-34, p. 67). Further, the Manual provided that “Salespersons shall not initiate a transaction for the purchase by an investor of securities not registered or exempt from registration under applicable federal and state securities laws and regulations.” (CX-34, p. 76).

that, although the Pet Metro offering was clearly a William Scott offering, there was no evidence presented that in January 1995 William Scott advised its salespersons of the registration status of the Pet Metro offering.<sup>9</sup> In fact, the notation on the January 1995 William Scott account statement that RC would own Pet Metro stock “when and if issued” implies that there may have been a firm-wide misunderstanding in this area. The Hearing Panel also noted that customer RC was not harmed because of Respondent’s violation. Customer RC utilized the \$3,010 to purchase other stock.

The Hearing Panel finds that Respondent Koppel’s violation was unintentional, and was attributable to his misunderstanding of the applicable rules. In turn, Respondent’s ignorance may have been attributable, in part, to William Scott’s failure to advise Respondent Koppel of the registration status of the Pet Metro offering and the importance of knowing such status. The Hearing Panel also believes that Respondent Koppel presently has a clearer understanding of the rules governing registration and will not likely make the same mistake in the future.

Based on these factors and the overall demeanor of Respondent, the Hearing Panel determined that imposing both a suspension and a fine--even at the minimum level of \$2,500--was not necessary to achieve NASD’s remedial purpose, and would be punitive. As between a fine and a suspension, the Hearing Panel concluded that a suspension would have a greater deterrent effect, by impressing on Respondent Koppel his obligation to understand the rules concerning registration.

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<sup>9</sup> The William Scott Manual provided that “[t]he Compliance Director, in consultation with outside counsel, will be responsible for ensuring that any security to be offered for sale is properly registered or exempt from registration by taking the following steps: . . . circulating a list to all salespersons of the status of any securities offering in which the Firm intends to participate to determine if the security involved was properly registered.” (CX-34, p. 67).

Therefore, the Hearing Panel reaffirms that a seven-business day suspension is appropriate under the particular facts and circumstances of this case.

#### **IV. Order**

Respondent Yakov (Jack) Koppel is suspended for seven business days for violating NASD Conduct Rule 2110, by soliciting the purchase of unregistered stock in violation of Section 5 of the Securities Act of 1933. In addition, Respondent Koppel is ordered to pay the \$2,063.50 hearing cost, which includes an administrative fee of \$750 and hearing transcript costs of \$1,313.50.<sup>10</sup> The remaining charges against Respondent Koppel are dismissed.

The suspension shall become effective on a date set by NASD, but not earlier than 30 days after the date this Decision on Remand becomes the final disciplinary action of NASD; except that if this Decision on Remand becomes the final disciplinary action of NASD, the seven-business day suspension shall become effective with the opening of business on Monday, September 15, 2003 and end with the close of business on Tuesday, September 23, 2003.

#### **HEARING PANEL**

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By: Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
July 14, 2003

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<sup>10</sup> The Hearing Panel notes that the Hearing cost imposed in this case is nearly as substantial as the \$2,500 minimum fine set forth in the Guidelines.

Copies to:

Yakov (Jack) Koppel (via Airborne Express and first class mail)

Brian Reis, Esq. (via facsimile and first class mail)

Philip A. Rothman, Esq. (via electronic and first class mail)

Jay Lippman, Esq. (via electronic and first class mail)

Rory C. Flynn, Esq. (via electronic and first class mail)