NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

HORNBLOWER & WEEKS, INC.
(CRD No. 4683),
110 Wall Street
New York, NY 10005,

JOHN R. ROONEY
(CRD No. 2511607),
240 E, 47th Street, Apt. 20D
New York, NY 10017,

ERIC ELLENHORN
(CRD No. 2199395),
P.O. Box 16
Quogue, NY 11959,

and

PAUL E. TABOADA
(CRD No. 2033981),
2916 Riverside Drive
Wantagh, NY 11793,

Respondents.

Disciplinary Proceeding
No. CAF020022

Hearing Officer—Andrew H. Perkins

EXTENDED HEARING PANEL DECISION

March 10, 2004

Rooney, Ellenhorn, and the Firm issued a research report in violation of the terms of a suspension imposed by NASD. For this violation, Rooney is barred in all capacities, the Firm is expelled from NASD membership, and Ellenhorn is suspended in all capacities for two years and fined $55,000. In addition, Ellenhorn is fined $25,000, and he and Rooney are barred in all principal

capacities for their failure to adequately supervise Taboada in connection with the preparation and release of the research report. Finally, Taboada is suspended in all capacities for six months and fined $25,000 for issuing a research report containing material misrepresentations and omissions.

Appearances

Helen G. Barnhill and Rebecca A. Donnellan, NASD, Washington, DC; Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel, for the Department of Enforcement.

David A. Schrader, SCHRADER & SCHOENBERG, LLP, New York, NY, for Paul E. Taboada.

Jerome M. Selvers, SONNENBLICK, PARKER & SELVERS, PC, Freehold, NJ, for Hornblower & Weeks, Inc., John R. Rooney, and Eric Ellenhorn.[1]

DECISION

I. INTRODUCTION

The Department of Enforcement ("Department") filed the Amended Complaint on December 16, 2002. The Amended Complaint contains four causes of action. The first cause of action alleges that Hornblower & Weeks, Inc. ("Hornblower" or the "Firm"), John R. Rooney ("Rooney"), the Firm's President, and Eric Ellenhorn ("Ellenhorn"), the Firm's Chief Executive Officer, violated the May 7, 2002, Letter of Acceptance, Waiver and Consent (the "MyTurn AWC") and NASD Conduct Rule 2110 by issuing a research report entitled "Marketing Letter" (the "Marketing Letter") for American Diversified Group, Inc. ("ADGI"). The MyTurn AWC had suspended Hornblower from issuing research reports for six months. The second cause of action alleges that the Marketing Letter contained exaggerated, unwarranted, and misleading statements and failed to disclose material facts and risks

[1] On September 29, 2003, Mr. Selvers withdrew as counsel for Hornblower & Weeks, Inc., John R. Rooney, and Eric Ellenhorn. At the hearing, Ellenhorn represented himself and Hornblower, and Rooney represented himself.

concerning ADGI. The Complaint therefore charges Hornblower and Paul E. Taboada ("Taboada"), the Marketing Letter's author, with violations of NASD Conduct Rules 2110, and 2210(d)(1)(A) and (d)(1)(B). The third cause of action alleges that Ellenhorn and Rooney failed to supervise Taboada in his drafting and release of the Marketing Letter, in violation of NASD Conduct Rules 2110 and 3010. Finally, the fourth cause of action alleges that Ellenhorn failed to establish, maintain, and enforce supervisory systems reasonably designed to ensure that research reports the Firm issued complied with all applicable rules, laws, and regulations. The fourth cause of action also specifically charges that Ellenhorn failed to correct certain deficiencies in the Firm's supervisory systems and procedures relating to research reports that had been identified in connection with the MyTurn investigation. The Complaint alleges that by failing to correct these deficiencies, Ellenhorn violated NASD Conduct Rules 2110 and 3010.

Each Respondent answered, denied the charges, and requested a hearing. The hearing was held in New York, NY, on October 8, 9, 10, and 14, 2003, before an Extended Hearing Panel composed of the Hearing Officer, a former member of the District 11 Committee, and a former member of the District 5 Committee.[2]

II. FINDINGS OF FACT

The Department opened an investigation into Hornblower's release of the Marketing Letter upon a referral from NASD's Department of Market Regulation.[3] Apparently, the Market Regulation Department was concerned about the Marketing Letter because it appeared to be a "research report,"

[2] References to the hearing transcript are cited as "Tr. __"; references to the Department's exhibits are cited as "C–"; and references to the Respondents' exhibits are cited as "R–."

which Hornblower was prohibited from issuing under the terms of the MyTurn AWC.[4] In addition, the Department of Market Regulation was concerned that the Marketing Letter may be misleading. Accordingly, the Department opened an investigation to determine if the Marketing Letter complied with NASD's rules and the federal securities laws.[5]

Following a review of the Marketing Letter, NASD staff concluded that it was misleading and that it constituted a research report. Accordingly, the Department commenced this enforcement action against the Firm and those responsible for drafting and issuing the Marketing Letter.

A. The Respondents

1. Hornblower & Weeks, Inc.

Hornblower was a registered broker-dealer based in New York City and a member of NASD. In October 2002, Hornblower filed a request to withdraw its broker-dealer registration, which request became final on December 21, 2002.[6] On May 20, 2003, NASD expelled Hornblower for failing to pay fines and costs that NASD had assessed as a result of the MyTurn AWC.[7]

2. John Rooney

Rooney first entered the securities industry in 1994.[8] He registered with NASD as a General Securities Representative in October 1994 and as a General Securities Principal in December 1994.

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[3] Tr. 136.

[4] Tr. 562.

[5] *Id.* at 135.

[6] Ex. C–2, at 2.

[7] *Id.;* Tr. 192.

[8] Ex. C–1, at 3.

During the relevant period, Rooney served as the Firm's President and Director of Research.[9] In addition, Rooney owned 60% of Hornblower Financial, Hornblower's parent company.[10]

Pursuant to the terms of the MyTurn AWC, Rooney was suspended in all capacities for three months commencing June 3, 2002, and thereafter for an additional four months in his principal and supervisory capacities.[11] Rooney also consented to a fine of $85,000.

Rooney left Hornblower and his registrations terminated on October 22, 2002. Since then, he has not been registered or associated with an NASD member firm.[12]

3. Eric Ellenhorn

Ellenhorn first entered the securities industry in 1991.[13] Before joining Hornblower in April 1997, Ellenhorn worked at several NASD member firms.[14] He served as Hornblower's Chief Executive Officer and, at times, its Compliance Officer.[15] Ellenhorn owned 40% of Hornblower Financial. Ellenhorn left Hornblower on October 22, 2002, and since then he has not been registered or associated with an NASD member firm.[16]

4. Paul E. Taboada

Taboada has been in the securities industry for approximately 12 years.[17] He first

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[9] Tr. 187–88, 204.

[10] *Id.* at 193.

[11] Ex. C–5.

[12] Ex. C–1, at 3; Tr. 185, 195.

[13] Ex. C–3, at 2.

[14] *Id.*

[15] Tr. 365.

[16] *Id.* at 366; Ex. C–3, at 3.

[17] Ex. C–4, at 2.

registered as a General Securities Representative in February 1990.[18] Since then, he has worked at several broker-dealers. From 1990 to 1993, Taboada engaged in retail brokerage services. Then, in or about 1993, he gradually began to shift his emphasis to investment banking, including private placements, corporate finance, and mergers and acquisitions. His investment banking business increased over the next six years, and, in 1999, Taboada joined Hornblower as Director of Corporate Finance.[19] Taboada brought ADGI with him to Hornblower.

Rooney and Ellenhorn supervised Taboada. Rooney supervised Taboada's trading and research activities, and Ellenhorn supervised him for all other activities.[20]

Although Taboada had more than six years of experience in investment banking, he had limited experience in authoring and issuing research reports. Taboada testified that while he was at Hornblower he participated in preparing only a few research reports and similar documents.[21] In each case, he worked on the document with Rooney, his supervisor.[22] Under no circumstance did Taboada have the authority to issue marketing materials without Rooney's and Ellenhorn's approvals.

Taboada left Hornblower in August 2002. Currently, he is associated with Fordham Financial Management, Inc.[23] ADGI[24] remains one of his clients.

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[18] *Id.* at 8.

[19] Tr. 372, 477–80; Ex. C–4, at 4.

[20] Tr. 371–72.

[21] *Id.* at 486.

[22] *Id.* at 486–89.

[23] *Id.* at 446; Ex. C–4, at 3.

[24] ADGI changed its name in July 2002 to GlobeTel Communications Corporation. (Tr. 280–81.)

B. The Marketing Letter

On January 7, 2002, ADGI and Hornblower entered into an investment banking agreement (the "Agreement").[25] Among the various services listed in the Agreement, Hornblower contracted to give ADGI exposure to exchanges, broker-dealers, financial institutions, and money managers. Jerrold Hinton, ADGI's President, testified that ADGI had retained Hornblower to assist ADGI with market exposure, public relations, and market support because ADGI did not have direct contact with the market, the brokerage community, other investment bankers, or market makers.[26] To gain this market exposure, and as part of ADGI's strategic planning, ADGI and Hornblower intended to draft and issue several information pieces.[27] Hinton envisioned that ADGI and Hornblower would issue these marketing pieces in progressive stages as the company grew.[28] The first step was to draft and issue a general "marketing letter" to educate the investment community about ADGI and its goals.[29]

ADGI assembled the Marketing Letter using its own staff and resources and sent it to Taboada for his review and input. Over the course of several weeks starting in April 2002, Taboada and Rooney made a number of edits to the draft and substantially condensed the material ADGI provided.[30] Although the executives at ADGI believed that they could do a better job describing the company's

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[25] Ex. C–31.

[26] Tr. 286–87.

[27] *Id.* at 287.

[28] *Id.* at 287–88. Taboada, however, testified at his on-the-record interview on September 19, 2002, that ADGI at first requested that Taboada prepare a research report on ADGI. According to Taboada, he declined to do so because the Company was not "fundamentally sound." (Ex. C–22, at 84.)

[29] *Id.* at 289–90.

[30] *Id.* at 495, 497–500.

business and plans, ADGI specifically wanted the Marketing Letter to go out with Hornblower's name on it to provide an "element of credibility."[31]

Hornblower issued the Marketing Letter[32] on May 28, 2002. Taboada is shown as the author.

The Marketing Letter, which consists of 11 single-spaced pages, provides a detailed analysis of ADGI and the telecommunications industry. On the first page, the Marketing Letter sets forth ADGI's market price, market capitalization, and 52-week price range. The first page also provides a 52-week price and volume chart for the stock and a general description of the company. The Marketing Letter advises that ADGI's core business is the international sale of telecommunications services, which primarily involves transmission of voice data over the Internet. The letter also provides an overview of the evolution of the telecommunications industry, with an emphasis on the issues relating to the transmission of voice data over the Internet, and a discussion of ADGI's telecommunications operations. The Marketing Letter sums up this discussion by stating that "the telecommunications industry and the investment community agree that one of the most promising new technologies in the telecommunications market remains Voice-over-Internet-Protocol" ("VoIP"),[33] one of ADGI's developing technologies. The Marketing Letter states that VoIP technology is experiencing an "impressive growth rate."[34] In summary, the Marketing Letter states that ADGI is particularly well-situated to take advantage of foreign market deregulation because of its ability to offer low-cost high-quality telecommunications services where telecommunications costs remain high and the availability of

[31] *Id.* at 293–294.

[32] Ex. C–18.

[33] *Id.* at 4.

[34] *Id.*

affordable bundled services (such as ADGI's) remain limited. According to the Marketing Letter, ADGI plans to expand into Asia, Central America, and South America.[35]

The remainder of the Marketing Letter is divided into the following main sections:

1. **The ADGI Networking Strategy**, which provides a detailed description of ADGI's business model and strategies;

2. **Network Build-Out Plan**, which describes ADGI's three-stage service deployment plan;

3. **ADGI—The Competitive Edge**, which lists eight factors "that make ADGI particularly well situated and qualified to successfully carry out [its] strategy";[36] and

4. **Catalysts**, which concludes by summing up why ADGI is "positioned to exploit the upside potential of the vast expansion of the Internet."[37]

The Marketing Letter is replete with glowing, unbalanced statements regarding ADGI's plans, strategies, and prospects; and it is devoid of any meaningful disclosure of the substantial obstacles and risks facing ADGI. The following are examples of the positive, unbalanced statements contained in the Marketing Letter:

1. The implied comparison of ADGI's expansion potential to companies such as MCI Communications Corporation that accomplished a "virtual overnight expansion" in the domestic telecommunications market.[38]

2. Given the favorable telecommunications market conditions in its target foreign countries, "ADGI's business model has strong prospects for success."[39]

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[35] *Id.*

[36] *Id.* at 9–10.

[37] *Id.* at 10–11.

[38] *Id.* at 2.

[39] *Id.* at 9.

3. "ADGI is positioned as a premiere provider of communication products and services and enhanced value-added services.…"[40]

4. "Ultimately, ADGI's established operations, array of services and customer base will make it an attractive potential takeover target for the large international [telecommunications companies].… The benefits of this for ADGI's shareholders and investors are obvious."[41]

5. "We believe ADGI is positioned to exploit the upside potential of the vast expansion of the Internet."[42]

In addition, the Marketing Letter fails to include information about its financial problems. It did not disclose, for instance, that as of December 31, 2001, ADGI had a net loss of $1,193,328 and an accumulated deficit of $21,612,935. The letter also does not tell potential investors that ADGI's auditors had issued a going concern opinion for the company and that the company was relying on loans from its executive officers and directors to pay operating expenses.

2. Approval and Release

Taboada completed the draft in late May 2002 and took it to Rooney for his approval.[43] Rooney told Taboada that he could not provide further input because he was about to start his suspension pursuant to the MyTurn AWC. Rooney was quite upset about the suspension, and he made clear at the hearing that he could not be bothered with reviewing the Marketing Letter. Instead, Rooney took Taboada to Ellenhorn.

[40] *Id.* at 10.

[41] *Id.*

[42] *Id.* at 11.

[43] Tr. 503.

Rooney, Taboada, and Ellenhorn met briefly, and Taboada asked if he could release the Marketing Letter.[44] Ellenhorn raised the issue of whether the Marketing Letter might violate the suspension under the terms of the MyTurn AWC. In response, Rooney and Taboada told Ellenhorn that the Marketing Letter did not contain a recommendation to buy or sell ADGI stock.[45] Nevertheless, Ellenhorn wanted to check with his attorney to confirm that releasing the Marketing Letter would not violate the MyTurn AWC.[46] Ellenhorn immediately called his attorney, but he was not available. Accordingly, Ellenhorn directed Taboada to delay releasing the Marketing Letter. Ellenhorn told Taboada that he would be back to him after he spoke to his attorney.[47]

Ellenhorn's and Taboada's accounts of what happened next differ markedly. Ellenhorn contends that he never authorized Taboada to release the Marketing Letter. Ellenhorn testified that he did not speak to his attorney until after Taboada issued the Marketing Letter.[48] Ellenhorn contends that he first learned of the letter's release while he was on vacation. Ellenhorn testified that he received a telephone call from Hornblower's chief financial officer who said that the Firm had received a facsimile from the Department dated June 25, 2002, demanding an explanation for the release of the Marketing Letter.[49] The Department's letter stated that the Marketing Letter had been posted on the website "TheStockbroker.com" and that the Marketing Letter appeared to violate the terms of the suspension

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[44] *Id.* at 380.

[45] *Id.* at 383.

[46] *Id.* at 385–86.

[47] *Id.* at 380.

[48] *Id.* at 385–387.

[49] *Id.* at 388; Ex. C–38 (Letter dated June 25, 2002, from Thomas B. Lawson, Chief Counsel for the Department of Enforcement, to Hornblower's attorney).

imposed by the MyTurn AWC. The Department further pointed out that ADGI had issued a press release dated May 31, 2002, which stated, among other things, that Hornblower had issued an "in-depth Marketing Letter and Report on ADGI."[50]

Taboada, on the other hand, testified that Rooney approved the Marketing Letter to be included in an "investor package" on ADGI and that Ellenhorn authorized its release after talking to his attorney.[51] According to Taboada, within a few days of their meeting in Ellenhorn's office, Rooney came to Taboada and said, "I think we can go to print, check with [Ellenhorn]."[52] Taboada understood Rooney's comment to mean that he could distribute the Marketing Letter, but only as part of an investor package that contained other detailed information about ADGI. Taboada understood that distribution would be limited in this manner because he had never requested broader authorization; the Marketing Letter was always intended to be included in an investor package.[53] Taboada further testified that he understood that "[a]ny other use of the marketing letter would require additional sign-offs."[54]

As to Ellenhorn's approval, Taboada testified that Ellenhorn tried to contact his attorney for a couple of days. Then, in two separate conversations, Ellenhorn told Taboada that he could send out the Marketing Letter.[55]

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[50] Ex. C–38.

[51] Tr. 521–25.

[52] *Id.* at 522.

[53] *Id.* at 522–23.

[54] *Id.* at 523.

[55] *Id.* at 524–33.

The Hearing Panel concludes that Rooney and Ellenhorn approved the release of the Marketing Letter. Taboada's version of events is more credible than both Rooney's and Ellenhorn's. Indeed, for the reasons discussed below, the Hearing Panel concludes that Rooney lacked any credibility. Accordingly, the Hearing Panel rejected his testimony where it was contradicted by other evidence. The Hearing Panel further finds that Ellenhorn's denial that he approved the letter's release is undermined substantially by his inability to provide an explanation of his claimed lack of knowledge of its release until nearly a month later. Given the size of the Firm, and Ellenhorn's essential role within the Firm, his claim appears questionable. Once Rooney left to serve his suspension, Ellenhorn was the only registered principal with the authority to approve the printing and mailing of the ADGI investment package. Certainly, Ellenhorn knew that Taboada mailed hundreds of the ADGI investment packages to potential investors, yet Ellenhorn raised no concern until late June 2002 when the Department requested information about the release and distribution of the Marketing Letter.

The inconsistencies between Ellenhorn's and Rooney's testimony at the hearing and their testimony at their on-the-record interviews further damaged their credibility. On key points, they varied their testimony to avoid culpability. For example, on the critical question concerning their approval of the Marketing Letter, at their on-the-record interviews, they testified that each was relying on the other to call outside counsel to verify that the Marketing Letter would not violate the terms of the MyTurn AWC. At the hearing, however, Ellenhorn admitted that he made the call and stated that he was the one who would advise Taboada if he could release the Marketing Letter.

C. Distribution

Once Ellenhorn granted approval to release the Marketing Letter, Taboada immediately began

to distribute it. Taboada advised ADGI that Hornblower's compliance department had approved the Marketing Letter, and, therefore, ADGI could begin to distribute it.[56] On May 28, 2002, the same day as the date of the Marketing Letter, ADGI had the letter published on the website known as TheStockbroker.com, which gave the public immediate access to the letter. Although Taboada denies that he knew that ADGI was going to publish the Marketing Letter on the Internet, Hinton testified that they had discussed posting the letter on TheStockbroker.com website and that Taboada never objected to it being on the website.[57] Moreover, Taboada testified at his on-the-record interview that he had a conference call with several executives at ADGI several days before the Marketing Letter was posted on TheStockbroker.com during which he told them the letter could be disseminated once it was approved by the Firm.[58] Taboada testified that he meant that if the Marketing Letter was approved it could be disseminated as part of an investor package.[59]

In addition, Hinton wanted to publish the Marketing Letter on ADGI's Internet site. But he knew also that Hornblower had been suspended from issuing research reports. Taboada had told Hinton that Hornblower's compliance department would have to approve any publication of the Marketing Letter on the Internet. Thus, on May 31, 2002, Hinton sent Taboada an email seeking his approval to post the Marketing Letter on the company's website.[60] According to Hinton, Taboada advised him that his compliance department approved the request, and ADGI posted the Marketing

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[56] Tr. 306.

[57] Tr. 303–04.

[58] Tr. 451–52.

[59] Tr. 452.

[60] Tr. 301.

Letter on its website on May 31, 2002.[61]

To further publicize the Marketing Letter, on the same day, ADGI issued a press release that stated that Hornblower, ADGI's investment banking firm, had released "an in-depth Marketing Letter and Report on ADGI," which was available on the company's website.[62] The press release also contained the following quote attributed to Taboada:

> We are acutely aware of ADGI's short and long term business plans and strategies, their potential involvements, ventures, and local partner relationships in many countries which we believe will yield even more impressive performances and financial rewards in the world-wide telecom arena.
>
> We continue to believe that the Company's fundamentals as illustrated in their sales, earnings and growth rate will be the driving force for the valuation of the Company's stock. We also believe the Company is on target to meet its financial goals for the year as set forth in previous releases.

Hinton testified that ADGI drafted the press release, which Taboada reviewed and approved. Taboada denies that he approved the press release, but he does admit that he did not object to it once it came to his attention.

The Hearing Panel finds that Taboada approved ADGI's release of the Marketing Letter on both TheStockbroker.com and the company's own website. Taboada's failure to object to the Internet postings and the press release corroborate Hinton's testimony that ADGI obtained Taboada's approval in each instance. In addition, the Hearing Panel places considerable weight

[61] Tr. 302.

[62] Ex. C–8.

on the fact that Ellenhorn also failed to raise any objections until he realized that the Department had concerns that the Marketing Letter might violate the terms of the MyTurn AWC. In sum, all of the Respondents' actions were consistent with Hinton's claim that ADGI sought and obtained approval from Taboada for each use of the Marketing Letter.

Hornblower issued the Marketing Letter on May 28, 2002. On the same day, ADGI had the Marketing Letter published on TheStockbroker.com, giving the public immediate access to the report.[63] The Marketing Letter remained on the website until at least June 24, 2002.

On May 31, 2002, ADGI published the Marketing Letter on its own website along with other information about the company.[64] The letter was available on ADGI's website until as late as July 5, 2002.[65] ADGI also issued a press release on May 31, 2002, announcing that Hornblower had issued the Marketing Letter, which ADGI called "an in-depth Marketing Letter and Report."[66] The press release advised that the Marketing Letter was available on ADGI's website.[67]

Originally, Hornblower's and Taboada's names were on the version of the Marketing Letter published on the two websites. However, in June 2002, ADGI removed their names after NASD publicly announced the sanctions it had imposed on Hornblower under the MyTurn AWC.[68] Hinton

[63] Ex. C–37 (copy of the Marketing Letter downloaded on June 19, 2002, from TheStockbroker.com); Tr. 133–34.

[64] Ex. C–19 (copy of the Marketing Letter the Department downloaded on June 25, 2002, from ADGI's website).

[65] Ex. C–21 (copy of the Marketing Letter the Department downloaded on July 5, 2002, from ADGI's website); Tr. 299.

[66] Ex. C–8.

[67] Tr. 296.

[68] Tr. 304, 324.

testified that ADGI removed their names due to concern about the adverse publicity generated by NASD's announcement.[69]

In addition to publication on the Internet, Taboada made 200 to 300 copies of the Marketing Letter for mailing to potential investors.[70] He estimates that he mailed the Marketing Letter to approximately 100 to 200 people.[71]

D. Rooney's Credibility

The Hearing Panel concluded that Rooney lacked any credibility; therefore, the Hearing Panel rejected his contested testimony.

Throughout the hearing, Rooney demonstrated a smug disrespect for the regulatory process and his obligation to testify truthfully. He approached the hearing as if it were a trivial game, the object of which was to obfuscate the facts and frustrate the Department. Indeed, on key points, even Taboada and Ellenhorn appeared shocked by Rooney's statements and attitude. A brief review of some of Rooney's testimony amply supports the Hearing Panel's conclusion.

Rooney began his testimony by refusing to provide the most elementary information. For example, Rooney at first testified that he could not remember his titles or responsibilities at Hornblower.[72] He said he could not recall if he had been President of the Firm or its director of research.[73] When confronted with the transcript of his on-the-record interview in which he admitted that

[69] *Id.* at 304–05.

[70] *Id.* at 458, 665.

[71] *Id.* at 665.

[72] *Id.* at 186–87.

[73] *Id.*

he had been the head of research, Rooney disavowed his earlier testimony, stating: "I could have been under duress at that point, I don't remember being head of research …."[74]

Although Rooney owned 60% of the Firm and served as its President for years, he claimed that he had no knowledge of what happened to the Firm once he left. Rooney claimed that he did not remember when he left Hornblower[75] and that he did not know if it was still in business.[76] Incredibly, Rooney testified that he could not remember when his ownership of Hornblower Financial (and hence the Firm) ended.[77] When pressed for an explanation, Rooney testified that he sold his interest on a golf course "to an overseas customer for fifty cents."[78] He claimed that he did not know the buyer's name and that he could not recall the year of the sale.[79] Rooney's demeanor during this exchange can be described best as flippant.

Later in his testimony, after conceding he had been President of the Firm, Rooney testified as follows when questioned about his responsibilities as the Firm's President:

> Q What were your responsibilities as President?
>
> A I don't recall.
>
> Q You don't recall any of your responsibilities as the President of the firm?
>
> A That is correct.
>
> Q Did you have any responsibilities for the firm's filings with its regulators?
>
> A I could have.

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[74] *Id.* at 188.

[75] *Id.* at 190. For that matter, Rooney claimed that he could not remember if he had worked at Hornblower at any time in 2003. (Tr. 198.)

[76] Tr. 191.

[77] *Id.* at 193.

[78] *Id.* at 194.

[79] *Id.*

Q Did you have any responsibilities as President concerning your employees?

A I don't recall.

Q Did you ever have any responsibility at Hornblower for the firm's compliance policies and procedures?

A I could have, I don't recall.

Q I'm referring now to the written procedures.

A I did not type them.

Q Did you have any responsibility to ensure that the procedures were designed to make sure that Hornblower & Weeks complied with the NASD Rules and Regulations?

A I believe I paid an outside consultant to do that, I don't know.

Q Did Mr. Ellenhorn have any responsibilities to ensure that the firm's compliance policies and procedures were reasonable and were designed to ensure compliance with NASD Rules?

A He could have.

Q Well, did he?

A You would have to ask him, I don't know.[80]

In brief, the Hearing Panel rejected Rooney's testimony because it was unreliable. Neither his previous on-the-record interview testimony nor the other trustworthy evidence in the record supports his hearing testimony.

III. CONCLUSIONS OF LAW

A. Jurisdiction

NASD has jurisdiction of this proceeding under the NASD By-Laws. Ellenhorn and Rooney were associated with Hornblower at the time of the misconduct alleged in the Complaint, and the Department filed the Complaint within two years of the date their registrations with NASD terminated.

[80] *Id.* at 205–05.

Taboada was associated with Hornblower at the time of the misconduct alleged in the Complaint, and he was registered with NASD when the Department filed the

Complaint. Hornblower was a member firm at the time of the misconduct alleged in the Complaint, and the Department filed the Complaint within two years of the date its membership ended.

B. Violation of the MyTurn AWC—First Cause of Action

The First Cause of Action alleges that Hornblower, Rooney, and Ellenhorn breached the MyTurn AWC by issuing the Marketing Letter on ADGI. The Department contends that, despite its title, the Marketing Letter constituted a "research report." Rooney and Ellenhorn dispute the Department's conclusion. They contend that the Marketing Letter "cannot be considered a research report because the document lacked material [financial] information necessary for an individual to make an investment decision."[81] In their view, the Marketing Letter contained nothing more than puffery—exaggerated opinion with the intent to sell a good or service—and not material misstatements of facts.[82] In sum, they contend that the Marketing Letter is not analytical; hence, it is not a research report. In addition, each Respondent[83] contends that a research report must contain an *explicit* recommendation to buy or sell the security, which the Marketing Letter does not.[84]

Because the MYTurn AWC does not define the term "research report," the Parties looked to extrinsic evidence for a definition. The Department relied on the expert opinion of Joseph P. Savage ("Savage"), counsel to the Investment Companies Regulation and the Advertising Regulation Departments at NASD. He testified that, at the time Hornblower issued the Marketing Letter, the term "research report" had a commonly accepted meaning in the securities industry. In his opinion, a

[81] Pre-Hearing Brief at 1–2 (letter dated Aug. 28, 2003, from counsel for Hornblower, Rooney, and Ellenhorn).

[82] *Id.* at 3.

[83] Although Taboada joins in this argument, he is not charged with violating the terms of the MyTurn AWC.

[84] *See* Tr. 797.

document containing an analysis of a company, industry, or security that is reasonably sufficient upon which to base an investment decision is a research report. In support of his opinion, Savage pointed out that the New York Stock Exchange employs this definition in Rule 472.10(2):

> "Research reports" are generally defined as an analysis of individual companies, industries, market conditions, securities or other investment vehicles which provide information reasonably sufficient upon which to base an investment decision.

However, he added, there is no bright-line test to determine if a document falls within this definition. Rather, application of the definition to a particular document requires a subjective analysis of the document in light of the individual facts and circumstances surrounding the communication.

Savage further testified that he considered two other sources. First, he noted that, in May 2002, NASD was in the process of adopting NASD Conduct Rule 2711, which defined "research report" as "a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision and includes a recommendation."[85] The Securities and Exchange Commission approved the Rule on May 10, 2002, to become effective on July 9, 2002.[86] NASD later amended Rule 2711 to conform to the research analyst provisions of the Sarbanes-Oxley Act of 2002. One of those amendments, which the SEC approved on July 29, 2003, modified the definition of "research report" found in Rule 2711(a)(8) by deleting "and includes a recommendation."[87]

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[85] NASD Rule 2711(a)(8).

[86] *See* Order Approving Rule Change Relating to Analyst Conflicts of Interest, Exchange Act Release No. 45908, 2002 SEC LEXIS 1262 (May 10, 2002).

[87] *See* Order Approving Proposed Rule Changes, Exchange Act Release No. 48252, 2003 SEC LEXIS 1823 (July 29, 2003). This change took effect on September 29, 2003. The Rule now provides:

Second, Savage looked at the definition of the term "bona fide research" in NASD's Corporate Finance Rules. In general, NASD Rule 2740 limits member firms from granting or receiving selling concessions, discounts, or other allowances in connection with the sale of securities that are offered as part of a fixed price offering. Rule 2740(b) defines the term "bona fide research" for the purposes of Rule 2740 as:

> [A]dvice, rendered either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities, or analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and performance of accounts.…

Although not directly applicable to this case, Savage said that Rule 2740(b) is nevertheless helpful in determining the meaning of the term "research report."[88]

Savage reviewed the Marketing Letter and concluded that it constitutes a research report, as the term is understood generally in the securities industry, because it contains many factors typically found in such reports. Those factors include the following:

1. an analysis of the company;
2. the name of company;
3. the name of the research analyst who authored the report;
4. an analysis of the company's markets;
5. a discussion of the company's competition;

"Research Report" means a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.

[88] Tr. 565–66, 582. Savage was concerned primarily with the meaning of the term "research report" as it is used in NASD Conduct Rule 2210, which rule applies to member firms' communications with the public.

6. a discussion of the regulatory environment;

7. a discussion of the company's strategies;

8. a discussion of the company's products and services;

9. a discussion of the company's management;

10. a discussion of macroeconomic factors; and

11. other statements that could trigger an investment decision.

In addition, although Savage thought that a recommendation is not an essential element of a research report, he determined that the Marketing Letter did recommend that investors purchase ADGI stock. For example, Savage pointed to the Marketing Letter's conclusion, which states: "We believe ADGI is positioned to exploit the upside potential of the vast expansion of the Internet."[89] He also regarded the following as a recommendation: "Ultimately, ADGI's established operations, array of services and customer base will make it an attractive potential takeover target for the large international [telecommunications companies].… The benefits of this for ADGI's shareholders and investors are obvious."[90]

The Hearing Panel concludes that the Marketing Letter is a research report under the facts and circumstances of this case. As the Department's expert testified, the Marketing Letter contains many elements typically associated with company, market, and industry analyses. The Marketing Letter also

[89] Ex. C–18, at 11; Tr. 569.

[90] Ex. C–18, at 10; Tr. 569–70.

contains substantial detail—more than many research reports.[91] Moreover, the Respondents drafted the Marketing Letter to attract new and additional investment. Without question, the Marketing Letter paints a favorable picture of ADGI to induce potential investors to purchase ADGI stock. Taken as a whole, the Marketing Letter amounts to an implied buy recommendation. The fact that it does not contain the word recommendation is not determinative of this issue. The substance rather than the form of the communication is the crucial consideration.

Accordingly, the Hearing Panel finds that the Marketing Letter is a "research report," and Hornblower, Rooney, and Ellenhorn thereby violated the terms of the MyTurn AWC and NASD Conduct Rule 2110 by issuing the Market Letter on May 28, 2002.

C. Misrepresentations and Omissions—Second Cause of Action

The Second Cause of Action alleges that Taboada and Hornblower violated the content standards of NASD Conduct Rules 2210(d)(1)(A) and (B)[92] because the Marketing Letter is not fair and balanced, and it makes false, exaggerated, unwarranted, and misleading claims. In addition, the Second Cause of Action alleges that Taboada and Hornblower violated NASD Conduct Rule 2110,

[91] The length and detail of the Marketing Letter is relevant to the determination of whether it constitutes a research report. The Hearing Panel notes that the NYSE provides guidance that a communication longer than a single page normally should be treated as a research report. (*See* Tr. 588.)

[92] Rule 2210(d)(1)(A) states that all member communications with the public shall be based on principles of fair dealing and good faith, should provide a sound basis for evaluating the facts, and may not omit any material that could cause the communication to be misleading. Rule 2210(d)(1)(B) states that exaggerated, unwarranted, or misleading statements or claims are prohibited in all member communications with the public. (*See e.g., Department of Enforcement v. U.S. Rica Financial, Inc*., Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *13 (Sept. 9, 2003)).

which provides that a member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.[93]

NASD Conduct Rule 2210(d) provides that no material fact or qualification may be omitted from any member communication with the public "if the omission, in the light of the context of the material presented, would cause the communication to be misleading," and prohibits "exaggerated, unwarranted, or misleading statement[s] or claim[s]" in all public communications. Rule 2210(d) further requires that all public communications provide readers with a sound basis for evaluating advertising statements and that sales literature "must 'disclose in a balanced way the risks and rewards for the touted investment.'"[94] Where sales literature sets forth points attractive to investors, it also must explain any contingent or speculative factors associated with the investment.[95]

1. Omission of Material Information

Taboada omitted material information from the Marketing Letter. For example, while the Marketing Letter stressed the up-side potential for ADGI, the letter failed to mention ADGI's troubled financial condition. ADGI's Form 10–KSB for the year ended December 31, 2001, which was released to the public in April 2002 as Taboada and Rooney were finalizing the Marketing Letter, showed that ADGI had a net loss of $1,193,328 for 2001, nearly twice the size of the loss from the

[93] NASD Conduct Rules are 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."

[94] *Robert L. Wallace*, Exchange Act Release No. 40654, 1998 SEC LEXIS 2437, at *10 (Nov. 10, 1998), quoting *Michael Fertman*, 51 S.E.C. 943, 950 (1994).

[95] *See Excel Financial, Inc.*, Exchange Act Release No. 39296, 1997 SEC LEXIS 2292, at *16, 19 (Nov. 4, 1997).

prior year.[96] ADGI also disclosed that its accumulated deficit at December 31, 2001, was $21,612,935.[97] In addition, both the company and its accountants expressed their "substantial doubt about [ADGI's] ability to continue as a going concern" given its recurring losses.[98] ADGI's audit report for the year ended December 31, 2001, further warned that the company had been dependent upon the willingness of its consultants, officers, directors, and professionals to accept stock in lieu of cash for services.[99] Finally, the Form 10–KSB reported that ADGI had on hand cash or cash equivalents of only $32,233, further reflecting its precarious financial condition.[100]

Although Taboada knew of the foregoing material information, he failed to reference any of it in the Marketing Letter. Taboada excused his intentional omission of the information by emphasizing that he had not intended investors to treat the Marketing Letter as a research report. Rather, he expected the letter to peak their interest in the Company and generate responses for more information, at which point he would advise them of the attendant risks associated with an investment in ADGI.[101] In other words, Taboada well knew that the Marketing Letter failed to disclose material information that potential investors would consider important to their investment decision.[102]

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[96] Ex. C–10, at 15.

[97] *Id.*

[98] *Id.* at 15, 37.

[99] *Id.* at 37.

[100] *Id.* at 23.

[101] Tr. 631–32; Ex. C–22, at 107, 127.

[102] For example, at his on-the-record interview, Taboada referred to the "tremendous amount of risk inherent in dealing with a penny stock in general." He also testified that through his due diligence on the Company he knew that there was substantial risk because ADGI was not profitable and was "capitalizing on a new business venture." (Ex. C–22, at 83.) Indeed, Taboada did not consider ADGI to be "fundamentally sound." (*See* Ex. C–22, at 84.)

2. Misleading and Exaggerated Statements

As discussed above, the Marketing Letter presented an unwarranted and exaggerated picture of ADGI's operations, plans, and prospects. The Marketing Letter stressed ADGI's "strong prospects for success,"[103] without any cautionary statements regarding the substantial risks and obstacles facing ADGI. By omitting a discussion of the company's limited resources, the Marketing Letter gives readers a false assessment of ADGI's potential for success. Furthermore, the Marketing Letter's conclusion that ADGI is "positioned to exploit the upside potential of the vast expansion of the Internet"[104] is misleading in light of the company's losses and limited capital. The Marketing Letter fails to provide a "sound basis for evaluating" ADGI, and it omits material facts to support the claims that ADGI was well positioned to succeed in its target foreign markets.

3. Conclusion

In sum, the unqualified nature of the statements made in the Marketing Letter violates Rule 2210(d).[105] In addition, the Marketing Letter omitted material facts that were necessary to provide readers with a sound basis for evaluating an investment in ADGI. Contrary to Taboada's argument, he could not cure these defects by providing more detailed and further information in the same package with the Marketing Letter or by answering investors' questions if they called in response to the letter. Communications of this type—whether a research report or other sales literature—must stand on their

[103] Ex. C–18, at 9.

[104] *Id.* at 11.

[105] *Sheen Financial Resources, Inc.*, 52 S.E.C. 185, 190 (1995).

own when judged against the standards of Rule 2210(d). Likewise, the inclusion of a standard risk disclosure without more is insufficient to rectify the misleading nature of the Marketing Letter.[106]

Taboada and Hornblower placed their names on[107] and distributed the Marketing Letter, thereby endorsing its content.[108] Accordingly, the Hearing Panel finds that Taboada and Hornblower violated Rules 2210(d)(1)(A) and (B) and Rule 2110, as alleged in the Second Cause of the Complaint.

D. Supervisory Violations

The Third and Fourth Causes of Action allege supervisory violations by Ellenhorn and Rooney. The Third Cause of Action alleges that they failed to supervise Taboada with regard to the review and release of the Marketing Letter. The Fourth Cause of Action alleges that Ellenhorn failed to establish, maintain, and enforce supervisory procedures or systems reasonably designed to ensure that research reports issued by Hornblower complied with applicable securities laws, rules, and regulations. The Fourth Cause of Action further specifically alleges that Ellenhorn failed to take necessary action to correct the deficiencies in the Firm's supervisory procedures noted in the MyTurn AWC. As a consequence, the Complaint alleges that Ellenhorn and Rooney violated NASD Conduct Rules 3010 and 2110.

1. Failure to Supervise Taboada—Third Cause of Action

NASD Conduct Rule 3010 requires that members establish, maintain, and enforce a set of written supervisory procedures and that these procedures be "reasonably designed to achieve

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[106] *See District Bus. Conduct Comm. v. Sheen Financial Resources, Inc*, No. C07910083, 1994 NASD Discip. LEXIS 49, at *34 n.9 (Jan. 4, 1994), *aff'd*, 52 S.E.C. 185 (1995).

[107] Tr. 501–02.

[108] *See District Bus. Conduct Comm. v. Sheen Financial*, 1994 NASD Discip. LEXIS 49, at *35.

compliance with applicable securities laws and regulations, and with the Rules of [NASD]." Whether supervision is reasonable "is determined based on the particular circumstances of each case. The burden is on the [Department] to show that the respondent's procedures and conduct were not reasonable. It is not enough to demonstrate that an individual is less than a model supervisor or that the supervision could have been better."[109]

Here, Ellenhorn's and Rooney's violations are patent. Each admits that Taboada brought the final draft of the Marketing Letter to him for approval, and each admits that they failed to review the Marketing Letter to assure that it complied with NASD's advertising rules. Rooney testified that he tried to abdicate his responsibility because he was about to commence the suspension imposed under the terms of the MyTurn AWC. Nevertheless, just before he left, he told Taboada that he could release the Marketing Letter. Ellenhorn, on the other hand, stated that he did not review the letter because that was Rooney's responsibility. Ellenhorn limited his inquiry to determining if the Marketing Letter would violate the Firm's suspension from issuing research reports. Although Ellenhorn was the Firm's compliance officer, he did not review the Marketing Letter for compliance with NASD's advertising rules. Nevertheless, he approved the release of the Marketing Letter.

The Hearing Panel concludes that Ellenhorn and Rooney utterly failed to exercise reasonable supervision of Taboada in connection with the final review and release of the Marketing Letter, in violation of NASD Conduct Rules 3010 and 2110.

[109] *District Bus. Conduct Comm. v. Lobb*, 2000 NASD Discip. LEXIS 11, at *16 (N.A.C. Apr. 6, 2000) (citations omitted).

2. Failure to Establish, Maintain, and Enforce Supervisory Procedures—Fourth Cause of Action

The MyTurn AWC contains a finding that Hornblower violated NASD Conduct Rules 3010 and 2110 because it failed to establish, maintain, or enforce supervisory procedures or systems reasonably designed to ensure that research reports issued by the firm complied with NASD's Rules and applicable securities laws and regulations.[110] For this violation (and others relating to the content of the MyTurn research report) Hornblower was suspended from issuing research reports for six months.[111] In addition, if Hornblower decided to resume issuing research reports after the suspension ended, it was required to hire a consultant to review the Firm's written procedures and, subject to a number of conditions, implement the changes the consultant recommended.[112]

The Fourth Cause of Action alleges that Ellenhorn failed to take any corrective action after May 7, 2002, the effective date of the MyTurn AWC, in violation of NASD Conduct Rules 3010 and 2110.[113]

The Hearing Panel concludes that the Fourth Cause of Action should be dismissed because it substantially overlaps the First Cause of Action. In essence, the Fourth Cause of Action charges Ellenhorn with a breach of the terms of the MyTurn AWC, as does the First Cause of Action. For six months after May 7, 2002, Hornblower was prohibited from issuing research reports regardless of whether it had revised its written supervisory procedures.

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[110] Ex. C–5, at 6–7 (Finding 13).

[111] *Id.* at 6. In addition, Hornblower was censured and fined $100,000.

[112] *Id.* at 7–8.

[113] Compl. ¶ 41.

Hornblower, Rooney, and Ellenhorn violated the terms of that suspension when Hornblower issued the ADGI Marketing Letter. Hornblower and Ellenhorn's failure to revise Hornblower's supervisory procedures is immaterial because Hornblower could not have issued the ADGI Marketing Letter when it did even if Ellenhorn had revised the applicable supervisory procedures. In other words, Ellenhorn's violation of the outright suspension subsumes his failure to update the Firm's supervisory procedures, and the sanctions the Hearing Panel imposed under the First Cause of Action take into consideration the breadth of Ellenhorn's violation.[114]

Accordingly, the Hearing Panel dismisses the Fourth Cause of Action.

IV. SANCTIONS

A. Violation of the MyTurn AWC—First Cause of Action

The NASD Sanction Guidelines ("Guidelines") do not provide a specific guideline for violations of an AWC. The Department requests that the Hearing Panel bar Rooney and Ellenhorn as principals and suspend them in all capacities for two years, In addition, the Department requests that the Hearing Panel fine Ellenhorn $55,000 and Rooney $70,000. As to the Firm, the Department requests that the Hearing Panel expel the Firm. In support of the requested sanctions, the Department points out that Ellenhorn and Rooney exhibited a complete disregard for their supervisory responsibilities by failing to prevent the issuance of the Marketing Letter. The Department also notes each Respondent's disciplinary history.

[114] The Department tacitly agrees with the Hearing Panel's conclusion. The Department recommends that Ellenhorn be fined $15,000 and suspended for 60 days in all supervisory capacities, which sanctions would be subsumed by the sanctions imposed for the violations alleged in the First Cause of Action. (Pre-Hearing Br. at 38.)

The Hearing Panel concludes that the requested sanctions for Rooney are too lenient. Not only did Rooney admittedly act recklessly in approving the deficient Marketing Letter for release to the public, his conduct demonstrates that he poses an unacceptable risk to the investing public should he be allowed to remain in the industry. Accordingly, the Hearing Panel bars Rooney from associating with any member firm in any capacity. In light of this sanction, the Hearing Panel will not impose a fine.

As to Ellenhorn, the Hearing Panel concludes that he should be suspended in all capacities for two years and fined $55,000. The fine shall be due and payable if and when Ellenhorn re-enters the securities industry. The Hearing Panel declines to bar Ellenhorn in his principal capacities for this violation although a bar is warranted because he is barred in all principal capacities for his supervisory violations under the Third Cause of Action.

Finally, the Hearing Panel expels the Firm from NASD membership.

B. Misrepresentations and Omissions—Second Cause of Action

The relevant guidelines for violations of NASD Conduct Rules 2210(d)(1)(A) and 2210(d)(1)(B), which govern the content of sales literature, provide for a fine of between $10,000 and $100,000 and a suspension of ten business days to two years where the respondent's conduct is intentional or reckless.[115] Consistent with the Guidelines, the Department asks the Hearing Panel to suspend Taboada in all capacities for six months and fine him $25,000.[116]

The Hearing Panel finds that Taboada acted recklessly and, therefore, the sanctions the Department requests are appropriate under the facts and circumstances of this case. Taboada seeks to

[115] NASD Sanction Guidelines 96 (2001 ed.).

absolve himself of all responsibility for the Marketing Letter he authored because he claims Rooney and Ellenhorn authorized its release as part of the investor package, and ADGI posted the Marketing Letter on the Internet without his approval and advance knowledge. In sum, Taboada takes no responsibility for the content of the Marketing Letter or the manner in which it was distributed to potential investors.

The Hearing Panel finds, however, that Taboada was involved in every step of the Marketing Letter's preparation and release. Contrary to his assertions at the hearing, the Hearing Panel finds that he knew of ADGI's plans to publish the Marketing Letter on the Internet.[117] From the beginning, Taboada had discussions with the officers at ADGI that they wanted to get the broadest coverage possible, including posting the Marketing Letter on the Internet. To that end, several days before Taboada released the Marketing Letter, he participated in a conference call with one or more ADGI executives and a representative from TheStockbroker.com. The President of TheStockbroker.com asked for a copy of the Marketing Letter so that he could distribute it, and Taboada advised him that he would send it once it was approved by the Firm's compliance department.[118] Significantly, Taboada did not prohibit ADGI from releasing the Marketing Letter on its Internet site, and he sent the report to TheStockbroker.com.[119] In addition, the email from Hinton to Taboada dated May 31, 2002, specifically asks Taboada if it is acceptable to him that ADGI puts the Marketing Letter on both its

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[116] The Department has not requested a separate sanction against the Firm because of its expulsion under the First Cause of Action.

[117] Ex. C–23, at 17–18. (Transcript of Hinton's on-the-record interview dated October 2, 2002.).

[118] Ex. C–22, at 98, 145.

[119] *See* Ex. C–9 (Decl. of the President of TheStockbroker.com.).

Internet site and TheStockbroker.com's Internet site.[120] Taboada contends he never responded to Hinton's request.

In addition, the Hearing Panel finds that Taboada recklessly failed to discharge his professional responsibilities after ADGI published the Marketing Letter. Hinton testified, and Taboada admits, that Hinton called Taboada to tell him that ADGI had published the Marketing Letter on the Internet. Although Taboada claims that Ellenhorn had not approved publication of the Marketing Letter on the Internet, Taboada took no action to have it removed.[121] Indeed, Taboada stated that he had no problem with the Marketing Letter appearing on the Internet although visitors to the site could read the Marketing Letter independently of the other materials Taboada contends were in the ADGI "investor package."[122] Accordingly, Taboada did not tell Ellenhorn or Rooney that the Marketing Letter was on the Internet.[123]

The Hearing Panel concludes that the sanctions the Department requests are appropriate given Taboada's reckless conduct. Taboada omitted material information concerning the risks associated with investing in ADGI, which rendered the Marketing Letter unbalanced and misleading, and he distributed the Marketing Letter to the public. In addition, he failed to take any action to have ADGI cease publishing the Marketing Letter on the Internet although he claims he was never granted authority to

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[120] Ex. C–16.

[121] He did claim at his on-the-record interview that he demanded that ADGI change the name on the Internet version from "Research Report" to "Marketing Letter." (Ex. C–22, at 94.)

[122] Taboada testified that he believed that visitors could get to the other materials by clicking a button on ADGI's site, but he never verified this information. He relied on the representation of one of ADGI's officers. (Tr. 463, 465–66.)

[123] Ex. C–22, at 96.

permit the Marketing Letter's publication in that manner. Accordingly, the Hearing Panel determines that Taboada should be suspended in all capacities for six months and fined $25,000.

C. Failure to Supervise Taboada—Third Cause of Action

The Guidelines for "Failure to Supervise" recommend a fine of $5,000 to $50,000, plus the amount of any financial gain. In addition, they recommend a suspension of the responsible individual in all supervisory capacities for up to 30 business days, and in egregious cases, a longer suspension of up to two years in any or all capacities, or a bar. The "Failure to Supervise" Guidelines direct adjudicators to consider the "[n]ature, extent, size, and character of the underlying misconduct" when determining an appropriate sanction.[124]

The Department requests the Hearing Panel to suspend Rooney and Ellenhorn in their supervisory capacitates for six months and fine them $25,000 each. The Hearing Panel determines that the sanctions recommended by the Department are too lenient. The Hearing Panel finds that Rooney's and Ellenhorn's supervisory failures were egregious. Accordingly, the Hearing Panel will bar both Rooney and Ellenhorn in all principal capacities. In addition, the Hearing Panel will fine Ellenhorn $25,000, which fine shall be due and payable when and if he re-enters the securities industry. The Hearing Panel has not imposed a fine on Rooney in light of his bar in all capacities under the First Cause of Action.

V. ORDER

Therefore, having considered all the evidence,[125] the Hearing Panel orders as follows:

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[124] NASD Sanction Guidelines 108 (201 ed.).

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

(1) For violating the terms of the MyTurn AWC in violation of NASD Conduct Rule 2110, Rooney is barred from associating with any member firm in any capacity. Ellenhorn is suspended for two years from associating with any member firm and fined $55,000, which shall be due and payable if and when he re-enters the securities industry. Hornblower is expelled.

(2) For issuing sales literature that omitted material information and contained misleading information in violation of NASD Conduct Rules 2110, 2210(d)(1)(A), and 2210(d)(1)(B), Taboada is suspended for six months from associating with any member firm in any capacity and fined $25,000.

(3) For failing to supervise Taboada reasonably in violation of NASD Conduct Rules 2110 and 3010, Rooney and Ellenhorn are barred in all principal capacities. In addition, Ellenhorn is fined $25,000, which shall be due and payable if and when he re-enters the securities industry.

Further, the Respondents, jointly and severally, shall pay the costs of this proceeding in the total amount of $7,162.17, which includes an administrative fee of $750 and hearing transcript costs of $6,412.17.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD; except, if this Decision becomes the final disciplinary action of the NASD, the effective dates of the suspensions imposed hereby are: (1) Ellenhorn's suspension shall become effective at the opening of business on May 3, 2004, and end at the close of business on May 3, 2006; and (2) Taboada's suspension shall become effective at the opening of business on May 3, 2004, and end at the close of business on November 3, 2004.

Andrew H. Perkins
Hearing Officer
For the Extended Hearing Panel

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