NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	
Complainant,	Disciplinary Proceeding No. CAF990018
v.	**HEARING PANEL DECISION**
PREMIER CAPITAL MANAGEMENT (BD #41332), Dallas, TX	Hearing Officer - JN
BRYAN JAMES O'LEARY (CRD #1711277) Dallas, TX	
	September 13, 2000
RYAN MARK REYNOLDS (CRD #2716545) Dallas, TX	
Respondents.	

Digest

The Complaint contains seven causes. The first cause charged the three Respondents (Premier, O'Leary, and Reynolds) with various misrepresentations, in violation of NASD Rules 2110, 2120 and 2210, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder. The second cause charged the three Respondents with failing to disclose the receipt of consideration from an issuer (reimbursement of advertising expenses), in violation of NASD Rules 2110, 2120, 2210, Section 10(b) of the

1934 Act and Rule 10b-5, and (via NASD Rule 2110) Section 17(b) of the Securities Act of 1933. The third cause charged Respondent Reynolds with failing to disclose the receipt of further consideration (stock from the issuer), in violation of the provisions cited in the second cause.

The fourth cause charged Reynolds with sharing losses in a customer account, in violation of NASD Rules 2110 and 2330(f). The fifth cause charged all three respondents with advertising a security without providing the price of the shares, in violation of NASD Rules 2110 and 2210. The sixth cause charged Premier and O'Leary with failing to file advertisements with the Association, in violation of Rule 2210. The last cause[1] charged Premier and O'Leary with supervisory failures, in violation of NASD Rules 2110 and 3010.

The Hearing Panel found that Respondent Reynolds was liable for the fraudulent conduct alleged in the first cause, and that Respondents Premier, O'Leary and Reynolds were liable for the violations of Rule 2210 (NASD's advertising standards), also alleged in the first cause. The Panel found that Reynolds was liable for the fraudulent nondisclosure alleged in the second cause, and that Premier, O'Leary and Reynolds violated Rule 2210 by not disclosing the receipt of consideration. The Panel further found that Reynolds was liable for the fraudulent nondisclosure and the advertising violations alleged in the third cause; that Reynolds was liable as charged in the fourth cause; that the Respondents were liable as charged in the fifth cause; that Premier and O'Leary were liable as charged in the sixth cause; and that Premier and O'Leary were liable for certain supervisory failures, alleged in the last cause.

[1] The counts in the Complaint are misnumbered. The count labeled "eighth cause" is really the seventh.

The total fines and suspensions imposed were $62,500 and 325 days for O'Leary; and $155,000 and 720 days for Reynolds. Reynolds and O'Leary were also ordered, jointly and severally, to make restitution to customer BO and to offer to rescind the purchases of customers LF and SJH at the customers' option. O'Leary and Reynolds were also required to re-qualify by examination and are subject to a pre-use filing requirement for future proposed communications with the public. The firm is expelled from membership in the NASD.

Respondents are jointly and severally assessed $5,241 as costs, including $4,491 for transcripts and an administrative fee of $750.

Appearances

Brian L. Rubin, Esq., Rodney W. Turner, Esq., and Rory C. Flynn, Esq., Washington, DC for the Department of Enforcement.

Cecil S. Mathis, Esq., Dallas, Texas, for Respondents Premier and O'Leary.

Thomas A. Ferrigno, Esq. and Roberta Koss, Esq., Washington, DC for Respondent Reynolds.

DECISION

Introduction

I. Background

This case involves a magazine advertisement in the form of a research report, containing a "very strong buy" recommendation for Continental Investment Corporation ("A Stock Whose Time Has Come") (CX-4).[2] Continental, a Dallas corporation whose securities traded on the over-the-counter Bulletin Board (Jt. Ex. 1), owned a large parcel of land near Atlanta which it

[2] Pages from the hearing transcript are cited with the prefix "Tr." Enforcement's exhibits are cited with the prefix "CX" and Reynolds' exhibits are cited with the prefix "RR."

believed had a possible future as a waste management facility. The company had no permits or licenses to construct or operate such a facility, had no experience in the waste management industry, and was simply "analyzing waste disposal opportunities" at the site (CX-20 p. 2).

The report was purportedly the product of Respondent Premier Capital Management, Inc., a member firm. Respondent O'Leary was the firm's President, General Securities Principal, Financial and Operations Principal, and Compliance Officer. Continental furnished over $200,000 to Premier for payment of the printing and publishing costs (CX-19; CX-43, p. 46; CX-45, p. 24). The report bore Premier's name, address, and telephone number, and the name of Respondent Reynolds, a General Securities Representative associated with the firm.

It appeared as an eight-page insert advertisement in the September, 1997 issue of Mutual Funds magazine, which had over 617,000 paid subscriptions and over 25,000 single copy sales (CX-4; Jt. Ex. 1). Single-page advertisements, which described Continental as "A Stock Whose time Has Come," and invited readers to contact Premier for a copy of "our research report," appeared in the August and September 1997 issues of Town & Country (paid circulation of over 428,000 and 453,000 copies respectively); the September 1997 issue of Individual Investor (paid circulation of over 479,000 copies); the August 1997 issue of Estates Internationale; and the October 1997 issue of Leading Estates of the World.[3]

The first cause of the Complaint alleged that the firm, O'Leary, and Reynolds were liable for the advertisement on two grounds: (1) it involved fraudulent misrepresentations and omissions (SEC Rule 10b-5 and NASD Conduct Rule 2120); and (2) it was not based on principles of fair dealing and good faith; did not provide a sound basis for evaluating facts; and

[3] CX-10 through CX-13, CX-15, CX-16, CX-43, p.53; Tr. 121, 382, 389, 610.

contained exaggerated, unwarranted or misleading statements (NASD advertising standards in Rule 2210). The second cause charged the three Respondents with failing to disclose consideration received from Continental (the costs of the advertisement). This cause, like the first, also involved allegations of fraud, and violations of the NASD advertising Rule. A third cause, charging fraud and advertising violations, alleged that Reynolds received Continental shares as further undisclosed consideration from the issuer. The fourth cause charged that Reynolds shared losses with a customer, in whose account he placed those shares. The fifth cause charged the firm, O'Leary, and Reynolds with liability for publishing the single-page advertisements without stating the price for the Continental shares. The sixth cause alleged that Respondents O'Leary and Reynolds failed to make appropriate filings of the advertisements with the NASD. The last cause charged the firm and O'Leary with supervisory violations.

A Hearing Panel, consisting of an NASD Hearing Officer and two current members of District Committee Number 6, conducted hearings in Dallas, Texas on February 1, 2, and 3, 2000. The Department presented six witnesses and fifty-four exhibits. Respondents presented five witnesses. Respondent Reynolds introduced eleven exhibits. Enforcement filed a Post-Hearing Submission on March 20, 2000; Respondents filed Post-Hearing Submissions on April 18, 2000; and Enforcement filed a Reply on April 28, 2000.

II. Actions of the Individual Respondents

A). Reynolds' Actions

In early 1997, Respondent Reynolds, a registered representative with Premier, had a conversation with Dale Sterritt, Continental's president and CEO, and ____ _______, a colleague of Sterritt's, whom Reynolds described as an experienced research analyst (Tr. 357). Sterritt and _______ proposed a "research report" about Continental's idea for a waste management facility.

Reynolds understood that the report would be published as a magazine advertisement under Premier's name, with Continental financing the publishing expenses, and using Premier as the vehicle for the payment of money to printers and publishers (Tr. 360-362). Reynolds said that Premier would be billed for the advertising costs because "they [Continental] just said it would look better coming from a brokerage firm ... it doesn't look good for a company to do that directly … [W]e need to do it through you guys" (CX-43. p. 33). Reynolds testified that Continental wanted the advertising cost payments "to go through Premier" because Continental "didn't have the credentials for Merrill Lynch, or for Bear Stearns, or for Smith Bar[ney] … to write a research report on them … they didn't want to put their name out there and act like they wrote the research report. They wanted to have a brokerage firm where the public actually had a contact …" (Tr. 442, 487). Reynolds acknowledged involvement in further discussions with Sterritt concerning the wiring of Continental's money to Premier's account (Tr. 413).

Reynolds understood that Premier was to receive telephone calls resulting from the advertisement and would send out literature on request (Tr. 361). Reynolds agreed that his name and Premier's telephone number would appear on the report as a contact for potential investors (Tr. 419). He believed that "the ad would both benefit Premier and myself" by making new contacts and probably opening new accounts (Tr. 444).

Reynolds signed a letter agreement with Mutual Funds magazine, agreeing that Premier would pay the magazine $130,000 for publishing the research report (CX-19E). He knew that the full report would appear in that magazine and that single-page ads would appear in other magazines, including Town & Country (Tr. 360, 381). Instructions from Mutual Funds concerning Premier's wiring of the funds were addressed to Reynolds (CX-19G), as were invoices from various printers (CX-19B, 19H, 19K, and 19L). Town & Country communicated directly with Reynolds concerning a disputed bill for the single-page ad, and he personally negotiated a settlement with that publisher (CX-19Y; Tr. 383).

Reynolds viewed a draft of the report and had conversations with Sterritt, _______, and the General Counsel concerning statements in it (Tr. 363-364, 430). He testified that he was familiar with the report's content and "felt comfortable with it" (Tr. 366). He defended statements in the report as truthful and believed that its disclosures were sufficient (Tr. 367-376). Reynolds testified that "I knew the company [Continental] better than anyone at Premier" (Tr. 378).

Reynolds' name appeared on the report but he denied authorship, stating that _______ wrote it (Tr. 359-360, 364, 422-426). Reynolds acknowledged that the appearance of his name on the report could have led people to perceive him as its author (CX-43, p. 31; Tr. 419). Reynolds' connection with the report persisted, even when O'Leary decided to send it to the NASD for review. It was Reynolds who signed the supposed transmittal letter, and his name appears as the "Sender" on the Federal Express airbill for the package which the Association did not receive (Tr. 379-380; CX-8).

B). O'Leary's Actions

O'Leary, Premier's President, initially found Continental's proposition "appealing" because the issuer was to pay for the report, while Premier undertook no obligation (Tr. 513).

He left most of the details to Reynolds, whom he described as the "quarterback" of the project (Tr. 589-590). He knew that Continental was wiring money to Premier to pay the publishing expenses and authorized the transfer of the firm's funds to Mutual Funds magazine for the advertisement (Tr. 522; CX-19F).

When he reviewed a draft of the research report, he objected to it as "ridiculously written and exaggerative" and told Reynolds that "[w]e're not doing this" (Tr. 514). To placate Reynolds, O'Leary directed that the draft be sent to NASD for a review which he believed would conclude with rejection of the report (Tr. 515, 517). He said that he told Reynolds and Sterritt that nothing could go out until NASD finished the review (Tr. 518-519).

O'Leary directed that it be sent to the NASD and mistakenly believed that the Association received it (Tr. 516-517). The firm's administrative assistant testified that she obtained an address to which to mail the report and that she had mailed the report to that address (Tr. 787, 789).[4] The Association never received it (CX-5; Tr. 99-101, 117-118). O'Leary admitted that he failed to check with the NASD as to receipt of the report and realizes that he should have done so (Tr. 519).

When Reynolds later showed him a copy of Mutual Funds magazine containing the ad, he was surprised because he believed (and told Reynolds and Sterritt) that the ad "cannot be printed without approval, or at least a critique from the NASD" and did not know that it would appear in Mutual Funds without changes (Tr. 520-522). Once the ad appeared, O'Leary realized that he "made the mistake of relying on the local office and the NASD to stop me from making a mistake, which I now realize it's not their responsibility" (Tr. 537).

[4] A Federal Express airbill confirms that Reynolds, on behalf of Premier, sent something to the NASD's Rockville, Maryland offices on Piccard Road (CX-8). Reynolds asserts that this package contained a copy

Notwithstanding his difficulties with the ad and his surprise at its publication, after O'Leary saw a published copy, he "was feeling pretty good about it. I knew it went to the NASD, and I knew they never called me back, and the fact that I hated it months earlier sort of went away in my mind" (Tr. 523). He did not tell Reynolds to stop the advertising for lack of NASD approval (Tr. 552). O'Leary also knew that his firm distributed copies of the eight-page report to prospects and customers, and the firm's administrative assistant testified that he instructed her to mail out such copies (Tr. 601, 607-608, 792).

O'Leary admitted that "it was very lax of me not to be more on top of it" (Tr. 526). He further admitted that he failed to follow his firm's supervisory procedures, which made him responsible for compliance and required his approval of all advertising before its use (CX-35, pp. 5, 15; Tr. 537, 539). He said: "I made the mistake of relying on the ... NASD to stop me from making a mistake, which I now realize it's not their responsibility. Anybody who acts in the capacity to be [a principal] is supposed to know thes[e] rules and follow the rules and I did not do that" (Tr. 537). Further, even though he believed that NASD would stop the ad, "I was the 24, and I was the 28, so the buck stops with me" (Tr. 552). Despite Reynolds' role, "I was there and I'm a big boy, and … I am in charge of anything that goes out. It went out. It's my fault" (Id.).

C). Customer Testimony

Customer BO testified that she bought 100 shares of Continental in August of 1997 after reading the September 1997 issue of Mutual Funds Magazine, which contained a copy of the Continental ad, and contacting Premier (Tr. 159-160, 163, 165). The advertisement's "price and wording, a stock whose time has come," and "[t]he recommendation, very strong

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of the draft research report, as well as a cover letter (Tr. 379-380).

buy, buy and accumulate," influenced her decision to purchase the shares (Tr. 162). She purchased the stock for $23 and later sold it for 25 cents per share (Tr. 165-166).

After reading the ad in the September 1997 issue of Mutual Funds Magazine, LF contacted Premier at the telephone number listed in the ad and purchased 100 shares (Tr. 145). He testified that the ad "positively influenced my decision to purchase the stock" (Tr. 152) and that "[t]here were a lot of statements in the magazine that sounded very positive regarding Continental" (Tr. 143).

Customer SJH first became aware of Continental after reading the ad in the September 1997 issue of Mutual Funds Magazine (Tr. 269). She contacted Premier at the telephone number listed in the ad and purchased 100 shares in August of 1997 (Tr. 274-275). SJH testified that "[j]ust about everything in the advertisement interested me…. I don't think there was anything that was a downer. [E]verything in the ad influenced me to buy it…. [B]ecause it's all upbeat. I mean there is nothing that tells you there is any, you know, chance of loss of money. I mean it seemed like a sure thing" (Tr. 273, 277).

III. Liability

A. First Cause (The Anti-Fraud Rules (SEC Rule 10b-5 and NASD Conduct Rule 2120) and NASD Advertising Standards (NASD Conduct Rule 2210))

1. Fraud as to Reynolds

The first cause alleged that Premier, through O'Leary and Reynolds, knew or had reason to know that the research report contained untrue statements of material fact or was otherwise false and misleading regarding Continental's business prospects and market value. These allegations rest on the antifraud provisions of SEC Rule 10b-5 and NASD Conduct Rule

2120. “To find a violation of Conduct Rule 2120 and Rule 10b-5, 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; and (3) they were made with the requisite intent, i.e. scienter.” District Bus. Conduct Comm. No. 9 v. Michael R. Euripides, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *18 (NBCC, July 28, 1997)(citations omitted).

The facts of this case establish these elements, as to Reynolds.

a). Misrepresentations and Omissions

Sales literature which fails “to provide an accurate and b____ced picture of the risks and benefits of the investment,” projects “returns without a reasonable basis,” and contains “exaggerated claims” is fraudulent, in violation of Rule 2120. District Bus. Conduct Comm. No. 3 v. Prendergast, No. C3A960033, 1999 NASD Discip. LEXIS 19, at *33, *39 (NAC, July 8, 1999). The Continental research report had all of these defects.

i). Unb____ced Picture

The Continental research report fell far short of presenting “an accurate and b____ced picture of the risks and benefits of the investment.” Its essence was “all upbeat,” as one customer testified (Tr. 277). The executive summary stated (CX-4, p. 9):

> As it is perfectly situated to be the site of a massive waste disposal and recycling facility, we believe that CIGC [Continental] is potentially in a position to dominate the waste disposal business in the entire southeastern U.S. (and beyond). WE STRONGLY RECOMMEND THAT INVESTORS

AGGRESSIVELY ACCUMULATE SHARES OF CIGC AT PRICES UP TO $50 PER SHARE.

In contrast to this unbounded optimism, the company's Form 10-KSB,[5] for the period ending December 31, 1996, detailed the "often unforeseen business risks and certain cost exposures associated with the establishment, ownership and operation of solid waste landfill sites" (CX-21, at p. 5). It further stated that "the Company will be subject to comprehensive federal, state and local environmental, health and safety laws and regulations" and explained that requisite governmental permits are "difficult and time consuming to obtain" and "usually opposed by various local elected officials and citizens' groups" (Id., at 7). It mentioned particular and potentially costly problems posed by several federal regulatory statutes[6] and expressed the belief "that there will be increased regulation and legislation," even though the waste disposal industry was already "subject to extensive and evolving environmental laws and regulations" (Id., at 6-7).

In contrast, the report brushed aside environmental concerns in four sentences, saying that the environmental laws forced older landfills to close and thus "helped (and will continue to help) create wealth for CIGC's shareholders! … [A]s regards Continental, the environmental issue is a positive, not a negative" (CX-4, p. 13). As to licensing, "[o]ur concern, however, is not whether Continental will receive the required governmental permits, but rather when

[5] A Form 10-KSB is the General Form of Annual Report for Small Business Issuers, filed with the SEC.

[6] These statutes are: the Resource Conservation and Recovery Act (potentially high cost "of insurance and bonds necessary to meet financial responsibility requirement"); the Federal Water Pollution Control Act (wetlands permitting "likely to affect the construction or expansion of many solid waste disposal sites"); the Comprehensive Environmental Response, Compensation and Liability Act (possible liability for investigatory and clean-up costs); and the Clean Air Act ("[l]andfills located in areas with air pollution problems may be subject to even more extensive air pollution controls and emission limitations") (Id., at 7-9).

Continental will receive them" (CX-4, p. 15). The research report virtually ignored the serious regulatory matters discussed in the Form 10-KSB.

Concerning competition, Continental's SEC filing recognized that "[t]he solid waste industry is highly competitive and requires substantial amounts of capital"; explained further that the industry was dominated by several large companies, as well as regional and local companies; and stated that "[a]ll of these companies have significantly larger operations and greater financial resources than CICG" (CX-21, p. 4). But according to the advertisement, Continental, holding "an insurmountable strategic advantage can potentially achieve complete predominance over significantly larger competitors" and major waste companies might "outbid each other to acquire Continental rather than suffer the potentially irreparable damage that could be caused by a 'price war' in the southeast" (CX-4, p. 10).

As to Continental itself, the SEC filing showed a pattern of declining revenues, together with increasing expenses and operating losses (CX-21, p. 23). Its most recent operations (the last three months of 1996) produced an operating loss of $320,702; its operations for the years ending on September 30 of 1996 and 1995 produced operating losses of $909,176 and $559,507 respectively (Id.). The company derived its revenues solely from the operations of "Fiber-Seal," a subsidiary specializing in fabric protection (Id., at 14). Continental envisioned improvement for the subsidiary, but noted that the latter's revenues declined over the period covered by the Form 10-KSB and that "[h]istorically, revenues from the fabric care operation have not been adequate to fund" Continental's operations (Id., at 15).

The advertisement, however, described the company as an "undervalued 'asset play,'" noting its ownership of the site and of Fiber-Seal, which it described as a potential "cash cow"

(CX-4, p. 12). There was no mention of Continental's pattern of operating losses, of Fiber-Seal's declining revenues, or of that subsidiary's historic inability to fund the parent's business.

The SEC filing concluded by stating: "[b]ecause of potential political, legal, bureaucratic, and other factors, there can be no assurance that the company will be able to accomplish any of the goals for the Property within a reasonable period of time" (CX-21, p. 15). The research report-advertisement was much rosier. It described Continental as a "stock whose time has come", and recommended the company as a "very strong" buy, with "extraordinary potential for both short-term and long-term capital appreciation" (CX-4, p. 9). It went on to say that "[u]nless Bill Gates or the Japanese dig a Grand Canyonesque hole 9 miles from downtown Atlanta, the value of CICG's property has no place to go but up" (Id., at 14).

On the subjects of regulatory hurdles, competition, financial strength, and overall outlook, the advertisement thus presented an overly optimistic picture, disclosing little or none of the risks noted in the SEC filing. Comparing the report with the Form 10-KSB, the Panel concludes that the advertisement failed to contain the requisite b____ced statement of risks and benefits of the investment and its risks and thus violated Rule 2120.[7] Prendergast, supra.

ii). Predictions of Price and Future Performance

The SEC has long "held that predictions of specific and substantial increases in the price of a speculative security within a relatively short period of time are fraudulent." In re Donald A. Roche, Exchange Act Rel. No. 38742, 1997 SEC LEXIS 1283, at *5 (June 17, 1997). The

[7] Reynolds argues that Enforcement cannot rely on reports filed with the SEC, citing cases holding that investors are presumed to be aware of public information (Reynolds' Post-Hearing Submission, pp. 12-13). Reynolds' citations are to shareholder derivative actions, not disciplinary actions, where such publicly available materials have often been used by SEC and NASD in testing the validity of a respondent's

same principles apply to performance predictions. See In re Richard Bruce & Co., Exchange Act Rel. No. 8303, 1968 SEC LEXIS 220, at *12-13 (April 30, 1968)(finding that predictions of "a sharp increase in earnings with respect to a speculative stock without disclosure of the uncertainties as well as the known facts upon which a prediction rests [are] inherently misleading"); In re Richard J. Buck & Co., Exchange Act Rel. No. 8482, 1968 SEC LEXIS 272, at *18 (Dec. 31, 1968)("[P]redictions of a sharp increase in earnings with respect to such a [speculative and unseasoned] security without full disclosure of both the facts on which they are based and the attendant uncertainties are inherently misleading").

The Continental research report contains such predictions of price and future performance:

1.) "Even if 99% of all stocks are dragged down with the overall market, in our opinion CICG will be an extremely profitable exception."

2.) "[W]e expect to see a tremendous upside 'run' in CICG's stock price all the way up to, at least, the mid-fifties" (CX-4, pp. 14, 15).

Continental had no background in waste management. It sustained operating losses and depended on the earnings of a subsidiary, which were in decline and concededly insufficient to fund operations.[8] The company was merely evaluating "potential operation" at the site (CX-21, p.2), and, as noted, would have to pursue contested local, state, and federal licensing proceedings to enter a highly competitive industry, where successful operation requires costly compliance with an expanding array of environmental, health, and safety provisions. As

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representations (See Enforcement's Post-Hearing Reply, p. 10 and authorities there cited).

[8] See, Lester Kuznetz, Exchange Act Rel. No. 23525, 1986 SEC LEXIS 551, at *6 n.3 (Aug. 12, 1986), aff'd, 828 F.2d 844 (D.C. Cir. 1987) (finding no reasonable basis for predictions that an investment was guaranteed or relatively safe for a company with four years of operating losses, and noting that a salesman recommending

Continental acknowledged in its Form 10-KSB, "[b]ecause of potential political, legal, bureaucratic, and other factors, there can be no assurance that the Company will be able to accomplish any of its goals for the Property within a reasonable period of time" (CX-21, p. 15).

In these circumstances, the Panel concludes that Continental stock was indeed speculative. See In re Clinton Hugh Holland, Exchange Act Rel. No. 36621, 1995 SEC LEXIS 3452, at *9 (Dec. 21, 1995) (securities of "development-stage companies with a limited history of operations and no profitability" are speculative).[9] Advertising which made predictions as to the price and future performance of Continental's speculative stock was fraudulent. See Roche, supra, and Richard Bruce & Co., supra.

iii). Exaggerated Claims

Premier's advertising of Continental contained the following language:

1.) Continental stock "offers extraordinary potential for … short-term … appreciation" (CX-4, p. 9);

2.) "Continental presents a 'textbook case' ... wherein a small company holding an insurmountable strategic advantage can potentially achieve complete predominance over significantly larger competitors" (Id., at 10) (in boldface);

3.) "Unless Bill Gates or the Japanese dig a Grand Canyonesque hole 9 miles from downtown Atlanta, the value of CIGC's property has no place to go but up" (Id., at p. 14) (in boldface);

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a security must disclose material adverse information which is known or readily ascertainable).

[9] Reynolds argues that Continental traded in the $20 range, had a profitable subsidiary, and was not insolvent or undercapitalized (Reynolds' Post-Hearing Submission, p. 25). These factors ignore the company's inexperience in the industry; the uncertainty (in terms of cost, difficulty, expense, and outcome) inherent in the required array of local, state, and federal contested licensing proceedings; the competitive nature of the industry to be entered; the company's history of operating losses; and the fact that its sole

4.) "Even if 99% of all stocks are dragged down with the overall market, in our opinion CIGC will be an extremely profitable exception" (Id.).

Even the Respondents recognized the extravagance of the report's language. Reynolds described the report as "salesy" or "a little bit fantastic" and O'Leary "thought it was ridiculously written and exaggerated" (Tr. 457-458, 514). Continental was a speculative company, and unwarranted "exaggerated claims" about it were fraudulent. Prendergast, supra.[10]

b). Materiality

"The test for materiality is whether the reasonable investor would consider a fact important" in making an investment decision, or whether disclosure would "significantly alter … the 'total mix' of information made available."[11] The misrepresentations and omissions in the research report meet that test.

The report's overly optimistic portrayal of Continental shows the importance of the missing b____ced discussion of risks and benefits. Three customer witnesses stressed the enthusiastic tone of the research report as influencing their investment decisions. One customer mentioned "the wording: 'A stock whose time has come'" (Tr. 162). The second mentioned

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source of revenue (the subsidiary's declining profits) was not enough to sustain Continental's operations.

[10] Reynolds argues that some of the report's language should be exonerated as "puffery" (Reynolds' Post-Hearing Submission, p. 17). Material omissions and misrepresentations go far beyond "puffery." Novak v. Kasaks, 216 F.3d 300, 315 (2d Cir. 2000). Moreover, the concept of "puffing" has no significance in enforcement actions. In re Cortlandt Investing Corp., Exchange Act Rel. No. 8678, 1969 SEC LEXIS 273, at *13 (Aug. 29, 1969); In re John R. Brick, Exchange Act Rel. No. 11763, 1975 SEC LEXIS 522, at *22 (Oct. 24, 1975).

[11] In re Martin R. Kaiden, Exchange Act Rel. No. 41629, 1999 SEC LEXIS 1396, at *18 (July 20, 1999)(citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976)); Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1988).

"[t]here were a lot of statements in the magazine that sounded very positive regarding Continental" (Tr. 143). Another testified that the ad influenced her to purchase the stock, explaining "it's all upbeat. I mean there is nothing that tells you that there is any, you know, chance of loss of money. I mean, it seemed like a sure thing" (Tr. 277).

Had these customers known about Continental's risks and adverse performance record, they would have been better able to evaluate the report's exaggerated "strong buy" recommendation. Indeed, they might well have chosen not to put their money into this speculative "hole" in the ground. The Panel believes that investors would consider such b____ce to be important in their decision-making.

c). Scienter

Scienter requires proof that respondents intended to deceive, manipulate, or defraud,[12] or that they acted "with severe recklessness … involving not merely simple or excusable negligence, but an extreme departure from the standards of ordinary care."[13] A respondent acts with scienter when the fraudulent circumstances "were so obvious … that he must have been aware of them."[14]

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[12] See Aaron v. SEC, 446 U.S. 680, 686-687, fn. 5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

[13] These principles were recently articulated by the National Adjudicatory Council in Market Regulation Comm. v. Michael B. Jawitz, 1999 NASD Discip. LEXIS 24 at, *19-20 (NAC, July 9, 1999), citing Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991) and cases there cited. Reynolds argues that Enforcement was using some easier measure of fraud, supposedly involving a "more exacting standard" for broker behavior (Reynolds' Post-Hearing Submission, p. 21). Nothing in Jawitz, or in this Panel Decision involves such a standard.

[14] Department of Enforcement v. Levitov, No. CAF970011 (NAC, June 28, 2000), at slip op. p. 10.

As to Reynolds, this case meets those standards. He read the Form 10K-SB (Tr. 345), and was thus aware of Continental's history of operating losses, its declining revenues, its inability to fund ongoing operations, and its total lack of experience in the waste management industry. Similarly, he was aware of the many hurdles underlying entry into that industry: numerous expensive and time-consuming contested regulatory proceedings before local, state, and federal agencies; costly compliance with environmental restrictions; and the "highly competitive" and costly nature of the industry itself.

The research report, which Reynolds read closely and discussed with the issuer's General Counsel and with _______, mentioned none of these negatives. He endorsed the report, was comfortable with it, and urged O'Leary not to interfere with its publication. Having read the 10K-SB and the report, he must have known that the latter failed to disclose the risks which the former discussed. In these circumstances, scienter is present, and fraud occurred.

Reynolds contends that he reasonably believed in the statements contained in the report, citing his conversations with Sterritt (Continental's President), Roberts (Continental's General Counsel), and _______ (an individual associated with Continental and Sterritt). in some manner), together with conversations with unnamed "mom and pop organizations" in the industry[15] (Tr. at 461-2; see Reynolds' Post-Hearing Submission, pp. 18-19). This argument has no merit.

Conduct Rule 2120 and SEC Rule 10b-5 are designed "to ensure that sales representatives fulfill their obligation to their customers to be accurate when making statements about securities." District Bus. Conduct Comm. No. 9 v. Euripides, No.C9B950014, 1997

[15] Reynolds was unable to recall the names of the individuals he spoke with, and admitted that he did not attempt to speak with representatives of the larger companies in the industry (Tr. 461-2).

NASD Discip. LEXIS 45, at *16-17 (NBCC, July 28, 1997). A registered representative "has a duty to make an adequate independent investigation" to ensure that his representations have a reasonable basis. In re Frank W. Leonesio, Exchange Act Rel. No. 23524, 1986 SEC LEXIS 1009, at *11 (1986).

That duty is not satisfied by a representative's reliance on sources affiliated with the issuer. Such action "affords no basis for leniency. [Regulators] must protect the public not only from professionals in the business who practice deliberate deception, but also from those whose credulity and failure to investigate inflict equal harm on investors and undermine public confidence in the securities market to the same extent." In re Nassar & Co., 47 S.E.C. 20, 26 (1978). Acting solely on the basis of "euphoric representations" made by those associated with the issuer reflects the scienter necessary for fraud. Id., at 25. That is especially so where, as here, Reynolds read the Form 10-KSB, knew or should have known of the serious risks disclosed there, and chose nevertheless to embrace the optimism expressed by Sterritt and his agents.

d). Reynolds' Involvement with the Research Report

Reynolds urges that he cannot be held liable for the advertising, arguing that he did not write the statements in the report and that various things were done by others (e.g., _______, O'Leary, or Premier), but not by him.[16] This contention lacks merit.

[16] In refuting Reynolds' argument that Enforcement lacked power to prosecute him as an aider and abettor, the Department replied that it was prosecuting him for "direct" liability for the advertising. See Reynolds' Post-Hearing Submission, pp. 31-33 and Enforcement's Post-Hearing Reply Submission, pp. 3-4. See also Reynolds' Memorandum in Support of Summary Disposition, pp. 13-16 and Enforcement's Opposition to Summary Disposition, pp. 6-8. The argument that some acts were those of Premier is not persuasive. A corporation acts only through people, and, in this case, the person was Reynolds, whose letter agreement placed the ad with Mutual Funds. Representatives cannot be shielded from disciplinary liability because they functioned through a corporation. Reynolds cites no authority for such a loophole, and the Panel declines to create or adopt one here.

Reynolds cannot escape liability merely because he did not personally make misleading statements. As the court said in SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1471 (2d Cir. 1996), cert. denied, 522 U.S. 812 (l997), "[p]rimary liability may be imposed 'not only on persons who made fraudulent misrepresentations, but also on those who had knowledge of the fraud and assisted in its perpetration'" (citation omitted). Moreover, he embraced the report and allowed his name to be held out as the author. In these circumstances, Reynolds effectively made the statements. See In re Sheen Financial Resources, Exchange Act Rel. No. 35477, 1995 SEC LEXIS, at *13, n. 25 (March 13, 1995), where the SEC stated: "[w]hile some of the [misleading advertising] may have been prepared by entities other than Applicants, Applicants endorsed the contents of these documents when they affixed the Firm's logo and Sheen's name and business address to each document … and distributed [them] to seminar attendees."

See also SEC v. Todt, 2000 U.S. Dist. LEXIS 2087 (S.D.N.Y. Feb. 25, 2000), holding that a person who did not personally attempt to sell a fraudulent certificate was nevertheless a "direct participant in the fraudulent sales scheme," where she was involved in acquiring it; was co-signatory on a safe deposit box where it was placed; was authorized signatory for withdrawing funds which reflected the fraud's proceeds; and was listed as "contact person for questions" about the investment (at *33-*34).

Applying these principles, Reynolds' liability is clear. The record confirms O'Leary's testimony that, "from start to finish," Reynolds was the "quarterback" who "put it [the research report] together, you know, got the money, ran the ads" (Tr. 590). As shown supra, Reynolds was involved from the outset, when Sterritt came to him with the idea of a research report to be financed by Continental under Premier's name. He signed the letter agreement for its publication in Mutual Funds, received publishing invoices, and negotiated payment with Town & Country. He had discussions with Sterritt about wiring Continental's money to Premier. He closely reviewed a draft of the report and consulted with Continental personnel about several statements in it. He reviewed with _______ calculations underlying the report. Reynolds authorized the appearance of his name on the report as the contact person and was willing to let readers assume that he was the author.

He received various invoices related to printing and publishing the report. He personally negotiated a dispute with one such supplier. He signed the cover letter which supposedly transmitted the draft research report to the NASD (Tr. 380; CX-8). Finally, he embraced the report, asserting that its representations were truthful and that he was comfortable with it. Reynolds was a direct participant in the fraudulent scheme.

2. Fraud as to O'Leary

O'Leary's actions with regard to the research report did not reflect severe recklessness. As shown in the section on his actions supra, he originally rejected the draft and told Reynolds that it could not be used. Instead of relying on his own reactions, O'Leary sought to placate Reynolds by agreeing to consult with the NASD. In this process, he voluntarily read the ad to an NASD investigator, who advised him to send it to the Advertising Department for review. He then directed an administrative assistant to transmit the report to the Association. She testified that she did so, though it is clear that the supposed submission never arrived at the NASD's Advertising Department. O'Leary was surprised when he saw the article in print.

Finally, O'Leary, unlike Reynolds, did not review the Form 10K-SB (Tr. 586), which detailed the numerous risks confronting Continental.

In the Panel's view, this evidence points to negligence, but not fraud. O'Leary carelessly assumed, without checking, that NASD received the draft and would reject or alter it and failed to follow up. But in the overall context of the uncontradicted evidence concerning his attempt to stop the ad, his improper assumptions do not rise to the level of "severe recklessness."

3. The Advertising Rule: Reynolds and O'Leary

The first cause alleges that the research report violated the NASD's advertising standards, set forth in Rules 2210(d)(1)(A) and (B), and (d)(2)(C). As here relevant, these Rules provide respectively that:

> 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 … discussed … No material fact or qualification may be omitted if the omission, in the light of the context of the material presented, would cause the communication to be misleading.

* * *

> Exaggerated, unwarranted or misleading statements or claims are prohibited in all public communications … and no member shall, directly or indirectly, publish, circulate or distribute any public communication that the member knows or had reason to know contained any untrue statement of a material fact or is otherwise false or misleading.

* * *

> Communications with the public must not contains promises of specific results, exaggerated or unwarranted claims or unwarranted superlatives, opinions for which there is no reasonable basis …

Rule 2210 requires that sales literature "must 'disclose in a b____ced way the risks and rewards of the touted investment.'" <u>In re Robert L. Wallace</u>, Exchange Act Rel No. 40654, 1998 SEC LEXIS 2437, at *10 (Nov. 10, 1998), <u>citing</u>, <u>In re Jay Michael Fertman</u>, 51 S.E.C.

943, 950 (1994). See also In re Excel Financial, Inc., Exchange Act Rel. No. 39296, 1997 SEC LEXIS 2292, at *16, 19 (Nov. 4, 1997) (literature "set forth selling points attractive to investors," but did not "explain the offering's contingent and speculative nature," and thus "did not contain a b____ced statement of the investment and its risks"); Prendergast, 1999 NASD Discip. LEXIS 19, at *51 (communications which "did not contain a b____ced statement of the benefits of the investment and its risks" violated Rule 2210). Unwarranted forecasts and exaggerated claims also violate Rule 2210. Prendergast, supra, at *42-52.

As shown, supra, the research report presented a rosy picture of Continental and its prospects, while omitting any meaningful discussion of the many risks and contingencies inherent in entering into the waste management industry, and of the company's own limited and negative performance. It embodied price and performance predictions for a speculative investment and it contained language which even the Respondents described as "a little bit fantastic" and "ridiculously written and exaggerative" (Tr. 457-458, 514).

The research report thus violated Rule 2210, as alleged in the first cause. Reynolds' close involvement in the research report makes him liable for that violation. O'Leary, President of the firm which allowed the misleading research report to be circulated to the investing public, was equally liable for violating Rule 2210. His failure to follow through on his own doubts about the ad enabled the research report to be published widely. His former belief that he could leave it to the NASD to review his advertising was unreasonable. The firm's supervisory procedures required his advance approval of all advertising (CX-35, at p. 15), and he failed to exercise this responsibility. "As chief executive officer, [O'Leary] was primarily responsible for ensuring that [the firm] complied with applicable governing rules." In re William H. Prince, 1975 SEC LEXIS 741, at *6 (Sept. 25, 1975).[17] O'Leary is held liable for the violations of the advertising Rule.

B. Second Cause (Undisclosed Consideration: Continental's Funding of the Research Report)

Continental (the issuer) financed the printing and publicity expenses for the research report and the single-page ads, using Premier as a conduit for the payments. The report and ads did not disclose this fact. The second cause alleges that such nondisclosure constituted fraud, in violation of SEC Rule 10b-5 and NASD Conduct Rule 2120; that it violated Section 17(b) of the 1933 Act; and that it violated the advertising standards in NASD Conduct Rule 2210.

1. Reynolds

a). Fraudulent Nondisclosure

As noted, an omission is fraudulent when it was material and when the act reflects scienter. The nondisclosure of Continental's payments meets these requirements as to Reynolds.

"The test for materiality is whether the reasonable investor would consider a fact important in making his or her investment decision." In re Martin R. Kaiden, Exchange Act Rel. No. 41629, 1999 SEC LEXIS 1396, at *18 (July 20, 1999), citing, TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976). The significance of Continental's funding of the ad was apparent from Sterritt's desire to hide it from reader-investors. As he explained to

[17] See also In re Joseph Elkind, Exchange Act Rel. No. 12485, 1976 SEC LEXIS 1581, at *3 (May 26, 1976) ("We have consistently rejected the notion that the president of a broker-dealer firm can be a mere figurehead, able to disclaim responsibility for his firm's compliance with regulatory requirements"); District Bus. Conduct Comm. No. 7 v. Key Biscayne Securities, Inc., 1992 NASD Discip. LEXIS 12, at *20 (NBCC, March 18, 1992) ("As president of the firm, Barham likewise bore responsibility for the firm's operating without the required net capital").

Reynolds, "it would look better coming from a brokerage firm" (CX-43, p. 33; Tr. 442). That Continental's Sterritt, an astute businessman, sought to conceal his company's role in financing the ad graphically demonstrates the importance of the information to investors.

The customer witnesses, as noted, emphasized the report's "wording" (a "very strong buy" recommendation), its "very positive statements" which "influenced my decision to purchase the stock," and its "upbeat" tone which made the investment "seem … like a sure thing" (Tr. 162, 143, 152, 273). Had they known that Continental was funding the ad, they would have been able to analyze it more objectively. A reasonable investor, deciding whether to purchase Continental on the strength of Premier's glowing recommendations, would want to know that the issuer financed such statements. See In re Kevin Eric Shaughnessy, Exchange Act Rel No. 40244, 1998 SEC LEXIS 1507, at *7 (July 22, 1998) (reasonable investor would consider broker's receipt of money from stock promoter as material in deciding whether to purchase that stock based on broker's recommendations). The Panel concludes that this omission violates SEC Rule 10b-5 and NASD Conduct Rule 2120.

There can be no question about Reynolds' scienter. He knew that Sterritt wanted to conceal Continental's role in the research report. He reviewed the report and must have known that it did what Sterritt wanted - presented the portrait of a brokerage-firm research report, which was in fact paid for by the issuer.

b). Section 17(b) of the Securities Act of 1933[18]

This statute provides:

[18] This aspect of the Second Cause is charged as a violation of NASD Conduct Rule 2110. See DOE v. Aleksandr Shvarts, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (NAC, June 2, 2000)(noting that caselaw holds that "violations of federal securities laws and NASD Conduct Rules, are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities

> It shall be unlawful for any person … to publish, give publicity to, or circulate any … advertisement … which … describes [a] security for a consideration received or to be received, directly or indirectly, from an issuer … without fully disclosing the receipt … of such consideration and the amount thereof.

Reynolds argues that Continental's payment of the expenses does not constitute "consideration." The Panel disagrees.

Section 17(b) "imposes liability on one who publicizes securities for an undisclosed compensation whether received 'directly or indirectly.' This provision is satisfied when the facts show that, in substance, there was a quid pro quo." S.E.C. v. Liberty Capital Group, Inc., 75 F. Supp. 2d 1160, 1162 (W.D. Wash. 1999), citing, S.E.C. v. Wall Street Pub. Inst., 851 F.2d 365, 376 (D.C. Cir. 1988) and United States v. Amick, 439 F.2d 351, 364-365 (9th Cir. 1971). The instant record satisfies the quid pro quo test. Each party gave something and got something. Continental gave money and received nationally-circulated advertising in which a brokerage firm touted its stock. Respondents gave Continental that imprimatur and received nation-wide publicity, with the potential for contacts with investors (Tr. 419, 512, 514). Reynolds told O'Leary that "it would be great for the firm" (Tr. 514), and believed that the ad would "benefit Premier and myself" by making new contacts and opening new accounts (Tr. 444). O'Leary explained that Premier did not have the money to run ads and described the advertising arrangement as "more or less an agreement with Continental to get our name in the public" (Tr. 512-513, 607). In these circumstances, Continental's payment of advertising expense obviously constituted "consideration."[19]

industry are expected and required to abide by the applicable rules and regulations")(citations omitted).

[19] Reynolds' reliance on dictionary definitions is immaterial. Judicial construction of this statutory term is authoritative. In any event, the present facts meet his proffered definitions: "[p]ayment given in exchange for a service rendered." American Heritage Dictionary, (2d ed. 1982, p. 313), and "[t]he inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a

The statute seeks to prevent duping investors through published opinions, which, though purportedly unbiased, were actually "bought and paid for."[20] The Panel finds that the advertisement's failure to disclose Premier's receipt of Continental's funding violated Section 17(b), and thereby also violated Rule 2110's required adherence to "high standards of commercial honor" and "just and equitable principles of trade." Respondents' failure to adhere to a long-standing Congressional mandate for such a disclosure in advertising reflects a departure from the standards required by Rule 2110. See Shvarts, supra.

c). The Advertising Rules

Rule 2210(d)(1)(A) provides that "[n]o material fact … may be omitted if the omissions, in the light of the context of the material presented, would cause the communication to be misleading." As shown, the nondisclosure of Continental's funding was material. A reasonable investor would have considered such issuer involvement important in evaluating the report's "strong buy" recommendation for Continental stock. That is why Sterritt wanted to hide his company's role in promoting itself through the report, and why the report purported to be the product of a brokerage firm. This omission violated NASD Conduct Rule 2210.

2. O'Leary

a). Alleged Fraudulent Nondisclosure

As previously found, O'Leary's involvement with the ad reflected negligence, but not fraud. The Panel sees no reason for any different conclusion as to the nondisclosed

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contract … some right, interest, profit or benefit accruing to one party …" (Black's Law Dictionary (6^{th} ed. 1990, p. 306)). Continental paid for the Premier's "services," by allowing its name to be used on the report, to convey the impression that it came from a brokerage firm, not the issuer, and providing a contact for potential investors to buy the touted stock. Continental's money was the "inducement" for Premier to enter into the arrangement. This small firm, which could not afford to run ads by itself (Tr. 512-513), now had the means of reaching a national audience of investors, and a valuable "benefit" thus accrued to it.

consideration. Unlike Reynolds' situation, there was no evidence of conversations involving O'Leary in the concealment of Continental's financial backing for the report. Although O'Leary testified extensively, Enforcement did not question him about the nondisclosure, and now points to nothing in this record specifically linking him to the fraudulent concealment. As to the nondisclosure of consideration, the Panel finds insufficient evidence of scienter on O'Leary's part.

b). Section 17(b) and Rule 2210

As shown, the advertisement failed to disclose the consideration received from the issuer - funding of the publishing expenses. Such nondisclosure violates Section 17(b), which does not require scienter. See SEC v. Liberty Capital Group, Inc., 75 F. Supp. 2d 1160, 1163 (W.D. Wash. 1999)("the plain meaning of §17(b) excludes an element of intent …"). The omission of Continental's funding of the report, in the optimistic context of the report's strong "buy" recommendation for the issuer, also made the advertisement misleading, in violation of Rule 2210. As President of the firm, O'Leary was responsible for its misconduct. Indeed, Premier's internal documents mandated his approval on all advertising before it appeared. He failed to perform that responsibility, and is, therefore, liable for the firm's violation of Section 17(b) and NASD Conduct Rule 2210(d)(1)(A).

C. Third Cause (Reynolds' Nondisclosure of Receipt of Continental Shares)

The research report appeared in the September 1997 edition of Mutual Funds (CX-4). In October of 1997, a stock transfer agent transferred ten thousand shares of Continental stock,

[20] H.R. Rept. No. 85, 73rd Cong., 1st Sess. 24 (1933).

then worth over $200,000, to an account owned by Reynolds' grandfather, over which Reynolds had discretionary authority (CX-26, CX-27, Tr. 391-392).[21] The Complaint alleges that Reynolds' nondisclosure of this receipt also violates the anti-fraud provisions (SEC Rule 10b-5 and NASD Conduct Rule 2120, Section 17(b) of the 1933 Act, and NASD Conduct Rule 2210(d)(1)(A).

Enforcement contends that these shares constituted undisclosed compensation to Reynolds for his activities involving the research report (Post-Hearing Submission, p. 16). Reynolds denies that the transfer was a form of compensation, claiming instead that the shares were the proceeds of a loan from Sterritt and Continental, in order to help him make up losses which occurred in his grandfather's account (Opposition to Post-Hearing Brief, pp. 28-31).

The "loan" was supposedly the subject of a written agreement, with a copy kept at Premier's and Continental's offices, but Reynolds was unable to produce such a document (Tr. 400, 448, 456). He believed that Stewart Rahr might have a copy, but had not contacted him (Tr. 457). Reynolds told the investigators that he borrowed the money from Continental, but testified at the hearing that the loan came from an affiliate whose name he could not recall (CX-43, p. 19; Tr. 448). Nor could he remember the term of the loan or its interest rate (Tr. 448-450).

This vagueness extended to the repayment terms. During investigative testimony, he could not recall whether he was to repay the loan in installments or all at once (CX-43, pp. 21-22). At the hearing, he testified that the loan was to be repaid by partial payments (Tr. 450). Despite the passage of two and one half years since the claimed loan, Reynolds had made no

[21] The shares bore some kind of restriction (Tr. 401, 453, 455; CX-26C). The record did not develop details as to the nature of the restriction or its economic impact, if any, on the shares' value. In any event, the account

payments. He told the investigators that "the agreement was I would not make payments until the stock [which had restrictions] was actually free trading" (CX-44, p. 12). During the hearing, however, he testified that he had made no payments on this $200,000 loan because "I haven't been asked to" (Tr. 402).

Reynolds cites an affidavit of Sterritt as corroborating the "loan" (Post Hearing Submission, p. 31, citing RR 31). Reynolds chose not to call Sterritt as a witness at the hearing (Tr. 568-569), where he would have been subject to cross-examination about his assertions that he, an experienced businessman, could not remember the terms of a $200,000 transaction or find the written agreement embodying it. In addition, an NASD supervisory examiner testified that Sterritt earlier gave a different version, denying the existence of an agreement about the shares, and stating that Reynolds obtained them elsewhere (Tr. 679). Under all of these circumstances, the Panel gives no weight to the affidavit.

There was no explanation as to why Sterritt, an astute businessman, would hand over $200,000 worth of stock to help Reynolds with his grandfather's account. Reynolds asks the Panel to believe that Sterritt would make an unsecured $200,000 loan for an uncertain term under unclear repayment provisions and would not ask for repayment even though he was in default for three years. He further asks the Panel to believe that this transaction would be embodied in an agreement which no one can find. The entire hypothesis is contrary to common sense, and the Panel cannot accept it.

The Panel believes that the "loan" never occurred. Taking this fabrication together with the timing of the transfer (shortly after the advertising appeared), and considering the absence of

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statement valued them at $205,630 (CX-27A, p. 2).

any other explanation, the Panel concludes that the shares were compensation for Reynolds' services on behalf of Continental.[22]

As with Premier's payment of the advertising costs, a reasonable investor would want to know that Reynolds, whose name appeared on the research report touting Continental (CX-4, p. 15), had in fact been paid the equivalent of $200,000 by the issuer. See Shaughnessy, supra, at *7 (broker's receipt of consideration from stock promoter would be material fact which should have been disclosed). Reynolds knew that he received the shares and must have known that the report failed to disclose such receipt. This material omission constituted fraud under SEC Rule 10b-5 and NASD Conduct Rule 2120; made the report misleading, in violation of Rule 2210(d)(1)(A); and also violated Section 17(b) of the 1933 Act which provides that consideration be disclosed in advertising.

D. Fourth Cause (Reynolds' Sharing of Customer Losses)

NASD Rule 2330(f) provides that no associated person "shall share directly or indirectly in the profits or losses in any account of a customer" held in a member firm. It is undisputed that Reynolds arranged the transfer of some $200,000 worth of Continental stock (the supposed "loan" which the Panel found to be compensation) to his grandfather's Premier account to restore losses (Tr. 397-403, 451-452). As Reynolds said, "I had lost some money in my granddad's account, and I felt bad and I wanted to put something back in it " (CX-43, p. 19).

[22] False testimony "may be taken as an admission that the true facts would defeat the position the party is seeking to maintain." United States v. Philatelic Leasing, Ltd., 601 F. Supp. 1554, 1566 (S.D.N.Y. 1985), aff'd, 794 F.2d 781 (2d Cir. 1986) (citing 2 Wigmore, Evidence, Sec. 278, Chadbourne Rev. 1979). A fact-finder may infer consciousness of guilt from false exculpatory statements. Coleman v. Meachum, 863 F. Supp. 66, 69 (D. Conn. 1994) and cases there cited.

The Rule contains a flat ban on "directly or indirectly" sharing losses in a customer's account. A broker who contributes his own assets (whether received as compensation or "loan") because he wants "to put something back in" to offset trading losses is "sharing" those losses in any sense of the word.

Reynolds argues that he did not violate the Rule because there was no underlying sharing agreement between him and the customer, because he was not hiding misconduct, and because there was a family relationship between him and the customer (Opposition to Post-Hearing Submission, p. 34). Such factors, while mitigating, do not excuse the violation. The Rule contains no requirement for an antecedent agreement or for any particular motive. Nor does it create an exception for grandsons. The Panel finds that Reynolds shared his grandfather's losses, in violation of Rules 2330(f) and 2110.

E. Fifth Cause (Omitted Price)

The Complaint alleges that the three Respondents violated Rule 2210(d)(2)(B)(ii)'s requirement that "[r]ecommendations on behalf of corporate equities must provide the price at the time the recommendation is made." Premier's single-page advertisements which appeared in Town & Country and Individual Investor magazines (CX-10, CX-11, and CX-12) described Continental as "A Stock Whose Time Has Come" and did not provide any price for the security. These ads thus violated the above advertising Rule and Rule 2110's ethical standard.

Premier and O'Leary do not dispute this count (Post-Hearing Submission, p. 3). Reynolds argues that he should not be held responsible for the omission of price in the single-page ads (Opposition to Post-Hearing Submission, p. 35). The Panel disagrees. As shown above in the section on his actions supra, Reynolds was directly involved in all of the advertising in issue, and may fairly be held liable for this violation.

F. Sixth Cause (Failure to File Advertising)

The Complaint charges the firm and O'Leary with violating Rule 2210(c)(3)(A)'s requirement that a firm which has not previously filed advertising with the Association shall file its initial advertisement at least ten days prior to use and provide the anticipated date of first use. O'Leary and the firm agree that "the report was neither received nor reviewed by NASD advertising" and do not dispute this charge (Post-Hearing Submission, pp. 1, 3). Accordingly, they violated the above Rule.

G. Eighth Cause (Supervisory Failures)[23]

This cause alleges that the firm and O'Leary failed to "establish, maintain, and enforce an adequate supervisory system" to achieve compliance with securities laws and regulations (Complaint, par. 41). O'Leary was Premier's President, General Securities Principal, and Financial and Operations Principal. The firm's supervisory procedures identified him as its only supervisor and its compliance officer, and, as noted, required his approval of advertising before it could be used (CX-35, pp.15, 20). O'Leary did not follow those supervisory procedures concerning the research report and accepted responsibility for that failure, stating "it was very lax of me not to be more on top of it" and "I didn't do what I told everyone else to do. I didn't follow the procedures" (Tr. 526, 537). O'Leary's Post-Hearing Submission does not contest his supervisory liability (p. 3).

[23] The last cause was mistakenly labeled as "Eighth." It should have been the "Seventh."

But, insofar as O'Leary is substantively responsible for particular violations, additional findings of deficient supervision as to such conduct would be "inappropriate and inconsistent." In re R. A. Johnson & Co., 48 S.E.C. 943, 947 n.14 (1988).[24] The Panel finds him responsible for supervisory failures regarding those aspects of the research report for which he was not found directly liable. His supervisory liability thus extends to the research report's fraudulent representations and omissions, including its nondisclosure of Continental's funding.[25]

The firm's supervisory procedures also required O'Leary's daily review of all securities transactions (CX-35, p. 7, 20).[26] Such review would have revealed the transfer of Continental shares into an account for which O'Leary knew that Reynolds had discretionary authority (Tr. 616), and thus raised red flags as to whether Reynolds received this stock as undisclosed compensation and was sharing losses in the account. The Panel finds O'Leary liable for supervisory failures pertaining to Reynolds' fraudulent nondisclosure of his receipt of those shares and to Reynolds' sharing of losses.

IV. Sanctions for O'Leary and Reynolds[27]

A. The First Cause

[24] See also Market Surveillance Comm. v. Markowski, No. CMS920091, 1998 NASD Discip. LEXIS 35, at *52-53 (NAC, July 13, 1998), and cases there cited.

[25] If O'Leary had not been found liable for direct violations of Rule 2210 and 2110 in the first through fourth causes, then the Panel would have found supervisory violations regarding such misconduct.

[26] The procedures further provided that "discretionary accounts will not be accepted by the firm" (CX-35, at p. 8). Thus, if O'Leary had done his job, the delegation of discretion to Reynolds would have been rejected in the first place.

[27] As to disciplinary history, Reynolds previously was fined $3,500 for trading while there was a defect in his Texas registration, during a time when he was transferring from one firm to another (Tr. 403-404; CX-38, p. 5). O'Leary's record reflects two AWC's: a fine of $8,500 and a ten-day suspension for failing to insure Reynolds' proper registration and a fine of $10,000 for a net capital violation (CX-37, pp. 5,7). The Panel gave no adverse weight to these records.

For intentional or reckless misrepresentations or material omissions of fact, the NASD Sanction Guidelines (1998) recommend fines between $10,000 and $100,000 and a suspension of 10 days to two years or, in egregious cases, a bar (at p. 80). For violations of the advertising rules, alleged in first cause, the Guidelines recommend fines between $1,000 and $20,000 and, in egregious cases, suspensions in all capacities for up to 60 days (Id., at p. 76).

The Panel believes that the research report presents an egregious case. The Respondents themselves admitted that the report-advertisement contained "salesy" or "a little bit fantastic" terms (Reynolds at Tr. 457-458) and was "ridiculously written and exaggerative" (O'Leary at Tr. 514). It made price and performance predictions about a speculative stock. This misleading report reached a substantial audience, appearing in Mutual Funds magazine, with a circulation of over 600,000 and single copy sales of over 25,000 (Jt. Ex. 1, par. 11). The ad failed to present a b____ced statement of the investment's risks and benefits, and injured customers.

1.) Reynolds

Reynolds was Premier's principal actor in producing the misleading research report and his sanctions should reflect that conclusion. Reynolds acted intentionally, or at least recklessly, in assisting in the dissemination of a research report which he knew contained several material misrepresentations and omissions. Accordingly, for violating the anti-fraud provisions of the securities laws and Rule 2210, the Panel imposes a fine of $50,000 and a 240 day suspension. The Panel aggregates the sanction for Reynolds' violation of Rule 2210 with the above sanction for his fraud and imposes the above sanction for both offenses.

2.) O'Leary

Although O'Leary objected to the report and directed that it be sent to NASD for a review, his failure to follow up on the assumed review, coupled with the assumption that NASD's silence somehow warranted publishing the report, is egregious. Leaving the matter in the hands of the NASD, when he believed the ad to be "ridiculously written and exaggerative," was especially aggravating. Once the report was published, O'Leary was surprised, but did nothing until NASD called to complain.

O'Leary properly acknowledged his shortcomings, recognizing that he should have followed up on the assumed NASD review of the research report and that his failure to do so reflected lack of judgment (Tr. 519). He said "I made the mistake of relying on the local office and NASD to stop me from making a mistake, which I now realize it's not their responsibility. Anybody who acts [as a principal] is supposed to know these rules and follow the rules and I did not do that" (Tr. 537).

The Panel has considered O'Leary's serious misconduct, while giving him some credit for later acknowledging his responsibility. It concludes, on b____ce, that his sanctions should be near the high end of the recommended range for failing to comply with Rule 2210 - a fine of $15,000 and a suspension of 45 days.

B. The Second Cause (Failure to Disclose Receipt of Continental's Funding)

1.) Reynolds

The Panel concluded that Reynolds - the "quarterback" of the Continental research report - allowed the report to be published and disseminated to the public without disclosing that Continental was funding the publication.

The Panel concluded that Reynolds allowed the research report to be published, while knowingly concealing the fact that the issuer was funding the publication expenses, a fact of significance to the reasonable investor evaluating the report's recommendation. Such intentional conduct violates the anti-fraud provisions of NASD Rule 2120 and SEC Rule 10b-5. For such misconduct, the Guidelines recommend a fine of $10,000 to $100,000 and a suspension of ten days to two years, or a bar in egregious cases (at p. 80).

Disclosing consideration received from an issuer is serious enough to be the subject of a separate statutory requirement in Section 17(b) of the 1933 Act. The importance of the information is apparent from the testimony of customers, who were impressed with the optimistic tone of the Continental research report ("it seemed like a sure thing" (Tr. 277)). Revealing that Continental was paying the expenses of publishing the report would have enabled investors to evaluate its claims more critically.

But, the omission was Sterritt's idea, not Reynolds'. Reynolds has potential for rehabilitation. He was hired by another firm notwithstanding the instant charges and is seen there as "a model employee" who follows the rules, consults his supervisor whenever necessary, and has "genuine concern for his customers" (Tr. 653-655). There were no customer complaints about Reynolds while at Premier, and none has been made during his service at the new firm (Tr. 651, 656).

"The overall purpose of NASD Regulation's disciplinary process, as well as, NASD Regulation's responsibility in imposing sanctions are to remediate misconduct and to protect the investing public" (Guidelines, at p. 3). Considering all of the circumstances, Reynolds' failure to disclose that the issuer was paying for the research report warrants a fine of $50,000 and a 240 day suspension.[28]

2.) O'Leary

The Panel found O'Leary liable for the nondisclosure of the consideration, in violation of Rule 2210, and (via Rule 2110) Section 17(b) of the 1933 Act. The most analogous Guideline is the recommendation for misleading advertising (Rule 2210): fines between $1,000 and $20,000 and, in egregious cases, suspensions in all capacities for up to 60 days (Guidelines, supra at p. 76).

O'Leary's conduct as to this offense presents a mix of circumstances. As found, disclosure of the issuer's funding would have been significant to the reasonable investor. O'Leary knew that Continental was paying for the report's publishing expenses, approved Premier's using those funds to pay the advertising costs, and had overall responsibility for the firm's advertising. But (unlike Reynolds), there was no evidence of direct communication between O'Leary and Sterritt about the concealment of the funding.

Moreover, O'Leary acknowledged his responsibility for the misleading research report. On b____ce, therefore, the Panel concludes that the appropriate sanctions for O'Leary's nondisclosure, in violation of Rule 2210, are a fine of $10,000 and a thirty-day suspension.[29]

C. The Third Cause (Reynolds' Failure to Disclose the Receipt of Shares)

The Panel found that Reynolds' failure to disclose his receipt of Continental shares as compensation violated Rule 2210, Section 17(b) of the 1933 Act (via Rule 2110), and the anti-

[28] The Panel aggregates or "batches" the sanction for Reynolds' fraudulent nondisclosure with his violations of Section 17(b), via Rule 2110, and of Rule 2210 and imposes the above sanction for both offenses. See Guidelines, at p. 5.

[29] Here again, the Panel "batches" the sanction for this violation with O'Leary's violation of Section 17(b),

fraud provisions. As noted, for intentional or reckless misrepresentations or material omissions of fact, the Guidelines recommend a fine of $10,000 to $100,000 and a suspension of 10 days to two years, or a bar (Id., at p. 80).

Reynolds' hiding of the receipt of the shares was aggravated by his fanciful tale about a supposed "loan" of the stock. In addition, a reasonable investor is entitled to know of compensation from an issuer in evaluating a broker's recommendation. Shaughnessy, supra. The Panel believes that this nondisclosure was egregious and concludes that Reynolds should be sanctioned with a $50,000 fine and a 240 day suspension for violating the anti-fraud provisions of the securities laws.[30]

D. Fourth Cause (Reynolds' Sharing of Losses)

Noting that the customer in whose losses Reynolds shared was his grandfather, Enforcement suggests that Reynolds should be "'moderately" sanctioned with a $10,000 fine and a one-month suspension (Post-Hearing Submission, pp. 37-38). The most analogous Guideline, "Guaranteeing a Customer Against Loss" (Guidelines, supra, at p. 79), recommends a fine of $2,500 to $10,000 and a suspension for up to thirty days.

As Reynolds notes, his sharing did not involve inducing a customer to trade or covering for trading misconduct (Post-Hearing Submission, p. 34). Those contentions, though not defenses to Rule 2330(f), nevertheless constitute mitigating considerations. In these circumstances, the Panel agrees that the sanction should be moderate and concludes that, for this misconduct, Reynolds should be fined $2,500 and suspended for five days. This misconduct

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via Rule 2110, and imposes the above sanction for both offenses.

[30] For sanctions purposes, the Panel aggregates or "batches" the fraudulent nondisclosure with Reynolds' violation of Section 17(b) and imposes the above sanction for both offenses. See Guidelines, at p. 5.

was relatively minor - compared to nondisclosure of receipt of the shares - and in this case was included within it. For this reason, such suspension shall be served concurrently with the suspensions imposed for his violations of the first, second and third causes of the Complaint.

E. The Fifth Cause (Failure to provide price of stock in advertising)

The Panel found O'Leary and Reynolds liable for violating Rule 2210(d)(2)(B) because the single-page advertisements failed to provide the price for Continental stock. For failing to comply with that advertising rule, the Guidelines, as noted, recommend fines of $1,000 to $20,000 and suspensions of up to sixty days in egregious cases (at p. 76).

The single-page advertising stated that Continental was "A Stock Whose Time Has Come" and invited readers to contact Premier for a free copy of "our research report" (see, e.g., CX-11, from Town & Country). Though intended as lead-ins to the misleading research report, the single-page ads had none of its detailed deception. Unlike the undisclosed consideration, there is no basis for an inference that filling in a particular price would have made a real difference to an investor. Yet, the omission of a price plainly violated Rule 2210(d)(2)(B). The Panel concludes that for this misconduct, each individual Respondent should be fined $2,500 and suspended for 10 days. Here, as was the case with the fourth cause, Reynolds' suspension shall be served concurrently with those imposed for his violations of the first, second and third causes of the Complaint. Similarly, O'Leary's suspension shall be served concurrently with that imposed for his violations of the first and second causes.

F. Sixth Cause (Failure to File Advertising)

The Panel found O'Leary liable for violating Rule 2210(c)(3)(a) because he failed to file the firm's initial advertisement (i.e., the research report) prior to its use and failed to provide the

Association with the anticipated date of first use. A review of the research report prior to first use might have led to its rejection or modification, and O'Leary did direct that the draft research report be filed with NASD. For failures to file communications with the public, the Guideline recommends fines of $1,000 to $15,000 and a suspension for up to ten days (Guidelines, at p. 75). The Panel concludes that this aspect of O'Leary's conduct warrants a $10,000 fine and a ten day suspension.

G. The Eighth Cause (Supervisory Failures)

The Panel found O'Leary responsible for supervisory failures as to Reynolds' fraudulent misconduct (first, second, and third causes) and sharing of losses (fourth cause). The relevant Guideline recommends a fine of $5,000 to $50,000, a suspension in supervisory capacities for up to thirty days, and - in egregious cases - suspension for up to two years, or a bar (p. 89). Enforcement recommends a fine of $25,000 and an eighteen-month suspension (Post-Hearing Submission, p. 38).

The Panel agrees that this is an egregious case. Premier's supervisory procedures required that O'Leary approve proposed advertising before its use (CX-35, p. 15). His failure in that regard allowed nearly 650,000 copies of a misleading research report, embodying a fraudulent nondisclosure, to circulate to the investing public. Similarly, adherence to the firm's supervisory procedures would have revealed Reynolds' receipt of the Continental shares and his resulting sharing of losses. "[I]t is critical for investor protection that a broker … enforce effective procedures to supervise its employees."[31] But the idea and momentum for the report came from the issuer and Reynolds, not O'Leary, and, as noted, the sharing of losses was

[31] In re Donald T. Sheldon, 1992 SEC LEXIS 3052, at *49 (November 18, 1992)(involving advertising inter alia).

relatively minor in the circumstances of this case. Moreover, O'Leary's candid acknowledgment of supervisory mistakes is a factor in his favor. Compare, Prendergast, supra, 1999 NASD Discip. LEXIS 19 at *71, an advertising case where "failure to accept responsibility for his actions" was an aggravating factor.

The Panel concludes that O'Leary's supervisory failures warrant a fine of $25,000 and a suspension of 240 days. See also the re-qualification requirement imposed below.

H. Further Sanctions Warranted by Overall Conduct

The Panel imposes additional sanctions, which are dictated by the totality of the conduct spelled out during the hearing. These further measures are, in the Panel's view, "remedial in nature and … designed to deter future misconduct and to improve overall business standards in the securities industry" (Guidelines, supra, "General Principles," p. 3).

1.) Re-qualification

These Respondents' casual approach toward NASD advertising standards led them to their current difficulties. But the Panel believes that each has sufficient redeeming qualities to remain in the industry after serving their periods of suspension. To impress upon Respondents O'Leary and Reynolds the significance of the rules violated here and of their responsibilities, the Panel requires that they re-qualify by examination in all capacities prior to associating with a member firm.

2.) Advance Review of Advertising

This case involves numerous serious advertising violations. As an additional remedial measure, the Panel thus orders that for a period of three years following the expiration of their respective suspensions, Respondents O'Leary and Reynolds shall file any advertising and sales literature on which their name appears with the NASD Advertising Regulation Department and obtain a “no objection” response prior to use. Such a sanction is recommended in the Guidelines for egregious advertising violations (at p. 76), and is appropriate for Reynolds and O’Leary.

3.) Restitution

Enforcement introduced testimony from three customers who invested in Continental after contacting Premier as a result of the misleading research report which appeared in <u>Mutual Funds</u> magazine (Tr. 143-144, 148-152; 162, 164-165; 270, 272-273, 276-278).

“Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss” and is appropriate when “an identifiable person ... has suffered a quantifiable loss as a result of a respondent’s misconduct” (Guidelines, <u>supra</u>, at p. 6). The instant case fits that description. As noted, customer BO purchased 100 shares of Continental at $23 and later sold the stock for 25 cents per share. She thus lost $2,329.86. The Panel directs that Reynolds and O’Leary, jointly and severally, make restitution of that $2,329.86 to BO. Such restitution shall include interest, running from August 7, 1997 (the date of purchase) to the date of payment. Pursuant to the Guidelines (at p. 12), such interest shall be calculated at the rate established for the underpayment of federal income tax in 26 U.S.C. Section 6621(a)(2).

The other two customers chose not to sell their Continental stock and still held it as of the date of the hearing (Tr. 152, 278). These customers, who paid $24 3/4 and $23 3/8 respectively for their shares (Tr.146, 275), nevertheless sustained losses. As of the hearing, Continental was in bankruptcy, and the price of its shares fluctuated between 20 cents and 7 cents (Tr. 484; CX-52). Because the customers retained their shares, the Panel cannot find the requisite "quantifiable loss" and calculate "the actual amount of the loss sustained by a person" (Guidelines, supra, at p. 6).

The Panel concludes instead that these two customers should have the opportunity to return their shares to the individual Respondents, who will be obligated, jointly and severally, to buy the stock back at the prices paid by those investors.[32] For a period of thirty days from the effective date of this Decision, customers LF and SJH may sell the Continental shares which they purchased on August 18, 1997 and August 25, 1997 respectively to O'Leary or Reynolds, who shall be obliged, jointly and severally, to pay those customers the original purchase price. In the case of LF, that price is $24 3/4 in the case of SJH, that price is $23 3/8. Such payments shall also include interest, calculated at the rate described above, from August 18, 1997 (for LF) and from August 25, 1997 (for SJH).

V. The Firm's Liability and Sanction

Premier filed a Broker-Dealer Withdrawal in November of 1999 and ceased operations at that time (Tr. 37; Premier-O'Leary Post-Hearing Submission, p. 4). Aside from the fraud aspects, Premier did not defend the Complaint's allegations. Its counsel, who also represented O'Leary, told the Panel "[w]e're not running from the fact that perhaps the use of that report was misleading, but not in the fraudulent sense" (Tr. 775). Its Post- Hearing Submission began by acknowledging that "Premier and O'Leary throughout this entire matter, from the investigative stage through the hearing, have not attempted to avoid liability ..." and that they

[32] For precedent, see In re David Joseph Dambro, 1993 SEC LEXIS 1521 at *14 (June 18, 1993), cited by Enforcement.

were not disputing any of the Complaint's non-fraud allegations (p. 3). As to a sanction for the firm, the submission suggested a "permanent bar" (pp. 1,4).

The Panel believes that, under these circumstances, cause-by-cause discussions of the firm's liability and sanctions are not necessary. The Panel concludes that Respondent Premier Capital Management, Inc., in violation of the first and second causes, issued misleading advertising, in violation of Rules 2110 and 2210, and failed to disclose Continental's financing, in violation of Rules 2110 and 2210, and Section 17(b) of the 1993 Act. The firm is also liable under the fifth and sixth causes (omitting prices from the single-page ads and failing to file the research report-advertisement) and under the eighth cause (supervisory violations). As sanctions for this conduct, Premier Capital Management, Inc. will be expelled from membership in the Association.

VI. Conclusion

A. Sanctions Summary

1). Respondent Ryan M. Reynolds

Cause One: The Hearing Panel imposed a $20,000 fine and a 60 day suspension for violating the advertising rules, and a $30,000 fine and a 180 day suspension for violating the anti-fraud provisions of the securities laws.

Cause Two: The Hearing Panel imposed a $20,000 fine and a 60 day suspension for violating the advertising rules, and a $30,000 fine and a 180 day suspension for violating the anti-fraud provisions of the securities laws.

Cause Three: The Hearing Panel imposed a $20,000 fine and a 60 day suspension for violating the advertising rules, and a $30,000 fine and a 180 day suspension for violating the anti-fraud provisions of the securities laws.

Cause Four: The Hearing Panel imposed a fine of $2,500 and a 5 day suspension for sharing customer losses, in violation of Rules 2110 and 2330(f).

Cause Five: The Hearing Panel imposed a fine of $2,500 and a 10 day suspension for omitting the price of a security in an advertisement, in violation of Rules 2110 and 2210(d)(2)(B).

As noted, the suspensions imposed on Reynolds for the fourth and fifth causes shall be served concurrently with the suspensions imposed for his violations of the first, second, and third causes. All other suspensions shall be served consecutively. In total, Reynolds is fined $155,000 and suspended for 720 days for his misconduct.

2). Respondent Bryan J. O'Leary

Cause One: The Hearing Panel imposed a fine of $15,000 and a 45 day suspension for violating the advertising rules.

Cause Two: The Hearing Panel imposed a fine of $10,000 and a 30 day suspension for violating the advertising rules.

Cause Five: The Hearing Panel imposed a fine of $2,500 and a 10 day suspension for omitting the price of a security in an advertisement, in violation of Rules 2110 and 2210(d)(2)(B).

Cause Six: The Hearing Panel imposed a fine of $10,000 and a 10 day suspension for failing to file an advertisement with the NASD Advertising Department, in violation of Rule 2210(c)(3)(A).

Cause Eight: The Hearing Panel imposed a fine of $25,000 and a 240 day suspension for failing to supervise Reynolds with regards to his violations of the anti-fraud provisions of the securities laws in the first and second causes and as to his misconduct in the third and fourth causes.

As noted, the suspension imposed on O'Leary for the fifth cause shall be served concurrently with the suspension imposed for his violations of the first and second causes. All other suspensions shall be served consecutively. In total, O'Leary is fined$62,500 and suspended for 325 days for his misconduct.

3). Respondent Premier Capital Management

For its conduct resulting in the above violations, Respondent Premier Capital Management Inc. is expelled from membership in the National Association of Securities Dealers.

B. Further Sanctions for Respondents O'Leary and Reynolds

For the totality of their conduct, resulting in the above violations, Respondents O'Leary and Reynolds are each required to re-qualify by examination in all capacities prior to associating with a member firm. In addition, for three years following the expiration of their respective suspensions, each is required to file any advertising and sales literature on which his name appears with the NASD Advertising Regulation Department and obtain from that Department a "no objection" response prior to any use of the material submitted.

O'Leary and Reynolds are ordered to make restitution of $2,329.86 to customer BO, with interest running from August 7, 1997. Such interest shall be calculated at the rate prescribed in 26 U.S.C. 6621(a)(2). Their liability shall be joint and several.

For 30 days following the effective date of this Decision, Customers LF and SJH shall have the right to return their Continental shares to O'Leary and/or Reynolds, who shall be jointly and severally liable for re-purchasing them. Upon such return, O'Leary and/or Reynolds shall purchase the shares from the customer at the price which the particular customer paid ($24 3/4 for LF and $23 3/8 for SJH), with interest running from that customer's date of purchase (August 18, 1997 for LF and August 25, 1997 for SJH). Such interest shall be calculated at the rate prescribed in 26 U.S.C. 6621 (a)(2).[33] Such restitution and repayment shall be completed before Respondents may re-qualify to enter the securities industry.

[33] The customers' full names will be set out in an Appendix to this Decision. Counsel for Enforcement are directed to inform customers LF and SJH of the availability of this remedy.

C. Costs

Respondents O'Leary and Reynolds shall pay costs of $5,241, reflecting $4,491 for transcripts plus the standard administrative fee of $750. They shall be jointly and severally liable for payment of these costs.[34]

* * *

These sanctions shall become effective on a date set by the Association, but not earlier than 30 days after the final disciplinary action of the Association. If this Decision becomes the final disciplinary action of the Association, the suspensions as to Respondent O'Leary shall become effective with the opening of business on Monday, November 6, 2000 and end at the close of business on Wednesday, September 26, 2001. The suspensions as to Respondent Reynolds shall become effective with the opening of business on Monday, November 6, 2000 and end on October 26, 2002.

HEARING PANEL

____
Jerome Nelson
Hearing Officer

Dated: Washington, DC
September 13, 2000

Copies to: Premier Capital Management (via overnight and first class mail)
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[34] The Hearing Panel considered all of the arguments of the parties, including those set out in Reynolds' Motion for Summary Disposition and Enforcement's Reply thereto. All arguments are rejected or sustained to the extent they are inconsistent or in accord with the views expressed here.

Roberta Koss, Esq. (via facsimile and first class mail)
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