

**NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARCUS K. HUGHES  
(CRD #1602626),  
Chicago, IL

Chicago, IL,

and

CHRISTOPHER ADEN  
(CRD #8977095),  
Yonkers, NY,

Respondents.

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Disciplinary Proceeding  
No. C8A990032

Hearing Officer—Andrew H. Perkins

**Hearing Panel Decision as to Respondent  
Marcus K. Hughes**

April 24, 2000

*Digest*

The Department of Enforcement filed a Complaint alleging that Respondent Marcus K. Hughes: (1) made misrepresentations of material facts in connection with the purchase or sale of securities, in violation of NASD Conduct Rules 2110 and 2120; (2) effected private securities transactions, in violation of NASD Conduct Rules 2110 and 3040; and (3) permitted Respondent Christopher Aden, an unregistered person, to sell securities, in violation of NASD Conduct Rule 2110 and NASD

Membership and Registration Rule 1031. All of the charges arose from the Respondents' sales activities in connection with the private placement of Moorgate Investments, Ltd.

Hughes answered the Complaint,<sup>1</sup> and requested a hearing. At the hearing, Hughes admitted to effecting private securities transactions and permitting Aden to sell securities without being properly registered. For these violations, Hughes agreed that he should be barred and ordered to pay restitution to the customers who purchased shares of Moorgate Investments, Ltd. As to the charge that Hughes misled investors, he stipulated that he did not have sufficient evidence to defend the charge. Hughes therefore offered to settle the charge—without admitting or denying the allegations—and accept an order barring him and requiring that he pay full restitution to the affected customers.

The Hearing Panel accepted Hughes's admission that he effected private securities transactions and permitted an unregistered person to sell securities. With respect to the charge that Hughes misrepresented material facts in connection with the purchase or sale of Moorgate Investments, Ltd. stock, the Hearing Panel, based upon the stipulations and other evidence in the record, found that Hughes committed the violations alleged in the Complaint.

For each violation, the Hearing Panel ordered that Hughes be barred from associating with any member firm in any capacity and that he pay restitution to the customers who purchased Moorgate Investments, Ltd. stock in the total amount of \$834,103.64. The Hearing Panel also ordered that Hughes pay the costs associated with this proceeding in the amount of \$1,319.60.

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<sup>1</sup> Aden failed to answer the Complaint or participate in the pre-hearing phase of this proceeding. As a result, the Hearing Officer held him in default pursuant to Code of Procedure Rule 9215. However, at the hearing the evidence showed that Aden had not been served properly. Accordingly, the Hearing Officer vacated the default order and continued the case against Aden to allow the Department of Enforcement to serve Aden with the Complaint, if it desired. For this reason, this Decision applies only to Respondent Hughes.

## *Appearances*

Dale A. Glanzman, Senior Regional Attorney, Chicago, Illinois, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, counsel for the Department of Enforcement.

Marcus K. Hughes appeared *pro se*.

No appearance by Christopher Aden.

## **DECISION**

### **I. Introduction**

This disciplinary proceeding arises from the sales activities of Marcus K. Hughes (“Hughes”) and Christopher Aden (“Aden”) in connection with the private placement of 21,790 shares of the common stock of Moorgate Investments, Ltd. (“Moorgate Investments”). At the time, they were associated with Moorgate Investments, Inc. (“Moorgate Securities”), a member of the National Association of Securities Dealers, Inc. (“NASD”), and an affiliate of Moorgate Investments. Hughes was registered with the NASD as a General Securities Principal, but Aden was not registered with the NASD in any capacity.

The Complaint contains five causes, of which the first three apply to Hughes.<sup>2</sup> The first charges Hughes and Aden with fraud in the offer and sale of securities in violation of NASD Conduct Rules 2110 and 2120. More specifically, the first cause charges that the Private Placement Memorandum dated December 1, 1995, and revised June 26, 1996, and February 1, 1997, (collectively, the

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<sup>2</sup> The final two causes relate solely to Aden. Cause four charges Aden with effecting securities transactions while failing to be registered in violation of NASD Conduct Rule 2110 and NASD Membership and Registration Rule 1031, and the fifth cause charges Aden with failing to appear and answer questions in connection with NASD Regulation’s investigation of his activities, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. Because the case is continued as to Aden, these charges are not addressed in this Decision.

“Moorgate Investments PPM”) that Hughes prepared and then used to sell Moorgate Investments stock contained a number of material misstatements of fact. The second and third causes, which pertain only to Hughes, charge him with effecting private securities transactions, in violation of NASD Conduct Rules 2110 and 3040, and permitting Aden, an unlicensed person, to sell securities, in violation of NASD Conduct Rule 2110 and NASD Membership and Registration Rule 1031.

## **II. Procedural History**

The Department of Enforcement (“Enforcement”) filed the Complaint in this proceeding on April 7, 1999. Hughes answered the Complaint on May 18, 1999, and requested a hearing.

On February 7, 2000, a Hearing was held in Chicago before a Hearing Panel comprised of the Hearing Officer and two current members of the District Committee for District 8. Hughes appeared without counsel; Aden did not appear.

At the hearing, Enforcement and Hughes (collectively, the “Parties”) requested the Hearing Panel to assist them in reaching a settlement or otherwise disposing of the case without a full hearing. (Tr. 5-6, 9.) After advising Hughes that by requesting a settlement conference with the Hearing Panel he waived certain rights under the Code of Procedure, including any right to claim that the Hearing Panel was biased by the information it learned as a result of the settlement conference, the Hearing Panel conducted extensive off-the-record discussions with the Parties. Hughes offered to settle the charges against him by admitting that he effected private securities transactions and that he permitted an unregistered person to sell securities, as alleged in the second and third causes of the Complaint, and by neither admitting nor denying that he committed fraud, as alleged in the first cause of the Complaint. Hughes further offered to accept a bar from the industry and an order requiring that he pay restitution to

the purchasers of the Moorgate Investments stock. With one exception, Enforcement agreed to the terms of Hughes's offer. With respect to the fraud charge, Enforcement required Hughes, pursuant to Rule 9270, to consent to the finding that he committed the alleged offenses.<sup>3</sup> This Hughes would not do.

Hughes further explained to the Hearing Panel that he did not intend to participate in the hearing if a settlement could not be reached because he did not have evidence to refute the fraud charge. He felt that if he stayed for the hearing without presenting a defense, his silence could be construed as a tacit admission of fraud. Hughes desired to avoid the hearing by stating that he could not contest the fraud charge, leaving the Hearing Panel to make findings consistent with the record evidence.

After receiving comments from the Hearing Panel, the Parties announced that they had reached a settlement, the terms of which were that Hughes would admit to the violations in the second and third causes of the Complaint and that he would not contest the fraud charge in the first cause of Complaint. In effect, as to the first cause of the Complaint, Hughes desired to enter the equivalent of an Alford Plea, which permits a criminal defendant to plead guilty while protesting his or her innocence.<sup>4</sup>

Although a similar procedure is not provided for expressly in the NASD Code of Procedure, the Hearing Panel concluded that it was in the public interest and consistent with the NASD's regulatory obligations to accept an agreed resolution of a proceeding without requiring the respondent to consent to the findings against him where the evidence otherwise supports a finding that the respondent committed the alleged violations. Accordingly, the Hearing Panel accepted Hughes's uncontested

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<sup>3</sup> Code of Procedure Rule 9270(c)(4) requires that every offer of settlement contain a statement "consenting to findings of fact and violations" consistent with the charged rule violations.

<sup>4</sup> In North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court held that the accused could enter a plea of guilty while protesting his innocence where he was faced with overwhelming evidence of his guilt and stood

“settlement offer”<sup>5</sup> and permitted Enforcement to summarize its case. The Hearing Panel heard from an examiner with NASD Regulation, and Enforcement introduced 77 exhibits into evidence.<sup>6</sup> Hughes offered no evidence.

### **III. Findings of Fact**

#### **A. Background**

##### **1. The Respondents**

Hughes was associated with Moorgate Securities from May 1995 to August 1997. He was also associated with Corporate Securities Group, Inc. (“CSG”) from April 1996 to October 1996. At each he was registered as a General Securities Representative and a General Securities Principal. (CX 4, at 2.) His registrations at CSG terminated in October 1996, and his registrations at Moorgate Securities terminated on August 22, 1997. (Id.) Hughes is not currently registered. (Id.)

Aden has never been registered with the NASD. (CX 2.) Despite this, he was associated with Moorgate Securities where he served as a Director and Secretary of the corporation. (CX 34; CX 9, at

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to gain nothing from a trial. An admission of guilt is not an essential element to waiver of trial and acceptance of a guilty plea.

<sup>5</sup> Code of Procedure Rule 9270 does not provide for oral offers of settlement. The Rule requires that every offer be in writing and otherwise conform to the Rule. Once a hearing on the merits has begun, an offer of settlement shall be forwarded to the Hearing Panel for review. If the Hearing Panel accepts the offer, the Hearing Panel shall forward the offer and an order of acceptance to the National Adjudicatory Council (“NAC”) for its review. Here, the offer of settlement did not conform to the strictures of Rule 9270. Nevertheless, the Hearing Panel concluded that it would be an inefficient use of resources and an unnecessary burden on the customer witnesses to hold a full evidentiary hearing when neither Party desired one. Therefore, rather than issuing a proposed order of acceptance of settlement, the Hearing Panel has issued this Decision. In doing so, the Hearing Panel considered Hughes’s offer of settlement as a stipulation to: (1) the violations alleged in the second and third causes of the Complaint; (2) the sanctions to be imposed for any violations found by the Hearing Panel; and (3) the absence of evidence to refute the allegations of fraud in the first cause of the Complaint.

<sup>6</sup> Enforcement’s exhibits are referenced as “CX \_\_\_\_.” Enforcement submitted Exhibits CX 1-74 with its Pre-Hearing Submission, and Hughes stipulated to their admissibility. (Department of Enforcement’s Pre-Hearing Submission at 9.) Exhibits CX 75-77 were submitted at the Hearing.

1.) He also acted as a financial consultant for the firm's customers. (CX 59, at 59.) Aden resigned from the Moorgate Securities Board of Directors on February 27, 1997. (CX 34, at 60.)

## **2. Moorgate Securities and Moorgate Investments**

The record concerning the history of Moorgate Securities and Moorgate Investments is confusing. The documentation reveals that as early as January 1995 Hughes filed an application with the NASD to amend the name of Scott Enterprises, Inc., an Arizona corporation and registered broker-dealer, to Moorgate Investments. (CX 8.) But the same exhibit also contains applications filed in the name of Moorgate Securities under the same broker-dealer number (17646), and, on at least one form, Sherwin Scott is listed as a former owner. (CX 8, at 35.) Nevertheless, it is clear that by the time of the events in question in this proceeding Moorgate Securities was registered with the NASD as the successor to Scott Enterprises, and Moorgate Investments was not registered as a broker-dealer. (CX 13.)<sup>7</sup> In March 1997, the attorney for Moorgate Securities wrote to the NASD, in connection with Moorgate Securities' application for continuing membership with the NASD, to explain the relationship between the two companies. He stated that Moorgate Securities was an investment firm, which began in 1985 as Scott Enterprises, Inc. Moorgate Investments, on the other hand, was established in 1995 "solely to facilitate business outside the parameters of [Moorgate Securities]." (*Id.*) He further stated that Moorgate Investments primarily acted as a short-term lender to small businesses. (*Id.*)

The two companies were affiliated. Moorgate Investments was a shareholder of Moorgate Securities and, as its affiliate, Moorgate Investments had obligated itself to pay all of Moorgate Securities' fixed expenses. (CX 38.) During the period applicable to this proceeding, the two

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<sup>7</sup> See also, CX 42, at 12 (note 1 to audited financial statement of Moorgate Securities dated Dec. 31, 1995).

companies also shared the same officers and board of directors. Hughes was President, Treasurer and majority stockholder of each company, and Aden was their Secretary. (CX 34; CX 35; CX 43, at 13.)

### **3. The Moorgate Investments Private Placement**

Between January 18, 1996, and May 1997, Moorgate Investments—through Hughes and Aden—sold 21,790.87 shares of stock to at least 20 members of the public. (Stip. ¶ 1.) The purchasers paid a total of \$510,396 for the stock. (Id.) To facilitate these sales, Hughes and Aden sent these investors copies of the Moorgate Investments PPM. (Stip. ¶ 2; CX 14–16; CX 55.)

### **B. Misrepresentations in the Offer and Sale of Securities—Cause One**

Cause One of the Complaint asserts that Hughes directly and indirectly induced investors to purchase shares of Moorgate Investments stock by manipulative, deceptive and other fraudulent means. (Compl. ¶ 4.) The specific allegations of fraud fall into two categories: false information in the Moorgate Investments PPM and false statements Hughes and Aden made directly to purchasing investors.

#### **1. The Moorgate Investments PPM**

As to the Moorgate Investments PPM, Enforcement alleges, and the record supports, that the memorandum contained the following materially false information.

##### **a) Application and Use of Offering Proceeds**

The first version of the Moorgate Investments PPM stated that the corporation had been formed to, among other things, “acquire, run, and develop business and business related enterprises.” (CX 14, at 2.) The later versions stated that the purpose of its formation was “to invest in a carefully selected portfolio of transactions in real estate, stocks, commodities/futures, and venture capital.” (CX 15, at 2; CX 16, at 2.) The Moorgate Investments PPM further represented that one immediate project



Moorgate would undertake upon completion of the offering would “be to acquire and sell approximately 24–48 distressed real estate properties annually.” (CX 14, at 15; CX 15, at 16; CX 16, at 16.)

Hughes did not apply the proceeds to the purposes and objectives stated in the Moorgate Investments PPM. Indeed, there is no evidence that Moorgate Investments ever invested in real estate, stocks, or commodities/futures. Instead, Enforcement proffered, and the record corroborates, that Hughes used the proceeds (1) to pay some of his and Aden’s personal expenses; (2) to pay operating expenses of Moorgate Securities; and (3) to repurchase stock from some of the investors in Moorgate Investments. Enforcement further proffered that, if called to testify at the hearing, the customer witnesses designated on its witness list would state that they would not have purchased Moorgate Investments stock from Hughes and Aden if they had been told how the proceeds were actually going to be used. (Tr. 46.)

Enforcement’s proffer is wholly corroborated by six of the seven customer declarations that Enforcement submitted at the Hearing. (CX 75.) For example, customer SW states in his declaration that Aden told him that the private placement was an investment fund that invested in stocks and bonds. (Id., SW Decl. ¶ 2.) SW further states that Aden did not mention that the proceeds of the private placement would be used “to liquidate the investments of some of the other purchasers of Moorgate Investments shares, to pay the operating expenses of Moorgate Investments . . . and the personal expenses of Hughes and Aden, or to make approximately \$123,000 in loans to individuals and

businesses.” (Id.) Moreover, SW states that if he had been told of the true application of the private placement proceeds, he would not have invested in Moorgate Investments. (Id.)<sup>8</sup>

The Moorgate Investments PPM also stated that dividends would be paid only from Earned Surplus, which was defined as the “portion of the surplus of the Corporation equal to the balance of its net profits, income, gains and losses from the date of incorporation plus or minus any other items allocated to such amount in accord with usually accepted accounting standards.” (CX 14, at 11, 23.)<sup>9</sup> Moorgate Investments did not earn a profit however, and its financial statement dated December 1996 shows that it had not accumulated an Earned Surplus out of which it could pay dividends. (CX 47, at 2-4.) Indeed, the financial statement shows that Moorgate Investments had no operating revenue in 1996. (Id. at 3.) Nevertheless, Hughes permitted Moorgate Investments to distribute dividends to investors as early as June 30, 1996. These disbursements are reflected as “Dividend Reinvestment[s]” on the applicable customer account statements. (CX 58.) Thus, when Hughes distributed the Moorgate Investments PPM to potential investors after June 30, 1996, he knew it falsely stated that dividends would be restricted to the distribution of Earned Surplus.

**b) False Earnings Projections**

The Moorgate Investments PPM also contained unreasonable and unfounded earnings projections. Specifically, the memorandum projected that Moorgate Investments would earn 40% annually and that investors would receive a 20% return on their investments. (CX 14, at 38; CX 15, at 42; CX 16, at 47.) Without doubt, these projections are unwarranted. Moorgate Investments never

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<sup>8</sup> See also CX 75, EH Decl. ¶ 5, BH Decl. ¶ 6, LL Decl. ¶ 5, CM Decl. ¶ 4, and RP Decl. ¶ 5.

<sup>9</sup> Each version of the Moorgate Investments PPM contained the same restriction.

made money, and the vast majority of the funds it received from the private placement were diverted to support Moorgate Securities.

Between February 1, 1996, and December 27, 1996, Moorgate Securities passed corporate resolutions authorizing it to accept \$842,122.22 from Moorgate Investments. (CX 34, at 4-65.) In return, Moorgate Investments received just 25 shares of Moorgate Securities stock for the initial \$235,000 invested. (Id. at 9.) The balance was transferred to Moorgate Securities with no repayment agreement, which Hughes confirmed in writing on January 31, 1997, in a letter he wrote to Moorgate Securities on behalf of Moorgate Investments. (CX 38.) In this letter, Hughes memorialized the arrangement between the two companies. Moorgate Investments was obligated to pay all of the expenses of Moorgate Securities without charging them back at any time. (Id.) In other words, with the exception of the 25 shares of stock Moorgate Securities authorized to issue to Moorgate Investments, the remainder of the funds transferred from Moorgate Investments to Moorgate Securities was a gift. Moorgate Securities has no obligation to repay Moorgate Investments.

The application of the private placement proceeds to support Moorgate Securities under the foregoing terms leads to the incontrovertible conclusion that Moorgate Investments could not earn 40% per annum on the invested capital. By diverting substantially all of the proceeds of the private placement to Moorgate Securities, Moorgate Investments was left with little working capital. (CX 47.) As a result, Moorgate Investments could make only a few relatively small short-term-business loans and a few other small investments that could not produce enough return to meet Moorgate Investments fixed overhead. (CX 27-32.) Thus, the Hearing Panel finds that the earnings projections in the Moorgate Investments

PPM are false and that Hughes knew them to be false when he gave the memoranda to potential investors in 1996 and 1997.

The Hearing Panel further finds that after the first quarter of 1996, Hughes did not amend the earnings projections to accurately reflect that Moorgate Investments had not made a profit in any quarter in 1996. For example, the earnings projected for the first quarter of 1996 were \$89,100. (CX 16, at 46.) Because Hughes did not amend this figure after he knew that Moorgate Investments had no earnings in this quarter, a reasonably prudent investor could be misled to conclude that the figure represented actual results. Thus, the Hearing Panel finds that the Proforma Financial Statements attached to the Moorgate Investments PPM were false and misleading after March 31, 1996, because they did not include accurate information regarding Moorgate Investments' actual earnings.

## **2. False Statements**

Apart from the misstatements of fact in the Moorgate Investments PPM, the record also shows that Hughes made oral misstatements of material fact to investors and potential investors. For instance, in July 1996, Hughes and other representatives from Moorgate Investments and Moorgate Securities presented an investment seminar at the Monroe Club in Chicago. CM, one of the attendees, states in her declaration that at the seminar Hughes described the real estate rehabilitation projects Moorgate Investments was working on and that Hughes told the audience that they could expect a 20% annual return if they invested in the Moorgate Investments private placement. (CX 75, CM Decl. ¶ 1.) Later in a private meeting with Hughes, he reiterated his assurance that she would receive a 20% return if she invested in the Moorgate Investments private placement "because the . . . funds would be put in the stock market and mutual funds." (Id. ¶ 5.) As discussed above, these statements were false.

Moorgate Investments had not undertaken any real estate rehabilitation projects and there was no reasonable basis to support Hughes's statement that investors would receive a 20% annual return on their investments.

Relying on Hughes's representations, on or about July 29, 1996, CM purchased 400 shares of Moorgate Investments stock. At the time, CM was 22 years old. She earned approximately \$11,500 per year, had about \$12,800 in assets, and owed approximately \$12,000 in student loans. (Id. ¶¶ 3, 5.)

Similarly, RP states in his declaration that in or about April 1997 Hughes told him that both Moorgate Securities and Moorgate Investments were "financially 'solid; the companies were doing great,'" and he would get a 20% annual return if he purchased stock offered in the Moorgate Investments private placement. (CX 75, RP Decl. ¶ 2.) Relying on these representations, RP bought 100 shares. (Id.)

### **C. Private Securities Transactions—Cause Two**

The Second Cause of the Complaint asserts that Hughes was registered with CSG from April 23 to October 16, 1996, as a General Securities Representative, and during that time he sold 17,987 shares of Moorgate Investments stock to 12 individuals. The Second Cause further asserts that Hughes failed to give CSG written notice of his intent to engage in each of these sales, and CSG did not grant him prior approval to make the sales. (Compl. ¶¶ 9-10.) Finally, the Second Cause asserts that the failure to give such written notice for each sale was a violation of NASD Conduct Rules 3040 and 2110.

Before the hearing, Hughes stipulated to these allegations, and at the hearing Hughes admitted that he violated Rules 3040 and 2110, as alleged in the Complaint. (Tr. 9.) Accordingly, based

on his admission and the documentary evidence in the record, the Hearing Panel finds that Hughes engaged in the alleged private securities transactions without giving CSG written notice as required by Conduct Rule 3040.

**D. Permitting Unregistered Persons to Sell Securities—Cause Three**

The Third Cause of the Complaint asserts that Hughes permitted two unregistered persons, Respondent Aden and Terrance D. Hart, to engage in the securities business in violation of NASD Membership and Registration Rule 1031 and NASD Conduct Rule 2110. Hughes admitted to these violations (Tr. 9.), and the record supports the finding that Respondent Aden acted as a representative of Moorgate Securities and sold Moorgate Investment stock to members of the public.<sup>10</sup> Accordingly, based on his admission, the Hearing Panel finds that Hughes violated NASD Membership and Registration Rule 1031 and NASD Conduct Rule 2110, as alleged.

**IV. Conclusions of Law**

**A. Jurisdiction**

Jurisdiction in this proceeding over Respondent Hughes is based on Article V, Section 4 of the NASD By-Laws, which provides that the NASD retains jurisdiction over formerly registered representatives for two years after the effective date of termination of registration. During this period, the NASD may file a Complaint for conduct that commenced prior to the termination of registration.

Hughes's registration with the NASD terminated on August 22, 1997. Enforcement filed the Complaint, alleging violations while Hughes was registered, on April 7, 1999, which is within the two-

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<sup>10</sup> Enforcement did not introduce evidence regarding Terrance D. Hart.

year period of retained jurisdiction. Accordingly, the NASD has jurisdiction over Hughes in this proceeding.

## **B. Misrepresentations in the Offer and Sale of Securities—Cause One**

### **1. Violations of NASD Conduct Rule 2120**

NASD Conduct Rule 2120 provides that “[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.” To find that Hughes’s misrepresentations discussed above violated Conduct Rule 2120, the evidence must establish that: (1) the misrepresentations were made in connection with the purchase or sale of securities; (2) the misrepresentations were material; and (3) the misrepresentations were made with the requisite intent, *i.e.*, scienter.<sup>11</sup>

Scienter is the mental state of knowingly intending to deceive, manipulate or defraud.<sup>12</sup> Scienter is also established by a showing that a respondent acted with a severe recklessness, or conduct defined as highly unreasonable that involves not merely simple or excusable negligence, but an extreme departure from the standards of ordinary case.<sup>13</sup>

The facts found above satisfy each of the required elements. They establish that, in connection with the sale of Moorgate Investments stock to the purchasers listed on Schedule A to the Complaint, Hughes deliberately misrepresented Moorgate Investments’ earnings, prospects, and investments. As discussed above, Hughes misled investors by representing that Moorgate Investments had a solid

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<sup>11</sup> District Bus. Conduct Comm. for Dist. No. 9 v. Michael R. Euripides, Complaint No. C9B950014 (NBCC July 28, 1997).

<sup>12</sup> See Aaron v. SEC, 446 U.S. 680, 686-87 n.5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

<sup>13</sup> Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9<sup>th</sup> Cir. 1990).

operating history and that investors could expect to earn a 20% return on their investments. Hughes also deliberately misled investors by misrepresenting how Moorgate Investments was applying the proceeds it received from investors who purchased stock through the private placement. Nearly all of the funds raised were diverted to support Moorgate Securities. Little or none of the private placement proceeds was used to buy real estate, lend money to small and medium sized businesses for periods of 30-60 days, purchase options, or trade in bank paper, as Hughes represented it would be. (CX 18.) These misrepresentations were plainly material to the purchasers of Moorgate Investments stock.<sup>14</sup> Therefore, the Hearing Panel finds that Hughes violated NASD Conduct Rule 2120, as alleged in Cause One of the Complaint.

## **2. Violations of NASD Conduct Rule 2110**

NASD Conduct Rule 2110 requires that “[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.”<sup>15</sup> The Rule “articulates a broad ‘elastic’ standard [and] . . . appropriately encompasses the myriad types of misconduct that may injure public investors and the marketplace.”<sup>16</sup> It is axiomatic that conduct violative of Conduct Rule 2120 supports a violation of Conduct Rule 2110.<sup>17</sup> Having found that Hughes made

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<sup>14</sup> Material facts include those that affect the probable future of the company and that might affect the desires of investors to buy, sell, or hold the company’s stock. SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992).

<sup>15</sup> Rule 2110 is applicable to associated persons pursuant to Rule 0115(a), which states that “[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules.”

<sup>16</sup> In re Protective Group Securities Corp., Exchange Act Release No. 34547, 57 S.E.C. Docket 1080, 1994 SEC LEXIS 2516, at \* 21 (Aug. 18, 1994) (footnote omitted).

<sup>17</sup> See generally District Bus. Conduct Comm. No. 9 v. Euripides, 1997 NASD Discip. LEXIS 45, at \*16-23; Market Regulation Comm. v. Kevin Eric Shaughnessy, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at \*24-27 (NBCC June 5, 1997).



materially false and misleading statements in violation of NASD Conduct Rule 2120, the Hearing Panel also finds that Hughes violated NASD Conduct Rule 2110.<sup>18</sup>

## V. Sanctions

### A. Misrepresentations in the Offer and Sale of Securities—Cause One

Enforcement requests that Hughes be barred from associating with any member firm in any capacity and that he be ordered to pay restitution to the investors who purchased Moorgate Investments stock.

In cases of intentional or reckless misconduct, the Sanction Guideline on “Misrepresentations or Material Omissions of Fact” recommends, as a non-monetary sanction, a suspension of 10 business days to two years, or a bar in egregious cases.<sup>19</sup> Because the Hearing Panel finds that Hughes’s conduct was egregious, it agrees with Enforcement that a bar is appropriate in this case.

The evidence shows that Hughes deliberately deceived the purchasers of Moorgate Investments stock over a period of many months. Hughes had absolutely no reasonable basis for making, and continuing to make, the representations contained in the Moorgate Investments PPM. Hughes well knew as the sole officer and director of Moorgate Investments and as the principal of Moorgate Securities that the proceeds from the Moorgate Investments private placement were going to be used to fund the day-to-day operations of Moorgate Securities. Hughes also knew that Moorgate Investments

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<sup>18</sup> Even if the evidence were insufficient to support a finding of scienter or materiality, Hughes’s conduct would still violate Rule 2110. See, e.g., District Bus. Conduct Comm. No. 9 v. Euripides, 1997 NASD Discip. LEXIS 45, at \*18-19 (“A misrepresentation may violate Conduct Rule 2110 even where there is no finding of intent to mislead . . . and there is no need for a finding of materiality or harm to investors . . . . Proceedings instituted by the NASD . . . are instituted to protect the public interest, not to redress private wrongs. Thus it [is] unnecessary for the NASD to show that customers [are] in fact misled.”) (citations omitted).

<sup>19</sup> NASD Sanction Guidelines 80 (1998 ed.).

could not possibly earn a 20% return for the investors since Moorgate Securities was not even obligated to repay the principal it received from Moorgate Investments. In short, Hughes used the Moorgate Investments private placement to further his personal agenda, including the payment of some of his personal expenses, and he totally disregarded his duty to the investors. Against this backdrop of fraud, there are no mitigating factors that would justify allowing Hughes to remain in the securities industry. Accordingly, the Hearing Panel will bar Hughes from associating with any member firm in any capacity for the violations alleged in Cause One of the Complaint.

With respect to Enforcement's request for restitution, the Hearing Panel notes that restitution is a traditional equitable remedy designed to "restore the status quo where otherwise a . . . victim would unjustly suffer loss."<sup>20</sup> The NASD Sanction Guidelines generally recognize that, in cases where an identified individual has suffered a quantifiable loss as a result of a respondent's misconduct, it is fitting to order the respondent to pay restitution.<sup>21</sup>

In this case, Hughes and Enforcement have agreed that restitution should be paid for the violations alleged in the Second and Third Causes of the Complaint, and they have stipulated to the amount the investors listed in Schedule A of the Complaint lost. (Tr. 25.)<sup>22</sup> The Hearing Panel also considers the same restitution to be an appropriate remedy for the misrepresentations found under the First Cause of the Complaint. Accordingly, Hughes is ordered to pay restitution in the total amount of

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<sup>20</sup> In re David Joseph Dambro, 51 S.E.C. 513, 518 (1993).

<sup>21</sup> NASD Sanction Guidelines 6.

<sup>22</sup> The Parties stipulated that the amount was the total shown on CX 53 in the column headed "Investment Current Quarter." The column is incorrectly totaled. The actual total is \$834,103.64. The difference, \$723.40, corresponds to the amount shown to be due to Deidre A., the first person listed on CX 53. Accordingly, the Hearing Panel concluded that CX 53 erroneously omitted her from the total.

\$834,103.64 to remediate his misconduct found under the First Cause of the Complaint.<sup>23</sup> The amount payable to each customer is listed on the attached Schedule to this Decision.

**B. Private Securities Transactions—Cause Two**

For private securities transactions or “selling away,” the applicable NASD Sanction Guideline recommends that adjudicators consider suspending a respondent for up to two years and, in egregious cases, consider barring the respondent.<sup>24</sup> To determine the appropriate sanction within this range, in addition to the general factors that adjudicators should consider whenever imposing sanctions,<sup>25</sup> the Guideline suggests that adjudicators consider the following: (1) whether the respondent had a proprietary or beneficial interest in, or was affiliated with, the selling enterprise or issuer; (2) whether respondent attempted to create the impression that the employer member firm sanctioned the activity; (3) whether the selling away involved customers of the employer member firm; and (4) whether the individual provided the employer with verbal notice of all relevant factors and, if so, the firm’s verbal or written response, if any.

In this case, Hughes and Enforcement have agreed that the appropriate sanction is a bar and full restitution to the customers who purchased Moorgate Investments stock. The Hearing Panel finds that a

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<sup>23</sup> Hughes stipulated that the total loss is the amount identified in the column entitled “Investment Current QTR” in Exhibit CX 53, which also provides the names of all of the customers identified by their initials in Schedule A to the Complaint. Although the Sanction Guidelines also suggest that, when ordering restitution, adjudicators may consider requiring the respondent to pay pre-judgment interest on the base amount, calculated pursuant to 26 U.S.C. § 6621(a)(2), *i.e.*, the interest rate used by the Internal Revenue Service to determine interest due on underpaid taxes (NASD Sanction Guidelines 12), here the agreed amount includes interest. Accordingly, the Hearing Panel will not order further interest added to the agreed restitution amount. Although the Hearing Panel stated at the conclusion of the Hearing that it would add interest to the agreed restitution amount, on further consideration the Hearing Panel concludes that it would be inappropriate to do so.

<sup>24</sup> NASD Sanction Guidelines 15. A fine is not recommended where a bar is imposed. See Notice to Members 99-86 (Oct. 1999).

<sup>25</sup> NASD Sanction Guidelines 8-9.

bar is warranted under the forgoing guidelines.<sup>26</sup> First, it is clear that Hughes did not provide any notice—written or oral—to CSG of the subject transactions. Second, although there is insufficient evidence to determine whether Hughes intended to create the impression that CSG sanctioned the transactions, Hughes did locate CSG’s branch office with the offices for Moorgate Investments and Moorgate Securities thereby creating the risk that potential investors would conclude that CSG sanctioned the sales activities. Finally, as discussed above, Hughes’s “selling away” activities involved the use of fraud to induce investors to purchase shares of Moorgate Investments stock. These factors show that his conduct was egregious. Accordingly, Hughes is barred for his violations of Rules 3040 and 2110. Further, in accordance with the agreement and stipulation between Hughes and Enforcement, Hughes is ordered to pay restitution in the total amount of \$834,103.64. Hughes shall pay the restitution to the individuals and in the amounts shown on the attached Schedule A.

**C. Permitting Unregistered Persons to Sell Securities—Cause Three**

Here also, Hughes and Enforcement have agreed that the appropriate sanctions are a bar and full restitution to the customers who purchased Moorgate Investments stock. The Hearing Panel considers these sanctions appropriate in light of the egregiousness of Hughes’s activities and consistent with the applicable Sanction Guideline for “Registration Violations.”<sup>27</sup>

The Hearing Panel finds that Hughes actively participated in Aden’s sales activities while he was unregistered. For example, Hughes and Aden jointly presented promotional materials and seminars to

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<sup>26</sup> The Hearing Panel notes that the guideline for private securities transactions does not provide usually for restitution. The guideline does provide that adjudicators may increase the recommended fine by the amount of a respondent’s financial benefit. But, because Hughes offered to pay restitution as part of his agreement with Enforcement, the Hearing Panel will order restitution in this case.

<sup>27</sup> NASD Sanction Guidelines 43.

induce investors to purchase Moorgate Investments stock. Hughes also had to approve and process all of the sales for Moorgate Securities as he was the only principal in the office. This activity makes clear that Hughes knew that Aden was engaged in the securities business and that Hughes assisted Aden in violating the NASD Membership and Registration Rule 1031. There is nothing in the record that mitigates the seriousness of this violation. Accordingly, in accordance with the agreement between Hughes and Enforcement, Hughes is barred and ordered to pay restitution in the total amount of \$834,103.64. Hughes shall pay the restitution to the individuals and in the amounts shown on the attached Schedule A.

## **VI. Order**

Therefore, having considered all of the evidence Enforcement submitted, Respondent Marcus K. Hughes is barred from associating with any member firm in any capacity and ordered to pay restitution in the total amount of \$834,103.64 for the violations charged in Causes One, Two and Three of the Complaint. Hughes shall pay the restitution to the individuals and in the amounts shown on the attached Schedule A.

Marcus K. Hughes is further ordered to pay the costs of this proceeding in the amount of \$1,319.60, which includes an administrative fee of \$750 and hearing transcript costs of \$569.60.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date this Decision becomes the final disciplinary decision of the NASD; provided, however,

that the bars shall become effective immediately upon this Decision becoming the final disciplinary action of the NASD.<sup>28</sup>

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Andrew H. Perkins  
Hearing Officer  
For the Hearing Panel

Copies to:

Marcus K. Hughes (Airborne Express, next day delivery, and first-class mail)  
Christopher Aden (first-class mail)  
Dale A. Glanzman, Esq. (first-class and electronic mail)  
Rory C. Flynn, Esq. (first-class and electronic mail)

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<sup>28</sup> The Panel considered all the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the findings herein.

## Schedule A

<b>Customers</b>	<b>Restitution Amount</b>
Deidre A.	\$723.40
Diane A.	19,347.12
SB & DB	100,000.00
AB	1,019.73
KD	4000
RD	2183.01
CF	15,000.00
JD	5067.81
GF & EF	35,142.98
AH	14,164.28
EH & BH	1828.6
TH & TH	6642.47
RJ	10,000.00
The L&H Family Living Trust	1,027.85
GL	513.41
RL	6069.48
PL	4179.73
WL	4997.53
JL	51,687.20
SL	30,030.96
LL	13,750.00
GL	527.85
GM & VM	1,413.70
Courtney M.	11,878.33
RM & CM	5,561.24
JN	113,400.65
JN & JD	25,194.71
MP	11,000.00
RP	2,500.00
CR	1,323.67
JR	113,578.63
CR	19,635.07
VS	2,154.52
MS & OS	5,095.89
WS & LS	7,000.00
WT & DT	74,240.38

TT	32,091.14
CV	5,747.12
<b>Customers</b>	<b>Restitution</b>
	<b>Amount</b>
AW	\$1,319.86
SW	1,253.80
MW & EW	69,311.52
HW	2,500.00
<b>TOTAL RESTITUTION</b>	<b>\$834,103.64</b>