NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C10010004
v.	:	**Hearing Panel Decision**
YAKOV (JACK) KOPPEL (CRD No. 2448735)	:	Hearing Officer – SW
Loch Sheldrake, NY,	:	
Respondent.[1]	:	Dated: February 13, 2003

Respondent Koppel violated Section 5 of the Securities Act of 1933 and NASD Conduct Rule 2110 by soliciting the purchase of shares of a company when no registration statement was in effect, i.e., gun jumping, as alleged in count eight of the complaint. For the gun jumping violation, Respondent Koppel is suspended for seven business days.

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.

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.

[1] 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.

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

DECISION

I. Introduction

A. Complaint and Answer

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 Yakov S. 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.[2]

Count seven, 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. ("Telmed"), Saliva Diagnostics Systems, Inc. ("Saliva Diagnostics"), and Kushi Macrobiotics Corporation ("Kushi"); and (2) by making a false representation to induce customer MW not to sell shares of Kushi.

Count nine, 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.

[2] On July 16, 2002, Enforcement filed a notice withdrawing certain allegations of counts seven and nine of the Amended Complaint.

Count eight alleges that Respondent Koppel committed gun jumping in 1995 by soliciting William Scott customer RC to purchase shares of Pet Metro, Inc. ("Pet Metro") when no registration statement was in effect or had otherwise been approved by the Securities and Exchange Commission ("SEC").

Respondent denied each of the allegations in counts seven, eight, and nine.

B. The Hearing

The Parties presented evidence to a Hearing Panel on July 18 and 19, 2002, in New York, New York.[3] The Hearing Panel consisted of a former member of District Committee 10, a former member of District Committee 11, and the Hearing Officer. At the Hearing, Enforcement presented eight witnesses: (1) five customers, SS, MW, RB, WW, and RC; (2) two NASD staff members, Neil Greenwald, a former staff supervisor,[4] and Patricia Villar, a former examiner;[5] and (3) Respondent. Respondent testified on his own behalf. Enforcement also offered exhibits labeled CX-1-CX-18, CX-21-CX-37, and CX-40-CX-58.[6]

Subsequently, Enforcement submitted two additional exhibits, labeled CX-59 and CX-60, on July 24, 2002 and July 26, 2002, respectively, which the Hearing Officer

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[3] 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-."

[4] At the time of the Hearing, Neil Greenwald was an Assistant District Director of NASD District 10. (Volume II, Tr. p. 8).

[5] At the time of the Hearing, Patricia Villar was a paralegal with the Department of Enforcement in District 10. (Volume II, Tr. p. 113).

[6] Enforcement did not offer into evidence pre-hearing exhibits labeled CX-19, CX-20, CX-38 and CX-39. The Hearing Officer accepted all of Enforcement's exhibits, except Exhibit CX-56, which the Hearing Officer rejected as untimely.

accepted. On October 31, 2002, Respondent submitted one exhibit, labeled RX-1, which the Hearing Officer accepted. Enforcement and Respondent submitted post-hearing briefs on October 31, 2002.

II. Discussion

A. Jurisdiction

From May 1994 to August 1996, Respondent Koppel was registered as a general securities representative with William Scott. (CX-59, p. 3). As of April 25, 2001, when the Amended Complaint was filed, Respondent Koppel was registered with Grayson Financial LLC. (Id.). Currently, Respondent Koppel is registered with Source Capital Group. (Volume II, Tr. p. 201; CX-59, p. 3). NASD thus has jurisdiction over Respondent Koppel.

B. Count Seven: Fraudulent Misrepresentations and Omissions Not Proven

Respondent Koppel is alleged to have violated Section 10(b) of the Exchange Act,[7] SEC Rule 10b-5 thereunder, and NASD Conducts Rule 2120[8] and 2110 by: (1) making false representations and material omissions to induce customer SS to purchase shares of Telmed, Saliva Diagnostics, and Kushi; and (2) making a false prediction of a

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[7] Section 10(b) of the Exchange Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[8] In re Prime Investors, Inc., Securities Exchange Act Release No. 38,487, 1997 SEC LEXIS 761, at *24 (April 8, 1997). (making material misstatements of fact in connection with a sale of a security is a violation of Conduct Rule 2120).

significant price increase in the stock of Kushi to induce customer MW not to sell his shares of Kushi.

Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and NASD Conduct Rule 2120 are anti-fraud provisions and prohibit the making of material misrepresentations and omissions in connection with the offering, purchasing, or selling of securities. NASD has also found that misrepresentations and omissions of material facts, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rule 2120, support a violation of NASD Conduct Rule 2110's requirement to observe "high standards of commercial honor and just and equitable principles of trade."[9]

In general, in order to find a violation of these provisions, there must be a showing that (1) misrepresentations and/or omissions were made in connection with the purchase or sale of securities, (2) the misrepresentations and/or omissions were material, (3) as to Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and Conduct Rule 2120, the misrepresentations and/or omissions were made with the requisite state of mind, i.e., scienter, and (4) as to Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder, the transactions involved interstate commerce, i.e., the respondent must have used a means or instrumentality of interstate commerce, such as the telephone, the U.S. Postal Service, or a national securities exchange.[10]

It is well established that an omission or misstatement is material if a substantial likelihood exists that a reasonable investor would find the omitted or misstated fact

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[9] Micah C. Douglas, Securities Exchange Act Release No. 37865, 1996 SEC LEXIS 3008, at *1 n.1 (1996).

[10] See SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992), 1992 U.S. Dist. LEXIS 1322 at **148-149 (1992).

significant in deciding whether to buy or sell a security and on what terms to invest in the security.[11]

Scienter is established by a showing that the respondent acted (i) intentionally, i.e., with an intent to deceive, manipulate or defraud, or (ii) with recklessness.[12] Recklessness has been defined as "those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers, which is either known to the defendant or is so obvious that
the defendant must have been aware of it."[13]

Enforcement failed to show by a preponderance of the evidence that Respondent Koppel made the alleged misrepresentations or omissions to customers SS and MW.

1. Customer SS

Customer SS is the medical director of rehabilitation at a regional hospital, supervising the rehabilitation of cardiac patients, following heart attacks, cardiac surgery, or angioplasties. (Volume I, Tr. pp. 39-40). In 1995, SS was an interventional cardiologist, performing interventional procedures such as angioplasties, implanting stints, etc. (Volume I, Tr. p. 40).

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[11] Basic, Inc. v. Levinson, 485 U.S. 224, 230-32 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

[12] District Bus. Conduct Committee v. Euripides, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *17 (1997).

[13] Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994), 1994 U.S. App. LEXIS 3326 at **15 (1994).

Respondent Koppel is alleged to have solicited SS in March 1995 to purchase shares of Telmed by telling SS that the Telmed offering was an initial public offering, and by failing to disclose to SS any information regarding Telmed including the negative financial information that Telmed had continuing substantial losses from operations, an accumulating deficit, and negative cash flow.[14]

Based on his investigation, Mr. Greenwald, the NASD staff supervisor, testified that, at the time of the private sale of Telmed in 1995, the due diligence files for the stock to be sold by William Scott representatives were contained in a file room, and all brokers had ready access and were encouraged to review the due diligence files that the firm maintained. (Volume II, Tr. p. 111).

SS testified that he first spoke to Respondent Koppel in January 1995, but that he did not send him any money until March 1995 to purchase 10,000 shares of Telmed. (Volume I, Tr. p. 131). In his November 10, 1998 Declaration ("1998 Declaration") and in his testimony at the Hearing, SS said that Respondent Koppel solicited a $100,000 investment but he agreed to invest approximately $25,000 as the initial investment in his William Scott account and sent a check for that amount to William Scott. (Volume I, Tr. p. 44).

In his 1998 Declaration and in his initial testimony at the Hearing, SS stated that Respondent Koppel told him that Telmed was an initial public offering, but he never discussed Telmed's business history or how long the company had been in existence. (Volume I, Tr. p. 46). Later in his testimony at the Hearing, however, when asked

[14] The amended Form 10-K for Telmed for the fiscal year ended October 31, 1995 disclosed that Telmed's initial public offering of units occurred in August 1992. (CX-40, p. 336). During fiscal 1995, Telmed raised net proceeds of approximately $1.05 million through the private sale of 264,375 units. (Id.).

whether Respondent Koppel told him what Telmed did, SS testified, "I don't remember what he told me about the company."[15] (Volume I, Tr. p. 92).

Contrary to SS's statement that the $25,000 Telmed transaction was the initial investment in his William Scott account, the evidence shows that SS's account contained assets valued at $5,875 as of March 1, 1995. (CX-22, p. 39). Subsequently, a $25,285 check was deposited into SS's account on March 27, 1995.[16] (CX-22, p. 40). At the time of the Telmed purchase, SS's account already held shares of Protosource Corp.[17] (CX-22, p. 39).

SS testified that, in April 1995, Respondent Koppel convinced him to purchase shares of Saliva Diagnostics by telling him that the company had developed a cheap and easy diagnostic test for AIDS, which was going to be approved by the FDA in a few weeks.[18] (Volume I, Tr. pp. 49-50). Initially, SS also testified that Respondent did not say anything about the financial condition, the business history, or the past earnings of Saliva Diagnostics. (Volume I, Tr. p. 52). Subsequently, however, in response to a question about Saliva Diagnostics, SS admitted, "I don't remember truly exactly what was said." (Volume I, p. 105).

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[15] Telmed was organized in 1991 to engage in the business of providing specialized home health care services, in conjunction with physicians, for pregnant women with high-risk pregnancy. (CX-40, p. 325).

[16] On March 22, 1995, 5,000 shares of Telmed were purchased in SS's account for a total cost of $13,135. (CX-23, p. 46). Two days later, on March 24, 1995, an additional 5,000 shares of Telmed were purchased for a total cost of $12,150. (Id.).

[17] Respondent Koppel testified that the purchase of shares of Protosource Corp. in an initial public offering was SS's first transaction in his William Scott account. (Volume II, Tr. p. 177).

[18] On May 2, 1995, 1,700 shares of Salvia Diagnostics were purchased for SS's account at a total cost of $5,103.75. (CX-22, p. 42).

On August 18, 1995, there were three separate transactions in SS's account: (i) a purchase of 1,000 shares and 500 warrants of Kushi for $5,075; (ii) a purchase of 5,000 shares of class A warrants of Zanart Entertainment, Inc. ("Zanart") for $8,854; and (iii) the sale of 10,000 shares of Telmed for proceeds of $8,896. (CX-22, p. 45).

SS testified that he did not really remember what Respondent Koppel told him about his approximately $9,000 purchase of Zanart stock, but that Respondent failed to provide any negative information about his $5,000 purchase of Kushi. (Volume I, Tr. pp. 55-56, 127). SS initially denied receiving the Kushi Offering Circular, but subsequently admitted he might have received it. (Volume I, Tr. pp. 56-57, 110). The Kushi Offering Circular indicated several risk factors including: no operating history; no significant tangible assets; a qualified auditors' report; and the possible need for an additional cash infusion. (CX-36, p. 197).

In his 1998 Declaration, SS indicated that his only prior experience with purchasing stock involved the purchase of mutual funds. (CX-21, p. 37). At the Hearing, SS admitted that he had invested in individual stocks, such as Home Depot and other pharmaceuticals. (Volume I, Tr. p. 42). When asked about the other inconsistencies in the 1998 Declaration, SS testified that if he studied the declaration he was sure he would find "probably 20 different words" he would not have written. (Volume I, Tr. p. 118).[19] Although confirming that he read his 1998 Declaration before he signed it, SS testified, "I did not read it with my attorney word by word, paragraph by paragraph. I did not consider that important to me at the time." (Volume I, Tr. pp. 67-68, 119).

[19] Mr. Greenwald testified that he interviewed SS, and he believed the declaration he prepared based on his conversation with SS to be accurate. (Volume II, Tr. p. 77).

When asked generally about his dealings with Respondent Koppel, SS testified, "He always guaranteed profits in anything, in everything. He never told me, you give me money and I am gong to make sure I lose it for you." (Volume I, Tr. p. 115). SS also testified, "[I]f a company comes out on the market today and it says it's becoming public, my feeling is the company must be financially sound." (Volume I, Tr. p. 129).

Respondent Koppel testified that he always told his clients about the product and the financials of any company that he recommended. (Volume II, Tr. p. 182). Respondent Koppel further testified that he never guaranteed a stock. (Volume II, Tr. p. 184). Respondent Koppel testified that he reviewed the information contained in the Kushi Offering Circular and disclosed it to SS. (Volume II, Tr. p. 254).

In a complaint letter dated September 15, 1995 sent to William Scott, counsel for SS complained primarily about Respondent Koppel's dealings in Telmed. (CX-25). The letter made no specific reference to Saliva Diagnostics being on the verge of FDA approval of an AIDS test, nor did it mention that Respondent Koppel had failed to disclose specific financial information about Telmed, Saliva Diagnostics, or Kushi. (Id.).

Respondent Koppel testified that SS rescinded the complaint letter. (Volume II, Tr. p. 182). SS testified that he did not remember if he rescinded his complaint. (Volume I, Tr. p. 124). According to the records of the Central Registration Depository, as of September 29, 1995, SS rescinded his complaint letter concerning Respondent Koppel. (RX-1).

The Hearing Panel carefully considered the Hearing testimony of SS, SS's 1998 declaration, and SS's 1995 customer complaint letter. Because of (i) the rescission of the 1995 complaint letter, (ii) the inconsistencies between SS's 1995 complaint letter and SS's

1998 declaration, (iii) SS's acknowledged inconsistencies between his 1998 declaration and his testimony at the Hearing, (iv) the inconsistencies between SS's testimony and the account statements regarding the first transaction in the account, and (v) SS's unsuccessful efforts to appear naïve about the stock market, the Hearing Panel was unwilling to find that SS should be credited over the apparent sincerity of Respondent Koppel.

After considering the conflicting testimony and assessing the credibility of SS and Respondent Koppel, the Hearing Panel found that Enforcement failed to meet its burden of showing by a preponderance of the credible evidence that Respondent Koppel made the misleading representations and omissions to SS.

2. Customer MW

Customer MW is a physicist who reviews technical work related to missile defense. (Volume I, Tr. p. 142). In 1995, MW had been involved in the stock market for approximately 15 years, and considered himself a moderately experienced investor. (Volume I, Tr. p. 160).

The Complaint alleges that, in August 1995, Respondent Koppel, in an effort to convince MW to retain shares of Kushi, told MW that the price of Kushi "would rise significantly within a short time." (Volume I, Tr. p. 150). "[The SEC has] repeatedly held that predictions of specific and substantial increases in the price of a speculative security are inherently fraudulent."[20]

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[20] Department of Enforcement v. Desane, No. C3A980071 (OHO Aug. 23, 2001) quoting In re Crow, Brourman, Chatkin, Inc., 42 S.E.C. 938 (1996) and citing In re Donald A. Roche, Exchange Act Release No. 38,742, 64 S.E.C. Docket 2042 (June 17, 1997).

On August 9, 1995, a check for $2,580 was deposited into the William Scott account of MW. (CX-28, p. 57). On August 18, 1995, MW purchased 500 shares of Kushi common stock and 250 Kushi stock warrants. (Id.). MW followed the price of Kushi in the newspaper. (Volume I, Tr. p. 148).

In his January 8, 1999 declaration, MW stated, "Shortly after Kushi began trading, the price dropped. In or about late August 1995, I called Koppel and told him to sell my entire position in Kushi. Koppel talked me out of selling by insisting that the stock price would rise significantly within a short time." (CX-26, p. 52). MW testified that his statement in his 1999 declaration was "probably my recollection at the time."[21] (Volume I, Tr. p. 150).

MW testified that, as of the date of the Hearing, he had no independent recollection of Respondent telling him that the price of Kushi was going to increase significantly. (Volume I, Tr. p. 177). Respondent Koppel testified, "I never specifically said that I believe the stock is going to go significantly higher." (Volume II, Tr. p. 158). Respondent Koppel did testify that it was his practice in a new issue to recommend that his customers "wait and see it out three, four months [and] not just sell it right away." (Id.).

The Hearing Panel carefully considered the 2002 testimony of MW and the January 8, 1999 declaration, both of which indicated that they were MW's best recollection of a 1995 conversation. The Hearing Panel also noted MW made no contemporaneous complaint about the transaction, and that much of the 1999 declaration

[21] MW supplemented his January 8, 1999 declaration with the statement "as best as I can recall." (CX-26, p. 53).

dealt with alleged unauthorized transactions by one of the other Respondents whose settlement offer was accepted by NASD.[22] For these reasons, the Hearing Panel did not credit the vague recollection of experienced investor MW over Respondent Koppel's contradicting testimony. Accordingly, the Hearing Panel finds that Enforcement failed to meet its burden of proving by a preponderance of the credible evidence that Respondent Koppel made the baseless price prediction.

C. Count Nine: Unauthorized Trading Not Proven

According to IM-2310-2, unauthorized trading is "[c]ausing the execution of transactions which are unauthorized by customers or the sending of confirmations in order to cause customers to accept transactions not actually agreed upon." The SEC has held that unauthorized trading of customer accounts accompanied by deception, misrepresentation, or nondisclosure violates Section 10(b) of the Exchange Act.

Count nine alleges that Respondent Koppel engaged in fraud by executing unauthorized transactions for customer RB in the purchase of shares of Tropic Communications, Inc. ("Tropic Communications") and Air Energy, Inc. ("Air Energy"), customer WW in the purchase of shares of Tristar Corp. ("Tristar"), and customer RC in the purchase of shares of Tristar.

The Hearing Panel found that Enforcement failed to meet its burden of showing by a preponderance of the evidence that Respondent Koppel executed the trades without authorization. As explained below, (i) two of the alleged four unauthorized purchases were canceled prior to their settlement date, (ii) Respondent Koppel's testimony

[22] Respondent Koppel testified that when he left William Scott and joined H.J. Meyers, MW set up an account with Respondent Koppel at H. J. Meyers. (Volume II, Tr. p. 159).

conflicted with the testimony of customers RB and RC, (iii) there were no alleged attempts to conceal the alleged unauthorized transactions, (iv) the three customers offered differing accounts of the circumstances surrounding the alleged unauthorized trades, and (v) the $100 in commissions, involved in the alleged unauthorized purchases, was a de minimus amount. The Hearing Panel also discounted Enforcement's argument that Respondent Koppel's actions established a pattern of unauthorized trades; two allegations of completed unauthorized trades do not establish a pattern.

1. Customer RB

Customer RB is a semi-retired tax accountant. (Volume I, Tr. pp. 178-179). RB had in 1996, and currently maintains, brokerage accounts with four other firms. (Volume I, Tr. p. 218).

RB opened an account with William Scott on November 7, 1994. (CX-2). On June 26, 1996, 5,000 shares of Tropic Communications were purchased in his account at a cost of $7,866.50. (CX-4). On July 18, 1996, 4,000 shares of Air Energy were purchased in his account at a cost of $44,104, with a settlement date of July 23, 1996. (CX-5). On July 26, 1996, the Air Energy purchase was canceled as of the July 23, 1996 settlement date. (CX-7, p. 13).

Enforcement alleged that the purchases of Tropic Communications and Air Energy in the account of RB were unauthorized, and that Respondent Koppel lied when he told RB that he would take care of the situation when RB confronted him.

RB testified that he did not authorize the purchase of 5,000 shares of Tropic Communications in June 1996. (Volume I, Tr. p. 189). The proceeds of the subsequent sale of shares of Alcohol Sensors, sold on July 9, 1996, were used to pay for the purchase

of the Tropic Communications stock. (CX-7, pp. 12-13). RB testified that he "never ever" authorized the purchase of a stock before he sold stock in his account; he always sold and then purchased. (Volume I, Tr. pp. 209, 215-216).

RB's testimony was inconsistent with his account records. The account records established that on at least one prior occasion, in April 1996, RB authorized the purchase of 500 shares of Alcohol Sensors before he authorized the sale of 1,500 shares of Saliva Diagnostics. (CX-6). Because no new funds were deposited into RB's account, the proceeds of the sale of Saliva Diagnostics were used to pay for the purchase of Alcohol Sensors. (Id.).

Respondent Koppel testified that RB authorized the purchase of Tropic Communications. (Volume II, Tr. p. 150). RB admitted that he called Respondent Koppel in July 1996 to discuss a possible purchase of stock before discovering the purchase of Tropic Communications in August 1996. (Volume I, Tr. p. 209). RB testified that upon receipt of his account statement showing the purchase of Tropic Communications and Air Energy, he called Respondent Koppel to complain.[23] (Volume I, Tr. p. 188).

RB viewed the purchase of Air Energy in his account as another example of the unauthorized trading in his account.[24] (Volume I, Tr. p. 203). He admitted, however, that by the time he discovered the Air Energy purchase in August 1996, the purchase had already been canceled. (Id.).

[23] RB testified that he received confirmation for the July 1996 Air Energy trade but did not receive a confirmation for the June 1996 Tropic Communications trade. (Volume I, Tr. p. 192).

[24] On May 1, 1997, RB wrote a customer complaint letter to the SEC regarding the alleged unauthorized trades of Tropic Communications and Air Energy. (CX-8).

Respondent Koppel testified that because William Scott only had "one back office lady" who was responsible for inputting the trades, it was his practice to review all the trades and correct any errors. (Volume II, Tr. pp. 146-147). Respondent Koppel testified that RB called in August 1996 and complained about the Air Energy trade, not the Tropic Communications trade. (Volume II, Tr. p. 151). Respondent Koppel testified that he told RB that the Air Energy purchase in his account was an error that had been corrected. (Id.). Currently, RB's account still holds the shares of Tropic Communications stock purchased in 1996. (Volume I, Tr. p. 196).

The Hearing Panel carefully weighed RB's testimony, and his declaration. RB and Respondent Koppel offered differing recollections of events that occurred in 1995, more than six years before the Hearing. Their recollections appeared to the Hearing Panel to be equally credible. Noting that RB's testimony was inconsistent with the account documents in certain respects, however, the Hearing Panel finds that Enforcement failed in its burden of showing by a preponderance of the credible evidence that Respondent Koppel executed unauthorized trades in RB's account.

2. Customer WW

Customer WW is a retired attorney who practiced primarily probate, estate administration, and some real estate law for 55 years. (Volume I, Tr. p. 227). On August 30, 1996, 1,300 shares of Tristar were purchased in WW's account at a cost of $9,854. (CX-32, p. 62). WW testified that he did not authorize the purchase of 1,300 shares of Tristar. (Volume I, Tr. p. 229). WW was confident he had not authorized the purchase, in part, because of the dollar amount involved. (Volume I, Tr. p. 241). WW testified that his usual purchases ranged from $2,700 on the low side to $5,800 on the high side, with the

one exception of Country World Casino.[25] (Volume I, Tr. pp. 254, 258). WW also confirmed that before August 1996, he had authorized a number of purchases of Tristar. (Volume I, Tr. p. 232).

Respondent Koppel testified that it was his habit to check all of his trades at least by the morning after the trade, because William Scott had one back office employee who was responsible for inputting all of the tickets. (Volume II, Tr. p. 142). Respondent Koppel testified that when he noticed the next day that 1,300 shares of Tristar were erroneously purchased for WW's account, he executed a "cancel and correct" order. (Id.).

Mr. Greenwald testified that, in his experience, a trade is canceled because: (i) the customer complains that the trade was unauthorized and the broker subsequently cancels it; (ii) the customer does not pay for the transaction and the broker-dealer or clearing firm cancels the trade; or (iii) there are legitimate errors that have occurred and the trade is canceled. (Volume II, Tr. p. 98).

There was no contradiction that 1,300 shares of Tristar should not be in WW's account. Respondent testified that it was an error that he corrected as soon as he discovered it. There was no dispute that the transaction was canceled the same day it was entered, prior to WW discovering or filing a complaint about the transaction. Therefore, the Hearing Panel finds that Enforcement failed to prove by a preponderance of the credible evidence that Respondent Koppel executed an unauthorized trade.

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[25] According to his 1995 tax return, customer WW executed at least eight purchases of stock in excess of $10,000 in 1995. (CX-60).

3. Customer RC

Customer RC audits convenience stores for BP Oil Company. (Volume I, Tr. p. 266). RC has audited convenience stores, verifying receipts against ledgers sent to the company, for approximately 35 years. (Id.). RC currently works about four to five days a month. (Id.). In 1995, RC confirmed that he had a net worth of $750,000 and a stock portfolio of $50,000. (Volume I, Tr. p. 297-298).

On January 26, 1995, 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, and was to be used for the purchase of shares of Pet Metro, when and if issued. (CX-11). The Pet Metro offering was not completed, and RC authorized Respondent Koppel to purchase other stocks with the Pet Metro funds. (Volume I, Tr. p. 279).

Enforcement alleged that Respondent Koppel, on June 27, 1996, purchased 2,000 shares of Tristar in RC's account without authorization, and the shares were sold at a loss, on July 5, 1996, to cover the cost of the initial purchase.

RC testified that, after the Pet Metro offering was discontinued, there were three or four other stocks purchased and sold in his account, but he does not remember what they were. (Volume I, Tr. p. 279). On June 27, 1996, 2,000 shares of Tristar were purchased in RC's account for a total cost of $15,604. (CX-13). On July 5, 1996, the 2,000 shares of Tristar were sold for net proceeds of $14,396. (CX-14).

RC testified that he did not authorize the purchase of Tristar. (Volume I, Tr. p. 281). RC also testified that he never actually spoke with Respondent Koppel after discovering the purchase of Tristar. (Volume I, Tr. p. 285). Respondent Koppel testified that he did not remember the specific conversation, but that it was improbable that RC had

not authorized the trade because it was done and was not corrected. (Volume II, Tr. p. 223). In a letter dated October 6, 1996, Respondent complained to William Scott about Tristar and other unauthorized transactions, which occurred in his account after Respondent Koppel had left. (CX-17). The October 6, 1996 letter implied that all of the transactions in his account were unauthorized and requested that his January 1996 original investment of $3,010 be returned to him. (Id.).

Noting that the Tristar transaction took place in 1996, more than five years before the Hearing, the Hearing Panel found RC's testimony no more credible than that of Respondent Koppel. Accordingly, the Hearing Panel finds that Enforcement failed to prove by a preponderance of the credible evidence that Respondent Koppel executed an unauthorized transaction in RC's account, as alleged in count nine of the Complaint.

D. Count Eight: Gun Jumping Proven

Count eight 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. Respondent 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" by violating Section 5 of the Securities Act of 1933.

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.[26]

Respondent Koppel seemed to be 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). In fact, 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. Similar to a firm commitment underwritten offering, the sale of the stock 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."[27]

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). On June 27, 1995, a check in the amount of $3,010 was deposited into RC's account, which was denoted to purchase shares of Pet Metro, when and if issued. (CX-11). 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

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[26] In re First Heritage Investment Company, Exchange Act Release No. 34-33484, 1994 SEC LEXIS 154, (January 14, 1994).

[27] Securities Act Release No. 33-5071 (June 29, 1970).

everything concerning RC was correct "because my name was on the rep." (Volume II, Tr. p. 165).

Respondent Koppel admitted that he spoke with RC because he wanted to be sure that RC "knew [Pet Metro] was a best efforts deal." (Volume II, Tr. pp. 165-166). Respondent Koppel testified that RC needed "to send the money in because its a best efforts" deal. (Id.). Because RC's check was received prior to the Pet Metro registration statement becoming effective, such sale contravened Section 5 of the Securities Act of 1933. Accordingly, the Hearing Panel finds 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 all capacities for up to two years or a bar.[28] This case, which involves a single gun-jumping violation based on Respondent's misunderstanding of the applicable rules, is not egregious. In fact, the Hearing Panel finds that the circumstances call for sanctions at the low end of the Sanction Guidelines.

The William Scott Manual contained an explicit prohibition on the sale of unregistered securities and provided that salespersons should not initiate such transactions.[29] (CX-34, pp. 67, 76). Respondent Koppel testified that he read the William

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[28] NASD Sanction Guidelines, p. 30 (2001 ed.).

[29] 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).

Scott Manual. (Volume II, Tr. p. 222). It was clear, however, that Respondent Koppel did not appreciate that soliciting funds, or confirming to RC that he needed to send in funds, before the Pet Metro registration statement became final, amounted to the sale of unregistered securities.

The William Scott Manual also 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).

Respondent Koppel was unsure of his responsibility in a best efforts offering. He 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 believes that Respondent Koppel's violation was not intentional, but was attributable to his misunderstanding of the rules. Therefore, the Hearing Panel concludes that a seven-business day suspension is sufficiently remedial to impress upon Respondent Koppel the importance of understanding and acting in accordance with NASD rules.

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. 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 become the final disciplinary action of NASD; except that if this Decision becomes the final disciplinary action of NASD, the seven-business day suspension shall become effective with the opening of business on Monday, April 7, 2003 and end with the close of business on Tuesday, April 15, 2003.

HEARING PANEL

____
By: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
February 13, 2003

Copies to:
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