NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A990031
v.	:	
	:	Hearing Officer - EAE
CHARLES W. TESTINO	:	
(CRD #1216651)	:	**HEARING PANEL DECISION**
Tucson, Arizona,	:	
	:	March 9, 2000
Respondent.	:	

DIGEST

On May 13, 1999, the Department of Enforcement ("Enforcement" or "Complainant") filed a Complaint against Charles W. Testino ("Respondent") alleging that he violated NASD Conduct Rules 2110 and 3040 by engaging in private securities transactions without giving prior written notice to his employer. At the time of the alleged violations, Respondent was associated with NASD member firm SunAmerica Securities, Inc. ("SunAmerica").

Respondent stipulated to the relevant facts and that he violated Rule 3040, and the Hearing Panel found that the stipulated facts also established a violation of Rule 2110. Based on the evidence, the Hearing Panel: (1) required Respondent to requalify as a Series 6 (Investment Company and Variable Contracts Products Representative) within 60 days, (2) fined Respondent $60,000 ($10,000 fine and $50,000 disgorgement of selling commissions),

and (3) suspended Respondent in all capacities for 60 days, such suspension to run concurrently with requalification.

The Panel assessed the costs of the Hearing $1,460.30 ($710.30 for the transcript and $750.00 administrative fee) against Respondent.

APPEARANCES

Roger D. Hogoboom, Jr., Esq., Regional Counsel, NASD Regulation, Inc., Department of Enforcement, District 3, Denver, CO. and Rory C. Flynn, Esq., Chief of Litigation, NASD Regulation, Inc., Department of Enforcement, Washington, D.C.

Lindsay Brew, Esq., Haralson, Miller, Pitt & McAnally, P.L.C., Tuscson, AZ for Respondent.

DECISION

I. Summary Of The Case and Statement of Facts

Prior to the Hearing, Respondent stipulated to the facts set forth below.

From November 1993 to September 1998, Respondent was associated with SunAmerica and registered with the NASD as a Series 6, Investment Company and Variable Contracts Products Representative.[1] Respondent admits that, from April 1997 through August 8, 1998, he referred approximately thirty-two individual investors to Oxford Development, LLC for the purpose of investing in Oxford promissory notes ("the Oxford Notes").[2] These thirty-two individuals purchased forty Oxford Notes totaling at least $1,216,161.[3] Eleven of the

[1] Joint Stipulations at ¶¶A1 and A2. At the time the Complaint was filed, Respondent was associated with Washington Square Securities, Inc. ("Washington Square"), an NASD member firm.

[2] Id. at ¶B1. Respondent stipulated and agreed that the Oxford Notes were securities. Id. at ¶B4. The Oxford Notes were used to pay short term expenses attendant to a real estate venture known as the Dacono Project. Transcript ("Tr") of December 7, 1999 Hearing at 13-14, 21-22, 26-28. The investors were to receive their funds back, with substantial interest, when the project closed.

[3] Id. at ¶B2. Eight individuals purchased more than one Note for a total of forty transactions.

individual investors maintained accounts at SunAmerica and purchased approximately $490,000 in Oxford Notes from Respondent, their registered representative.[4] Respondent received approximately $167,000 in compensation for his referrals.[5]

Respondent admitted that he failed to provide SunAmerica with prior written notification of his participation with respect to the Oxford Note transactions[6] and that his conduct violated NASD Conduct Rule 3040.[7]

The Parties presented evidence to the Panel with respect to the issue of sanctions only. Five witnesses testified in support of Respondent: Keith Davis ("Davis"), a fund raiser for the Dacono Project who contacted Respondent concerning potential investors; Timothy Shelnut, a business associate of Respondent; JH and CB, Respondent's clients who purchased Oxford Notes; and Timothy Althus, a broker who worked with Respondent at SunAmerica and, subsequently, at Washington Square. Respondent also testified.[8] Complainant presented no witnesses.

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[4] Id. at ¶B3.

[5] Id. at ¶B5.

[6] Id. at ¶B6.

[7] Id. at II. Respondent was unwilling to admit that his conduct also violated NASD Conduct Rule 2110, but conceded that for purposes of sanctions it probably made no difference. See Transcript of Proceedings ("Pre-Hearing Conference Tr."), November 30, 1999 at 7-9.

[8] Respondent also made an offer of proof for a witness, Constance Wolfson, who the Panel did not permit to testify. Tr. at 73-74. Ms. Wolfson would have been called solely as a character witness.

With the exception of the two customers, the Panel determined that the testimony of Respondent's witnesses was immaterial to the factors to be considered in determining sanctions.[9]

II. Conclusions of Law

Respondent admitted that his conduct violates NASD Conduct Rule 3040(b) which provides in pertinent part "prior to participating in any private securities transactions, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction * * *." Respondent acknowledges that he never provided such notice.[10]

The Panel finds that Respondent's conduct also violates NASD Conduct Rule 2110.[11] The SEC has "a long-standing and judicially recognized policy that a violation of another Commission or NASD Rule or regulation, including Conduct Rule 3040, constitutes a violation of Conduct Rule 2110."[12] Further, the SEC has held that a violation of another NASD rule

[9] Prior to the Hearing, Respondent's counsel was advised that most of the testimony he was intending to offer on behalf of Respondent was irrelevant for purposes of determining sanctions. Pre-Hearing Conference Tr. at 12-22. Further, the Panel did not permit Mr. Althus to testify concerning his knowledge as to Respondent's financial condition as it was affected by his termination at SunAmerica since Respondent's counsel was unprepared at the Hearing to submit the required evidence to support an inability to pay defense, which had not been raised previously. Tr. at 67-72. The Panel, however, did allow Respondent to testify generally as to his current financial condition.

[10] Respondent also admitted receiving selling compensation.

[11] The NASD Sanction Guidelines ("the Guidelines" at 15) make clear that a violation of NASD Conduct Rule 3040 also is a violation of NASD Conduct Rule 2110.

[12] In re Stephen J. Gluckman, Exchange Act Rel. No. 1628, 1999 SEC LEXIS 1395, *22 (July 20, 1999).

constitutes a violation of just and equitable principles of trade even when the respondent acted in good faith.[13]

III. Sanctions

The applicable Sanction Guideline for Selling Away (Private Securities Transactions) recommends a fine of $5,000 to $50,000, a suspension for up two years and, in egregious cases, a bar. The Guideline advises that adjudicators may consider increasing the fine by adding the amount of the respondent's financial benefit.[14]

In addition to the principal considerations adjudicators always should consider in determining sanctions,[15] the applicable Guideline advises adjudicators to consider (1) whether respondent had a proprietary or beneficial interest in, or otherwise was affiliated with, the selling enterprise; (2) whether respondent intended to create the impression that his member firm sanctioned the activity; (3) whether the selling away involved customers of the firm; and (4) whether the respondent provided his member firm with verbal notice of his activity.[16]

Here there is no evidence that Respondent had a proprietary or beneficial interest in the selling enterprise or that he intended to create the impression that his member firm sanctioned the activity.[17] Respondent's conduct, however, did involve customers of SunAmerica and there is no evidence that Respondent provided his member firm with verbal notice of his activity.

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[13] In re Clinton Hugh Holland, Jr., Exchange Act Rel. No. 36621 (December 21, 1995), aff'd, 105 F.3d 665 (9th Cir. 1997)(Table).

[14] Guidelines at 15.

[15] Guidelines at 8-9.

[16] Guidelines at 15.

In addition to the foregoing, the Panel considered that Respondent accepted full responsibility for his conduct, candidly admitted that he made a mistake and that his conduct violated NASD Conduct Rule 3040, and was cooperative with the NASD during its investigation.[18]

Respondent did not attempt to mislead anyone or to conceal his conduct.[19] The customer witnesses, who have been investing with Respondent for many years, were very supportive. Even though they have yet to recoup their investment, the purport of their testimony is that they trust Respondent and that he did not misrepresent the nature of the investment.[20] In addition, Respondent has no prior disciplinary history.[21]

Further, Respondent already has been penalized for his conduct. He was terminated by SunAmerica in September 1998 and he has had almost no income since then. As a result, he has suffered adverse financial consequences.[22]

The Panel recognizes that the purpose of sanctions is not punitive, but remedial.[23] Based on the evidence at the Hearing, the Panel concludes that Respondent used poor

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[17] Complainant admitted this in its Pre-Hearing Submission-Case Summary at 5 and also in its opening statement. Tr. at 8. Further, the two investor witnesses testified that Respondent never suggested that SunAmerica sanctioned or endorsed the activity and that they invested in the project solely on the basis of Respondent's recommendation. Tr. at 46, 57.

[18] See Complainant's Pre-Hearing Submission-Case Summary at 5 and Tr. at 78, 83-84.

[19] The selling away was discovered during a routine internal audit by SunAmerica when Respondent made all his files available for review. Tr. at 84, 108.

[20] Tr. at 44-45, 56-58.

[21] The Panel recognizes that this is not to be considered a mitigating factor pursuant to the decision of the National Adjudicatory Council in In re Balirer, Complaint No. C07980011 (October 18, 1999). In evaluating the seriousness of Respondent's misconduct, however, the Panel thought it appropriate to consider that there is no evidence that Respondent, who has been in the securities industry since 1993, ever engaged in any similar misconduct.

judgment, but that his conduct was an aberration. Further, Respondent is providing a service to long-standing clients who speak highly of him. Based on his testimony, the Panel finds that Respondent does not have the financial means to disgorge the full amount of his selling commissions and, accordingly, that requiring him to do so would not serve any remedial purpose. Because, however, the purpose of the Guidelines also is to "deter future misconduct and to improve overall business standards in the securities industry,"[24] the Panel finds that Respondent should be required to disgorge a significant portion of his selling compensation.

Accordingly, for violations of NASD Conduct Rules 2110 and 3040 as alleged in the Complaint, the Panel requires Respondent to requalify as a Series 6 within 60 days, fines Respondent $60,000 ($10,000 fine and $50,000 disgorgement of selling commissions), and suspends Respondent in all capacities for 60 days, such suspension to run concurrently with requalification.

CONCLUSION

The Panel finds that Respondent violated NASD Conduct Rules 2110 and 3040 as alleged in the Complaint by engaging in private securities transactions without prior written notice to his employer member firm and that the following sanctions are appropriate: (1) requalification as a Series 6 within 60 days, (2) a fine of $60,000 ($10,000 fine and $50,000 disgorgement of selling commissions), and (3) a suspension in all capacities for 60 days, such suspension to run concurrently with requalification.

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[22] Tr. 81-83.

[23] Guidelines at 3, ¶1.

[24] Id.

These sanctions shall become effective on a date determined by the Association, but no sooner than thirty days from the date this decision becomes the final disciplinary action of the Association.[25]

THE HEARING PANEL

By_____
Ellen A. Efros
Hearing Officer

Copies to: Charles W. Testino (via over-night delivery and first class mail)
Lindsay Brew, Esq. (via over-night delivery and first class mail)
Roger D. Hogoboom, Esq. (via first class and electronic mail)
Rory C. Flynn, Esq. (via first class and electronic mail)

[25] The Hearing Panel considered all the argument of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the findings herein.