NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C8A010060
v.	:	
	:	**HEARING PANEL DECISION**
ELLEN M. ALESHIRE (CRD #2411031) Antioch, IL,	:	Hearing Officer-SW
	:	June 12, 2002
Respondent.	:	

The Hearing Panel fined Respondent $15,000, suspended her for 30 calendar days in all capacities, and ordered her to requalify as a general securities representative and a general securities principal, for violating Conduct Rules 2210, 2220, and 2110 by participating in the distribution of misleading sales literature.

Appearances

Richard S. Schultz, Esq., Regional Counsel, Chicago, Illinois, for the Department of Enforcement.

Alan J. Bernstein, Esq., Chicago, Illinois, for Respondent Ellen M. Aleshire.

DECISION

I. Procedural Background

A. Complaint and Answer

The Department of Enforcement filed a one-count Complaint against Respondent alleging that Respondent, while employed at D. H. Brush & Associates, Inc. ("DH Brush"), drafted and then disseminated to her customers three memoranda that were misleading, and that she participated in the distribution of several form letters, drafted by a co-worker, which were

misleading. The Complaint alleges that Respondent's participation in the distribution of the misleading documents violated advertising and option disclosure Rules 2210, 2220, and 2110.

Although Respondent stipulated that the memoranda and the form letters were misleading, she argued that she should not be sanctioned. With respect to the memoranda, Respondent argued that, because she submitted the three memoranda to her compliance officer at DH Brush prior to dissemination and reasonably relied on the compliance officer's approval, she had fulfilled her obligation to ensure that the three memoranda were not misleading.

With respect to the form letters, Respondent argued that she did not have the authority to authorize the dissemination of the letters drafted by her co-worker, that she did not, in fact, authorize the letters, and that she did not know the letters were being issued. She argued, therefore, that she did not have any responsibility for the dissemination of the letters.

B. The Hearing

On January 9, 2002, the Parties presented evidence to a Hearing Panel, consisting of two current members of the District 8 Committee and the Hearing Officer, at a Hearing held in Chicago, Illinois.[1] The Parties presented joint stipulations.[2] Enforcement presented exhibits labeled CX-1 -- CX-11, and Respondent presented no separate exhibits.[3] Enforcement presented the testimony of two witnesses: Charles R. DuTemple ("DuTemple"), Respondent's co-worker, and Kathleen Robey ("Robey"), an NASD compliance examiner for District 8. Respondent

[1] References to the testimony set forth in the transcript of the January 9, 2002 Hearing will be designated as "Tr. p." with the appropriate page number(s).

[2] References to the Stipulations, filed January 7, 2002, will be designated as "Stip. at ¶."

[3] References to exhibits presented by Enforcement will be designated as "CX-." The Hearing Officer admitted all of Enforcement's exhibits. Subsequent to the Hearing, Respondent attempted to submit an exhibit, which the Hearing Officer excluded as irrelevant.

presented the testimony of Robert McBride ("McBride"), the former compliance officer of DH Brush, and herself.

II. Findings of Facts and Conclusions of Law

A. Jurisdiction

During the period from October 1996 through June 2001, Respondent was a general securities representative and a general securities principal with DH Brush. (CX-1, p. 4; Stip. at ¶1). On July 3, 2001, after the assets of DH Brush were acquired by Peregrine Financials & Securities, Inc. ("Peregrine"), Respondent became registered as a general securities principal and a general securities representative with Peregrine. (CX-1, p. 3; Tr. p. 300). As of September 7, 2001, when the Complaint was filed, Respondent was still registered with Peregrine. (CX-1, p. 3) The NASD thus has jurisdiction over Respondent.

B. Misleading Communications

The Hearing Panel finds that Respondent shares the responsibility for providing misleading communications to the public in violation of advertising and option disclosure Rules 2210,[4] 2220, and 2110.

Conduct Rule 2210 prohibits members and associated persons from making exaggerated, unwarranted or misleading statements or claims in their public communications.[5] All public

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[4] Rule 2210 was amended effective November 16, 1998 to require that written or electronic communications prepared for a single customer be subject to the general standards of NASD Rule 2210 and to include other non-substantive changes.

[5] The pre-November 16, 1998 version of NASD Rule 2210(d)(1)(B) provided "exaggerated, unwarranted or misleading statements or claims are prohibited in all public communications of members. In preparing such literature, members must bear in mind that inherent in investment are the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield, and no member shall, directly or indirectly, publish, circulate or

communications must provide a sound basis for evaluating the facts discussed, and must not omit material facts or qualifications that would cause the communication to be misleading in light of its context, including material information such as risks or costs of the particular product or service.[6]

Conduct Rule 2220 generally prohibits members and associated persons from utilizing any advertisement, educational material, sales literature, or other communications to any customer or member of the public concerning options that contain any untrue statement or omission of a material fact, or is otherwise false or misleading, or contain promises of specific results or exaggerated or unwarranted claims.[7] Rule 2220 specifically requires that the special risks attendant to option transactions be reflected in any advertisement, educational material, or sales literature which discusses the uses or advantages of options.[8]

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distribute any public communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading."

[6] The pre-November 16, 1998 version of NASD Rule 2210(d)(1)(A) provided "all member communications with the public shall be based on principles of fair dealing and good faith and should provide a sound basis for evaluating the facts in regard to any particular security or securities or type of security, industry discussed, or service offered. No material fact or qualification may be omitted if the omission, in the light of the context of the material presented, would cause the advertising or sales literature to be misleading."

[7] NASD Rule 2220(d)(1) provides "no member or member organization or person associated with a member shall utilize any advertisement, educational material, sales literature or other communications to any customer or member of the public concerning options which:

> (A) contains any untrue statement or omission of a material fact or is otherwise false or misleading;
> (B) contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labeled as forecasts. . ."

[8] NASD Rule 2220(d)(2)(A) provides that "the special risks attendant to options transactions and the complexities of certain options investment strategies shall be reflected in any advertisement, educational material or sales literature which discusses the uses or advantages of options. Such communications shall include a warning to the effect that options are not suitable for all investors. In the preparation of written communications respecting options, the following guidelines shall be observed:

(i) Any statement referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities should be avoided. Thus, a statement such as 'with

The particular communications consisted of the four following documents: (1) the Traders' Primer 1998 ("Primer"); (2) the Traders' Addendum #1 1998 ("Addendum"); (3) a memorandum addressed to All Customers ("All Customers Memorandum"); and (4) a total of 22 form letters, dated between October 13, 1998 and February 17, 1999 ("DuTemple Letters"). Respondent stipulated that the Primer, the Addendum, the All Customers Memorandum, and the DuTemple Letters constituted sales literature[9] or educational material, and that they were misleading. (Stip. at ¶¶4, 6, 8, 10).

1. Three Memoranda

a. <u>Background</u>

Respondent first became registered as a general securities representative in October 1993 with Euro-Atlantic Securities, Inc. (CX-1, p. 3; Stip. at ¶1). In January 1994, Respondent joined Gibraltar Investments, Inc. and subsequently became registered as a general securities representative in March 1994 and as a general securities principal in October 1994. (CX-1, pp. 3, 5; Stip. at ¶1). On October 15, 1996, Respondent registered as a general securities representative and a general securities principal with DH Brush. (CX-1, p. 4; Stip. at ¶1).

Respondent's particular style of trading involved buying and selling allegedly high quality stocks repeatedly, at her discretion, and issuing covered calls. (CX-3, p. 1-2). Respondent drafted a memorandum to explain her trading methodology to customers who had committed to

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options, an investor has an opportunity to earn profits while limiting his risk of loss,' should be balanced by a statement such as 'of course, an options investor may lose the entire amount committed to options in a relatively short period of time.'"

[9] Rule 2210(a)(2) defines sales literature as any written or electronic communication distributed or made generally available to customers or the public, which communication does not meet the definition of "advertisement." Rule 2210(a)(1) defines advertisement as material published, or designed for use in, a newspaper, magazine or other

Respondent's trading program. (Tr. p. 224). Each year, Respondent submitted her memorandum to DH Brush's compliance officer, McBride, and each year McBride approved the memorandum, with certain changes, for distribution to clients if used in the context of an oral presentation.[10] (Tr. p. 296).

In June 1999, the NASD staff commenced an examination of DH Brush, including a review of the firm's sales literature and advertisements. (Tr. p. 195). Although Rule 2210(a)(2) defines sales literature as any written or electronic communication distributed or made generally available to customers or the public, McBride testified that he did not initially view the Primer and the Addendum as sales literature subject to the NASD rules. (Tr. pp. 161, 173). McBride believed that because the Primer and the Addendum were being used to explain a trading method in conjunction with a face-to-face meeting rather than to solicit business, they did not need to be submitted to the NASD for review. (Id.). Accordingly, McBride failed to submit the Primer and the Addendum to the NASD's Advertising Department for review. (Id.). Upon review of the Primer and the Addendum, the Advertising Department found a number of deficiencies. (CX-6).

b. <u>Misleading Memoranda</u>

a. Traders' Primer 1998

Respondent drafted the five-page Primer in October 1998. (CX-3; Tr. p. 222). The Primer, similar to Respondent's earlier memoranda, was drafted to explain her trading methodology. (Tr. p. 318). According to Respondent, the Primer was designed to be used only in

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periodical, radio, television, telephone or tape recording, video-tape display, signs or billboards, motion pictures, telephone directories (other than routine listings), electronic or other public media.

[10] The Primer and the Addendum were disseminated to potential customers as one document. (Tr. p. 39). The Primer and the Addendum were an updated version of the memorandum that Respondent had used since 1997 to

connection with an oral presentation. (Id.). Respondent stipulated that the Primer was improper because it:

a. contained exaggerated, unwarranted or misleading statements or claims, and failed to reflect the risks of fluctuating markets, in that it stated that:

investors will begin "trading like the pros do";

"since we are purchasing almost exclusively Blue Chip stocks, the risk is exactly the same as buying and holding them";[11]

"we are looking for 2 points or more in movement in High Quality Stocks only. These movements occur almost every day in stocks that are over $40 per share";

"we are hoping for 2 points or more in movement, which means $1,000 in net gross profits for you after paying charges";

"if the stock makes 5 to 10 2-point or more moves, wouldn't it make sense to have someone moving your money in and out of IBM during this same period of time?"

"even if we buy a stock and it moves somewhat lower, I have several techniques to help us still get out with a profit";

"I have always beat the S& P Index and have almost always doubled it";[12] and

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explain her trading methodology. (Tr. p. 296). The prior memorandum was almost exactly the same. (Id.). Respondent testified, "It just didn't have '98 on it." (Id.).

[11] Respondent admitted that the risks of buying and holding a stock are different from the risks of buying and selling a stock on a short-term basis. (Tr. pp. 228-229).

"covered calls are the most conservative investment you can make";[13]

(Stip. at ¶6c).

b. omitted material facts and obscured essential information resulting in a misleading presentation, while containing phrases such as "at year's end all positions are sold out at cost" without disclosing the definition of "at cost,"[14] and, stated that "Active Traders" are eligible for specific commissions without defining "Active Trader." (Stip. at ¶6b).

c. failed to disclose, in discussing dollar cost averaging, that such a plan does not assure a profit and does not protect against loss in declining markets.[15] (Stip. at ¶6d).

d. identified purchases of IBM stock, which is improper in option educational material. (Stip. at ¶6e).

e. discussed successful past trades without also setting forth all past recommendations of the same type, kind, and grade made within the last year. (Stip. at ¶6f).

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[12] This statement implies that Respondent's past performance provides a basis for future expectations on the part of the investor. (CX-6, p. 3). The statement also fails to provide specific information as to time periods, actual returns, etc., to substantiate this claim and provide a sound basis for evaluating the statement as required by Rule 2210(d)(1)(A). (Id.).

[13] Because the statement was made in connection with a discussion of options, Respondent intended customers to understand that covered calls were the most conservative option investment. (Tr. p. 326). However, the statement as drafted was false; Respondent acknowledged that a certificate of deposit is a more conservative investment. (Tr. p. 325).

[14] Although Respondent intended that the customer understand that she would sell out the customer's down position without charging a commission, the sentence can be interpreted to mean that she would sell out at the customer's original cost of his investment. (Tr. p. 238).

[15] The Hearing Panel also noted that the Primer's description of dollar cost averaging, as buying more stock "whenever we feel sure that it has 'bounced' from its recent low" is inaccurate. (CX-3, p. 2).

f. failed to disclose that options may not be a suitable type of investment for investors, or to offer a complete and balanced picture of all potential risks of the application of the strategy. (Stip. at ¶6g).

The Hearing Panel also finds that the Primer as written was misleading and violated advertising and option disclosure Rules 2210, 2220, and 2110.[16] Even assuming that Respondent orally advised her customers of the risks involved in investing and option trading, the additional information did not solve the misleading nature of the Primer as drafted. The case law is clear that advertisements and sales literature are to be judged in "the context of" material provided in the advertisement or sales literature itself.[17] The subsequent dissemination of appropriate disclosures is not sufficient to correct false or misleading advertisements or sales literature.[18]

b. Traders' Addendum #1 1998

Respondent drafted the two-page Addendum in October 1998 to supplement the Primer. (CX-4; Tr. p. 222). Like the Primer, the Addendum was drafted to illustrate Respondent's trading methodology. (Tr. p. 239). Respondent stipulated that the Addendum was improper because it:

a. contained exaggerated, unwarranted or misleading statements or claims and failed to reflect the risks of a fluctuating market, in that the Addendum repeatedly ended examples by summarizing the investor's "Net Profits," implying that commissions would be covered by gains

[16] Respondent stipulated that the use of the Primer violated NASD Rules 2110, 2210(d)(1)(A), (d)(1)(B), (d)(2)(B)(iii), (A), (d)(2)(I), and (f)(3)(F), and Rule 2220(d)(1), (d)(1)(B), (d)(2)(A), (d)(2)(C)(iv), and (d)(2)(C)(v). (Stip. at ¶7).

[17] In re Sheen Financial Resources, et al, Exchange Act Rel. 35477, 1995 SEC LEXIS 613 (Mar. 13, 1995) (Defects in advertisements cannot be cured through subsequent detailed explanations. Advertisements must stand on their own.)

from the trades, and described call strategies by stating that "Until Called Upon to sell, this [strategy] could go on indefinitely." (Stip. at ¶8e).

b. failed to contain a complete explanation of the risks of day trading, which include market volatility, potential delay in trade execution and loss of capital.[19] (Stip. at ¶8b).

c. identified purchases of IBM stock, which is improper in option educational material.[20] (Stip. at ¶8c).

d. discussed successful past trades without also setting forth all past recommendations of the same type, kind, and grade made within the last year. (Stip. at ¶8d).

e. failed to disclose that options may not be a suitable type of investment for investors, or failed to offer a complete and balanced picture of all potential risks of the application of the strategy. (Stip. at ¶8f).

The Hearing Panel also agrees that the Addendum was misleading as written, primarily in failing to offer a complete and balanced picture of the potential risks of day trading, in violation of advertising and option disclosure Rules 2210, 2220, and 2110.[21]

c. All Customers Memorandum

Respondent drafted the All Customers Memorandum, dated August 21, 1998, primarily to remind her customers to contact her to discuss their options during the period of market instability. (CX-2; Tr. pp. 220-222).

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[18] Id.

[19] Rule 2220(d)(2)(A)(i) requires that any statement referring to the potential opportunities or advantages presented by options be balanced by a statement of the corresponding risks.

[20] Rule 2220(d)(2)(C)(iv) states that educational option material may not identify any specific security other than index options, foreign currency options, and securities exempt under the Securities Act of 1933.

[21] Respondent stipulated that the use of the Addendum violated NASD Rules 2110, 2210(d)(1)(A), (d)(1)(B), and (f)(3)(F), and Rule 2220(d)(1), (d)(1)(B), (d)(2)(A) and (d)(2)(C)(iv) and (d)(2)(C)(v). (Stip. at ¶9).

Respondent stipulated that the All Customers Memorandum contained exaggerated, unwarranted or misleading statements or claims and failed to reflect the risks of a fluctuating market. (Stip. at ¶4b). The memorandum stated that "the DJIA lost approximately 27% over 3½ months and recovered over another 3 ½ months" and offered this as a basis for a recommendation that her clients "sit tight," as when this occurred, "it cost investors time, but no losses were necessary." (Id.). At the same time, the memorandum failed to reflect the risks of fluctuating prices and the uncertainty of rates of return and yield inherent in investing, and contained unwarranted implications of safety and security in light of market risks associated with investing. (Id.).

The Hearing Panel agrees that the All Customer memorandum was misleading, primarily in its unwarranted implication of the safety of remaining invested in the stock market in light of the market's relative instability.[22]

In addition, Respondent stipulated that each of the three memoranda "[f]ailed to include the full address and telephone number of the Member's main office or its registered branch office or OSJ responsible for supervision of the proposed trading activity."[23] (Stip. at ¶¶4a, 6a, 8a).

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[22] Respondent stipulated that the use of the All Customers Memorandum violated NASD Rules 2110, 2210(d)(1)(B) and (f)(3)(F). (Stip. at ¶5).

[23]The memoranda and the form letters bore the address, _____, Antioch, Illinois, which was neither the address of a registered branch office nor the address of the office of supervisory jurisdiction of DH Brush. (Stip. at ¶¶4a, 6a, 8a, 10b). In fact the address was not even the actual address of the home office location, _____, Antioch, Illinois. (CX-2; CX-3; CX-4; CX-5). Rule 2210(f)(3)(F) provides that letterhead shall conform to the provisions of Rule 3010(g)(2). Rule 3010(g)(2) provides that a non-branch location at which the member conducts an investment banking or securities business may be identified in a member's sales literature provided the sales literature also sets forth the address and telephone number of the branch office or office of supervisory jurisdiction of the firm from which the persons conducting business at the non-branch locations are directly supervised.

c. Respondent Shares the Responsibility for the Three Memoranda

Respondent stipulated that she drafted the three memoranda and disseminated them. (Stip. at ¶¶4, 6, 8). Respondent admits that the memoranda were misleading when they were distributed. (Id.). It is also undisputed that McBride, DH Brush's compliance officer, participated in the drafting and approved the dissemination of the three memoranda. (Tr. p. 124). Respondent relied on her compliance officer's expertise in deciding whether the memoranda met the requirements of the NASD rules. Respondent's reliance was not wholly unreasonable.

Nevertheless, the case law makes clear that Respondent as the primary drafter of the All Customers Memorandum, the Primer, and the Addendum retains responsibility for their misleading nature, even though DH Brush's compliance officer approved them.[24] Accordingly, the Hearing Panel finds Respondent violated advertising and option disclosure Rules 2210, 2220, and 2110[25] by disseminating misleading communications to the public in the form of the Primer, the Addendum, and the All Customer's Memorandum.

2. DuTemple Form Letters

a. Background

Respondent worked for DH Brush out of her home at _____, Antioch, Illinois. (CX-1, p. 1; Stip. at ¶3). In January 1998, Respondent's home burned down.

[24] See DOE vs. Ryan Mark Reynolds, Complaint CAF99008 (NAC, June 25, 2001)(National Adjudicatory Council found that registered representative was responsible for the misleading and unbalanced statements contained in an advertisement, even though the material had been reviewed and approved by the appropriate principal at the firm prior to distribution), and DOE vs. Martin Lee Eng, Complaint C01970032, 1999 NASD Discip LEXIS 38 (NAC, Aug. 12, 1999), affirmed In re Martin Lee Eng, 2001 SEC LEXIS 807 (Apr. 26, 2001).

[25] A violation of another NASD rule or regulation constitutes a violation of Conduct Rule 2110. See Steven J. Gluckman, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999) (citations omitted).

(Tr. p. 214). During the period from January 1998 to March 1999, while her home was being rebuilt, Respondent conducted her securities business out of a rental house near her home.[26] (Id.).

In July 1998, DuTemple joined the securities industry when he became associated with DH Brush.[27] (CX-7, p. 4). From July 1998 to March 1999, DuTemple worked out of Respondent's home office in Antioch, Illinois. (Tr. p. 28; Stip. at ¶3). Respondent's home office, housed in one large open room, contained desks for DuTemple, Respondent, her assistant, and another broker, Tom Chrysler.[28] (Tr. pp. 28-29). While located at Respondent's home office, DuTemple drafted and disseminated 22 letters to solicit potential customers. (Stip. at ¶10).

Although Respondent provided DuTemple a desk in her home office, both Respondent and DuTemple were characterized as independent contractors, supervised by DH Brush. (Tr. pp. 71, 170). DuTemple paid for his own telephone, computer, scanner, and stamps. (Tr. pp. 71-72). The Parties stipulated that Respondent was never DH Brush's designated principal for the approval of sales literature and advertising. (Tr. p. 359).

Respondent testified that she was paired with DuTemple so that she could prevent "young broker mistakes." (Tr. p. 178). McBride testified that Respondent was paired with DuTemple so that she could provide "operational supervision." (Tr. pp. 241-242). Respondent received a 5% override on DuTemple's regular customers whose accounts were traded under DuTemple's

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[26] The address of the rental home was _____, Antioch, Illinois. (Tr. p. 214).

[27] After passing his Series 7 examination, DuTemple was registered as a general securities representative with DH Brush on August 24, 1998. (CX-7, p. 5). DuTemple testified that he obtained his position at DH Brush through Respondent. (Tr. p. 27).

[28] People could hear what was going on in other parts of the office. (Tr. p. 30).

representative no. P-77.[29] (Tr. pp. 66-67, 243). Pursuant to an oral agreement with Respondent, DuTemple solicited day trading customers to utilize Respondent's trading methodology under joint representative number P-76. (Tr. pp. 66, 242). Consequently, in addition to the 5% override, Respondent also received 50% of the brokerage commissions from day trading customers solicited by DuTemple under joint representative number P-76. (Tr. p. 35). Pursuant to this arrangement, Respondent earned approximately $15,000. (Tr. p. 283).

b. <u>Misleading DuTemple Letters</u>.

There were 22 one-page letters soliciting customers drafted by DuTemple with the assistance of Respondent from October 13, 1998 to February 17, 1999. (Tr. pp. 42-43; CX-5). The letters were primarily drafted as a follow-up to DuTemple's previous conversations with potential customers concerning DH Brush's services. Only one of the addressees became a customer of DH Brush. (Tr. p. 55). Several of the letters enclosed the misleading Primer and Addendum. (CX-5, pp. 1-4, 12-22).

Respondent stipulated that some of the DuTemple Letters were improper because they:

a. were not approved by the appropriate principal of the Member. (Stip. at ¶10a).

b. contained exaggerated, unwarranted, or misleading statements or claims and failed to reflect the risks of fluctuating markets, in that some of the form letters stated that: the "principal day trader has over 15 years experience";[30] "three brokers work together to monitor the markets"; and "day trading takes advantage of short term price activity to affect growth in the

[29] Respondent described the 5% override as a finder's fee for finding a broker that comes to the firm and produces. (Tr. p. 286). Respondent testified that she made less than $500 pursuant to the override arrangement. (<u>Id.</u>).
[30] The fourteen letters that referenced Respondent as a principal day trader with over 15 years experience were false. (CX-5, pp. 5-13, 15, 18-21). Respondent joined the industry in 1993; in 1998, she had been in the industry five years. (CX-1, p. 3).

portfolio," all while failing to contain a thorough and complete explanation of the risks of day trading, trading options, and the fluctuating market. (Stip. at ¶10d).

c. omitted material facts and obscured essential information resulting in misleading presentations, while containing phrases, such as "realized profits can be rapidly reinvested,"[31] "day trading takes advantage of short term price activity to affect growth in the portfolio," "Trader's Primer will help to explain how day trading works and how you may be able to benefit from it,"[32] and "I have already realized a 14.2% return," while failing to contain a thorough and complete explanation of the risks of day trading. (Stip. at ¶10c).

d. failed to include the full address and telephone number of the Member's main office or its registered branch office or OSJ responsible for supervision of the proposed trading activity. (Stip. at ¶10b).

The Hearing Panel agrees that the letters were misleading.[33]

c. Respondent Shares Responsibility for the DuTemple Letters

DuTemple testified that drafting the DuTemple Letters was a "joint collaboration" with Respondent. (Tr. p. 88). DuTemple further testified that Respondent approved each of the 22

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[31] The fourteen letters that mentioned "realized profits can be rapidly reinvested" failed to disclose that market volatility and volume could delay trade execution. (CX-5, pp. 5-13, 18-21).

[32] The letters that mentioned the benefits of day trading failed to discuss the risks of day trading in violation of Rule 2210(d)(1)(A).

[33] Respondent stipulated that the use of the DuTemple Letters violated NASD Rule 2110, 2210(b)(1), (d)(1)(A), (d)(1)(B) and (f)(3)(F). (Stip. at ¶11).

letters before they were disseminated. (Tr. pp. 43-44). Respondent testified that she did not know that DuTemple was disseminating the letters.[34] (Tr. p. 246). The Hearing Panel finds DuTemple to be a more credible witness than Respondent, based on DuTemple's demeanor, Respondent's demeanor, and the documentary evidence.

The Hearing Panel finds that DuTemple's testimony, McBride's testimony, and the documents support the findings of fact that Respondent (i) participated in the drafting of the DuTemple Letters, (ii) knew that DuTemple was including the Primer and Addendum as enclosures in some of the letters, and (iii) approved all of the DuTemple Letters for dissemination.

DuTemple testified that Respondent was the only the person to whom he submitted his letters for approval. (Tr. p. 33). McBride confirmed DuTemple's testimony when he testified at the Hearing that he never received any of the DuTemple letters prior to the NASD exam in 1999. (Tr. p. 135). Robey, the NASD examiner, testified that, in prior statements to her, the president of DH Brush, Kevin Kowalski, and McBride denied that they had received any of the DuTemple letters for their approval; these prior statements are consistent with DuTemple's testimony. (Tr. pp. 198-199). Accordingly, Respondent's testimony that she had initialed some of the letters solely to indicate that they had been faxed to McBride or Kowalski for their approval was not credible.

[34] Respondent admitted that she knew DuTemple had created some documents, which she saw on his computer screen. (Tr. p. 275).

The Hearing Panel also finds that Respondent, McBride, and DuTemple understood that Respondent would provide guidance to DuTemple. The Hearing Panel further finds that the DuTemple Letters were being used to solicit customers for the joint benefit of Respondent and DuTemple.[35] Although DuTemple admitted that he handled his own mailings, Respondent's argument that she did not see the final mail go out because they had separate mail procedures is not sufficient to relieve her of liability. (Tr. pp. 32, 260).

Accordingly, the Hearing Panel finds that because Respondent participated in the drafting of the letters and approved the letters for dissemination, Respondent shares the responsibility for dissemination of the misleading DuTemple Letters, in violation of advertising Rule 2210 and Rule 2110.

III. Sanctions

The Guidelines governing communications with the public provide for a fine ranging from $1,000 to $20,000 for inadvertent use of misleading communications or a fine ranging from $10,000 to $100,000 for intentional or reckless use of misleading communications.[36] The Guidelines list, among other things, the following general considerations in determining sanctions: (i) whether the respondent's misconduct resulted directly or indirectly in injury to other parties;

[35] The Hearing Panel noted that, in the particular circumstances, it was likely that Respondent participated in the drafting of the letters because she would have potentially benefited from the letters.

[36] NASD Sanction Guidelines, pp. 88, 89 (2001).

and (ii) whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence.[37]

In arriving at appropriate sanctions, the Hearing Panel considered two important mitigating factors. First, Respondent submitted the Primer and Addendum, which contained the most troubling omissions, to DH Brush's compliance officer for approval prior to dissemination.[38] Respondent was not trying to hide the material. Secondly, the 22 DuTemple letters resulted in only one new customer for DH Brush, and there was no evidence presented that Respondent's misconduct resulted in direct injury to investors. (Tr. p. 55).

On the other hand, particularly because Respondent was a registered principal, the Hearing Panel found her lack of rudimentary knowledge of the advertising rules of concern. For example, Respondent testified that she did not know that when describing a trading strategy you have to describe the risks involved in that trading strategy. (Tr. p. 236). Respondent testified that she did not know that when making certain representations it was necessary to provide sufficient information to help investors to evaluate the representations. (Tr. p. 233). When questioned concerning the statement "I have always beat the S&P Index and have almost always doubled it," Respondent testified that she didn't calculate that number, relied on the calculations provided by McBride, and made no independent attempt to verify the accuracy of McBride's calculations. (Tr. pp. 233, 321-322).

When asked about the examples of trades provided in the Addendum, Respondent testified that she didn't know that if you gave an example of a specific trade you were required to set forth

[37] Id. at pp. 9-10.

[38] In the Matter of Thomas S. Foti, Exchange Act Rel. 31646, 1992 SEC LEXIS 3329 (Dec. 23, 1992).

all of your past recommendations of the same type, grade, or kind within the last 12 months. (Tr. p. 236).

Contrary to Respondent's statement that it was not her job to know the advertising rules, the Hearing Panel finds that when registered representatives undertake to draft material to be distributed to customers, it is their responsibility to familiarize themselves with the appropriate rules. (Tr. p. 235). Respondent repeatedly emphasized that she was seeking advice and approval from McBride and Kowalski. (Tr. pp. 219, 233). In this case, merely seeking advice and approval was not sufficient.

Finally, the Hearing Panel did not find Respondent credible when she testified that she did not assist in the drafting, or approve the dissemination, of the DuTemple Letters.

For example, Respondent emphasized that she never had the authority to authorize or approve any type of sales literature at the firm. (Tr. p. 215). This is contrary to McBride's testimony that in a conversation with Respondent in 1999, Respondent stated that it was her understanding, with her prior management experience and her Series 24 qualification, "she could have letters sent by DuTemple if she had reviewed them" acting as an office of supervisory jurisdiction. (Tr. p. 136). Respondent admitted to having a conversation with McBride in which he told her to be careful about correspondence, although she denied that she "saw the actual letters that he was discussing." (Tr. p. 268).

At the Hearing, Respondent denied that she knew that DuTemple was soliciting customers. As indicated by her initials and her testimony, Respondent had the opportunity to preview at least one letter drafted by DuTemple addressed to a potential customer. When responding to questions from Robey in 1999 concerning Respondent's initials on three of the

DuTemple Letters, Respondent did not advise the NASD examiner that she did not know that DuTemple had sent out the DuTemple Letters. (Tr. p. 198).

Enforcement recommended that Respondent be fined $20,000, suspended for 20 days, and ordered to requalify as a principal for the misleading communications.

The Hearing Panel finds that Enforcement's recommendations with some modifications are appropriate. The Hearing Panel finds that the NASD's remedial goals would be better accomplished by a longer suspension and a smaller fine and orders that Respondent requalify as a general securities representative and as well as a principal. Accordingly, the Hearing Panel determined that Respondent should be fined $15,000, suspended for 30 calendar days in all capacities, and ordered to requalify as a general securities representative and a general securities principal.

IV. Conclusion

The Hearing Panel fines Respondent Ellen M. Aleshire $15,000, suspends her for 30 calendar days in all capacities, and orders her to requalify as a representative and principal before again serving in such capacity. In addition, Respondent is ordered to pay the $2,963.64 hearing costs, which include an administrative fee of $750 and hearing transcript costs of $2,213.64. These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this decision becomes the final disciplinary action of the NASD, except that if this decision becomes the final disciplinary action of the NASD the suspension shall become effective with the

opening of business on Monday, August, 5, 2002 and end at the close of business on Tuesday, September 3, 2002.[39]

HEARING PANEL

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By: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
June 12, 2002

Copies to:

Ellen M. Aleshire (via Airborne Express and first class mail)
Alan J. Bernstein, Esq. (via facsimile and first class mail)
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Rory C. Flynn, Esq. (via electronic and first class mail)

[39] The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.