NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LANCE CHRISTOPHER NEWBY (CRD #1679777) 505 Paokamo Loop Kailua, HI 96734 Respondent.	:	Disciplinary Proceeding No. C01030019 Hearing Officer – DMF **HEARING PANEL DECISION** April 8, 2004

Respondent entered into an unauthorized commitment agreement on behalf of the member firm with which he was associated, and subsequently sent misleading communications to the firm, in violation of Rule 2110. For the violation, he is barred from associating with any member firm in any capacity.

Appearances

David A. Watson, Esq., San Francisco, CA, (Rory C. Flynn, Esq., Washington, DC, Of Counsel) for Complainant.

Lorrin A. Kau, Esq., Honolulu, HI, for Respondent.

DECISION

1. Procedural History

The Department of Enforcement filed a Complaint charging that respondent Lance Christopher Newby entered into a commitment agreement on behalf of the NASD member firm with which he was associated without the firm's authorization, and subsequently sent misleading communications to the firm, in violation of Rule 2110. Newby filed an Answer in which he denied the charges and requested a hearing. The hearing was held in Honolulu, Hawaii on February 11 and 12, 2004, before a Hearing

Panel that included a Hearing Officer and two former members of the District 1 Committee.[1]

2. **Facts**

Newby has been in the securities industry since 1989. From that time until 2001, he was associated with NASD member Raymond James Financial Services, Inc., or a related firm.[2] Although he was registered through Raymond James as a General Securities Principal and a General Securities Representative, Newby was an independent contractor, not an employee of Raymond James. Since October 2001, he has been associated with another NASD member and registered through that firm. He has no prior disciplinary history. (CX-1; Tr. I at 26, 98; Tr. II at 51-52, 175.)

In the Fall of 2000, Newby was contacted by the principals of RightStar International, Inc. RightStar wanted to acquire the Hawaiian assets of Loewen Group, a Canadian-based company that owned cemeteries and funeral homes in Hawaii and other states, but was embroiled in bankruptcy proceedings in a United States Bankruptcy Court. Under Hawaii law, Loewen was required to hold in an independent trust all funds that it had obtained from purchasers of "pre-need" funeral or interment services or from purchasers of "perpetual care" cemetery services, to ensure that funds would be available when the services were needed. If RightStar purchased cemeteries and funeral homes from Loewen, the corresponding trust funds would accompany those properties.

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[1] Enforcement offered the testimony of four witnesses and Complainant's Exhibits ("CX") 1-14, which were admitted. Newby testified on his own behalf and called one other witness, and also offered Respondent's Exhibits ("RX") 1-42, which were admitted.

[2] Before becoming associated with Raymond James Financial Services, Newby was associated with Robert Thomas Securities, a predecessor firm. Raymond James Financial Services, like Robert Thomas Securities, is a subsidiary of Raymond James Financial, Inc. Some of the Raymond James witnesses whose testimony is discussed below are employed by Raymond James Financial or another one of its subsidiaries, but for convenience, all the firms are referred to simply as "Raymond James" in this decision. (Tr. I at 26.)

RightStar's principals told Newby that they had discovered a "secret": the trust[3] was over-funded by some $30 million. RightStar believed that once it concluded the acquisition, the trust could provide the surplus funds to RightStar, which could then use those funds to pay for the acquisition. Thus, RightStar planned to acquire the assets at, effectively, no out-of-pocket cost. To effectuate this plan, it was essential to maintain the secret; RightStar believed that if Loewen learned that the trusts contained a $30 million surplus, it would have to pay a higher price. (CX-5 at 18-57; Tr. II at 15-16, 28-29, 40.)

Newby became embroiled in RightStar's plan. He recruited "future trustees" – individuals who would take responsibility for the trust assets if RightStar completed the purchase from Loewen and who would "be more responsive" to RightStar.[4] Newby also devised a plan to allow the new trustees to make the surplus funds available to RightStar. Through Newby, the new trustees would open a Raymond James account,[5] into which all the trust assets would be deposited as part of the closing of RightStar's purchase. The trustees would then liquidate $30 million of the assets and provide those funds to RightStar. Because RightStar believed that if the trustees simply distributed the funds to RightStar it would trigger a substantial tax obligation, the plan contemplated that the trustees would make a $30 million loan to RightStar. Establishing the accounts and transferring and liquidating the assets, however, would take time, and RightStar needed the funds to close the transaction. (Tr. II at 14, 17, 24, 35, 173.)

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[3] There were actually one or more separate pre-need and perpetual care trusts for each funeral home and cemetery, but for convenience they are treated as a single trust in this decision.

[4] Newby initially selected his former wife, as well as some long-time acquaintances, to be the future trustees, but subsequently his former wife was replaced by a former Governor of Hawaii. When they ultimately became trustees, these individuals received $200,000 each as an "inception fee," plus $5,000 to $10,000 per month thereafter, for serving. (Tr. II at 24, 29-31, 34-35, 130-31.)

[5] In fact, there would be a separate Raymond James account for each trust.

In order to have the funds available, Newby initially sought a loan from Raymond James' investment banking department, but that department turned him down. He then sought to obtain the funds through a "pre-pay." The testimony at the hearing established that "pre-pay" refers to Raymond James loaning a customer the amount of the proceeds of a sale of securities from the customer's account during the period between the trade date and the settlement date. Newby, however, proposed that Raymond James pre-pay the sale of $30 million of trust assets simultaneously with RightStar closing the purchase from Loewen. The new trustees would then receive custody of the trust assets and transfer them to Raymond James, which would complete the pre-paid $30 million sale. (Tr. I at 31, 82; Tr. II at 175; CX-8 at 10.)

James Fulp, Newby's Raymond James supervisor in Florida, told Newby that this plan would not be acceptable because, among other things, Raymond James would not pre-pay a sale that had not yet occurred, involving assets that Raymond James had not yet received. He suggested that Newby arrange a "cash out" of the assets – that is, for the current trustee to liquidate $30 million of the assets prior to the closing, so the new trustees would have cash that they could immediately loan to RightStar. Newby rejected this approach, however, because of concern that it would disclose the existence of the surplus to Loewen. Fulp did not authorize Newby to commit Raymond James to a pre-

pay or to otherwise obligate Raymond James to provide the $30 million that RightStar needed to close the purchase.[6] (Tr. I at 129-31, 134-36; Tr. II at 55-58, 61.)

In spite of this, Newby issued a letter to RightStar dated January 4, 2001. The letter (which was on Raymond James letterhead and was signed by Newby, on behalf of Raymond James, as "Branch Manager, Hawaii") stated:

> It is my pleasure to inform you that your funding request for $30,000,000 USD has been approved. Raymond James Financial Services, Inc. will provide $25,000,000 USD to escrow and $5,000,000 USD to RightStar International Incorporated to enable RightStar International Incorporated to close pursuant to an Asset Purchase Agreement to be entered into between RightStar International Incorporated and [the various corporate entities though which Loewen held the Hawaii assets].

The letter further stated, "**You may regard this letter as our firm commitment to fund under the following conditions:**" and then set forth six conditions, including a requirement that Raymond James "will operate as Investment Manager and Custodian of the following Pre-Need Trusts Funds and Perpetual Care Funds for as long as balance is outstanding," and that "All Trusts Assets will be transferred to Raymond James Financial Services, Inc. and upon receipt a simultaneous closing and funding will occur." Newby signed the letter on behalf of Raymond James and provided it to RightStar, so that

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[6] Although at the hearing Fulp did not have a good recollection of his discussions with Newby, in a February 5, 2001, e-mail to other Raymond James personnel, he described his discussions with Newby, explaining that "[t]he concept [Newby] and the acquisition company have been promoting is to have the securities transferred to [Raymond James], liquidated and then to have the sales proceeds disbursed to the acquisition firm as a pre-pay of the sale proceeds on closing day." Fulp continued: "I've told [Newby] that there are many different issues that would have to be resolved for this to happen. We'd have to know what party has legal control over the funeral trust funds. The securities would have to be in [Raymond James'] possession prior to the date they are to be liquidated. We'd have to know that the trustees are empowered to release the funds from the funeral trust and that they can legally allow the acquisition firm to use these funds for the purchase of the funeral homes. And that's just the beginning."

Fulp explained that his "instructions to Newby were to provide us with detailed information about the transaction . . . ." He concluded: "I remain skeptical that this transaction will come to fruition but I can't yet say that it won't. Until we have extensive documentation in hand, it's nothing I'd spend too much time thinking about or worrying about." (CX-8 at 15.)

RightStar could "let the Loewen Group know that [RightStar] was going to be able to purchase the property." No one at Raymond James was aware of this letter or authorized Newby to issue it, or to make the statements contained in it, and he did not provide the letter to anyone at Raymond James either before or after he issued it. (RX-2; Tr. II at 25, 62.)

Newby also issued a memo to RightStar dated January 8, 2001. In the memo, he stated:

> Raymond James Financial Services, Inc. has completed a review of the bank and trust records concerning the trust funds that will accompany the purchase of the cemeteries and funeral homes identified in our Commitment Letter dated January 4, 2001 and addressed to RightStar International, Inc. Raymond James Financial Services, Inc. is satisfied with the gross market values and the surplus values of the said trust funds.

No one at Raymond James was aware of this memo, nor did anyone authorize Newby to issue it, or to make the statements contained in it. Additionally, Newby did not provide the memo to Raymond James either before or after he issued it. (RX-3.)

Newby issued a revised version of the commitment letter to RightStar dated January 13, 2001. The commitment portion of the letter was identical to the January 4 letter, but the conditions set forth in the letter differed somewhat. In substance, however, the conditions still provided that Raymond James would be the investment manager and custodian of the trust funds, and that all trust funds would be transferred to Raymond James, upon receipt of which "a simultaneous closing and funding will occur." Once again, no one at Raymond James was aware of this letter or authorized Newby to issue it, or to make the statements contained in it, and he did not disclose the letter to Raymond James either before or after he signed it. (RX-4; Tr. II at 25.)

The charges in the Complaint, however, are not based upon the above-described documents – indeed, it appears that Raymond James and Enforcement were not even aware of them until Newby included them as proposed exhibits in his pre-hearing submission. Instead, the Complaint rests on a third commitment letter that Newby issued to RightStar dated January 26, 2001. The commitment portion of that letter was identical to the corresponding portions of the January 4 and January 13 letters, except that the January 26 letter refers to an "Asset Purchase Agreement dated January 26, 2001," rather than "an Asset Purchase Agreement to be entered into." The conditions set forth in the January 26 letter also varied somewhat from those set forth in the earlier letters. They included the requirement that Raymond James serve as Investment Manager and Custodian of the trust funds, but rather than providing for "a simultaneous closing and funding," the January 26 letter required that "All trust assets shall have been transferred to Raymond James Financial Services, Inc., as custodian." (CX-3.)

The January 26 letter was preceded by a series of communications involving Newby and Raymond James personnel in Florida. On or about January 18, 2001, Newby spoke by telephone to Trudy Bixby, who was vice-president of customer accounts at Raymond James, with responsibility for authorizing pre-pays and margin loans. By this time, Newby had already issued the January 4 and January 13 commitment letters and the January 8 memo. According to a January 18 e-mail from Bixby to Raymond James Compliance, Newby asked Bixby if Raymond James would allow a $30 million pre-pay "just BEFORE he started selling the assets in the account. . . . I told him this could only be done as a loan, that we would not 'prepay' on trades that were not executed. However, an escrow account can not be collateralized. [Newby's] next question was

whether we would do a $30 million prepay once the trades are done. I told him I thought we could . . . ." (CX-8 at 14; Tr. I at 25-26, 28-30.)

On January 23, Bixby sent Newby an e-mail advising him that "[f]rom a financial perspective, as long as the client pays the interest charges, we do not have a problem with doing this prepay." She added: "However, I've provided the information you've given me on the account to Compliance to see if they would require any additional paperwork or review before this account is accepted." On January 25, Newby responded: "Thanks! I do not yet have all of the information we will need. This transaction will probably not happen for several months. . . ." Also on January 25, Bixby sent Newby an e-mail stating:

> Please be sure that you listen to the voice message I left you. Paul Matecki, the head of corporate counsel, WILL NOT allow this prepay. In addition, he felt that you might want to have an attorney look at the paperwork for the bankruptcy to make sure you are not being asked or suggesting anything that may not meet the bankruptcy court's requirements. If you have questions on this, please contact John Bowman in RJFS Compliance.

(CX-8 at 16-17; Tr. I at 30-35.)

Newby acknowledged that he received Bixby's January 25 e-mail before he signed and issued the commitment letter on behalf of Raymond James on January 26, but claimed that he thought his statements in the letter were authorized based on communications with Bixby. According to Newby, he spoke to Bixby on January 19 and she agreed that Raymond James could pre-pay the sale of $30 million of the trust's assets while they were "in transit" to the new trust's Raymond James accounts. On January 23, however, he retrieved a voice mail message that Bixby had left him on January 19 in which she told him that "the pre-pay was not going to be authorized, corporate counsel

had nixed it." Newby testified that he then called Bixby and asked her "if you're not going to give me a pre-pay, will you at least give me a margin loan? She said yes." Newby claimed that in the January 26 letter, he intended merely to commit Raymond James to the margin loan that Bixby had authorized. (Tr. II at 52-53, 77-79.)

Newby's testimony was inconsistent with Bixby's. She testified, credibly:

> I did not give him any authorization. We discussed the possibility of doing a pre-pay out of an account. We discussed the possibility of doing a margin loan out of an account. And I told Mr. Newby that in order to do either of those, RightStar had to own the assets in the account, show proof of ownership.
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> The assets had to be in an account of Raymond James in the street name; and that we could consider a loan or a pre-pay or whatever the client's desires were once the business was approved and brought to Raymond James. I gave him no authorization.

(Tr. I at 40-41.)

Bixby's testimony was consistent with her e-mail to Raymond James Compliance on January 18 and her e-mail to Newby on January 23; in contrast, Newby's testimony is inconsistent with these e-mails, as well as his own January 25 reply e-mail to Bixby in which, instead of questioning her about her January 23 e-mail, or indicating that she had approved a margin loan, he thanked her and stated that the transaction probably would not happen for several months.

Newby's testimony was also inconsistent with a written statement, dated October 18, 2001, that he provided to NASD staff during its investigation in response to the staff's questions about the circumstances under which he issued the letter. There he characterized the January 26 letter as being signed "under the normal course of business of providing clients with **Same Day Settlement** conditions when they request funds the same day they sell securities. . . . The commitment letter was understood by the Board of

Trustees to be a three-day loan at 7% while $30 million in surplus was being settled . . . . Yes, prepayments are accomplished as a normal course of business." (CX-5 at 1.) Yet at the hearing, Newby testified that the letter contemplated a margin loan, not a pre-pay, because, he admitted, Bixby had told him Raymond James would not approve a pre-pay.

Newby's testimony was also inconsistent with a memorandum he prepared that was addressed "To: Whom It May Concern" and was also dated October 18, 2001. There he claimed:

> [Bixby] after talking to me had some doubts about what she told me and checked with Raymond James counsel. Counsel told her we would not be doing a prepayment because this was a bankruptcy situation and they wanted no part of it. Here in lies the rub! All of this conversation took place late on a Friday afternoon Florida time. After talking to counsel, [Bixby] called my office and left me a **Voice Mail**. I did not get [Bixby's] message until the following Monday and I had already issued the letter over the weekend. . . . I then, called [Bixby] about the change and requested to know if the firm would do a margin loan. The answer was yes, provided the Trustees were meeting all Hawaii statutes and each account was administratively set up for margin transactions.

(CX-6 at 2.)

Therefore, the Hearing Panel credits Bixby's testimony and rejects Newby's insofar as it is inconsistent with Bixby's. In particular, the Panel finds that Bixby did not authorize Newby to commit Raymond James to a $30 million margin loan.

On February 1, Newby replied to Bixby's January 25 e-mail, but he did not disclose that he had issued the commitment letter. Instead, he stated:

> We have had three Hawaii attorneys look this over. Jim Fulp understands what is happening here and I will send you a legal opinion. The bankrupcy [sic] court is approving the sale. I will forward the paperwork when I have it. Let's not be show stoppers. I have been at this for six weeks. . . .

(CX-8 at 16.)

Raymond James heard nothing more from Newby about this transaction until May 2001. In the meantime, RightStar had encountered problems in closing the purchase. According to a written statement by Newby, the January 26 letter "was placed in escrow as a part of the escrow instructions where the accounts were to be sent to Raymond James prior to the closing." Subsequently, however, "escrow did not close. At the last moment, an unqualified bidder (as is known now) indicated to the bankruptcy court that they wanted to bid. The purchase price was bid up . . . ." Newby testified that, by March 2001, "we already [were] well aware that Raymond James' involvement in any of this is no longer going to be possible," and that he told "everybody" – meaning all of RightStar's principals – that the January 26 letter was "dead." In spite of that, he "caught [one of RightStar's principals] representing that Raymond James was going to fund this transaction after I had told him that Raymond James was not funding this transaction." Nevertheless, Newby did not issue any written withdrawal of the January 26 letter, or make any disclosures to Raymond James, Loewen or the Bankruptcy Court. The letter apparently remained in escrow while RightStar attempted to conclude the purchase. (CX-6 at 2; Tr. II at 99, 102-03, 107, 140.)

On May 31, Newby sent an e-mail to Steve Putnam, who was Fulp's supervisor at Raymond James in Florida, describing RightStar's planned acquisition of assets from Loewen. In the e-mail, Newby did not disclose his communications with other Raymond James employees in January, or that he had signed the various commitment letters, or that the January 26 letter was in escrow. Instead, he told Putnam that in connection with RightStar's purchase, the new trustees would be opening accounts with $65 million in assets and "want[] to margin all of the accounts." Specifically, he indicated that the

trustees "want to borrow $47 million for six months. . . . [They] would like to have the margin available as soon as the accounts hit the firm or at least within the first couple of days." Putnam approved a reduced rate for the margin loan and forwarded Newby's e-mail to other Raymond James personnel to review the proposed transaction. (CX-8 at 19; Tr. I at 175-76, 180.)[7]

On June 1, Bixby learned of Newby's request and advised the other Raymond James personnel who were reviewing Newby's proposal about her communications with Newby in January. As a result, they asked Newby to provide additional information. Newby responded with an e-mail on June 4 in which he recounted a portion of the prior history, but once again did not disclose the January 26 commitment letter. Raymond James then asked for still more information. (CX-8 at 18, 20, 21; Tr. I at 183.)

On June 27, 2001, Raymond James learned of the January 26, 2001 commitment letter issued by Newby when it received a copy of the letter from a law firm that represented Loewen. On June 28, Paul Matecki, Raymond James' corporate counsel, sent a letter to RightStar stating:

> We recently discovered that on January 26, 2001, Lance Newby, without the authorization or consent of Raymond James Financial Services, Inc., purportedly represented to you that RJFS would provide you with funding in the sum of $30,000,000. Mr. Newby did not have actual or apparent authority to execute this commitment letter. . . . Raymond James Financial Services will not be proceeding with any form of funding for RightStar International, Inc.

Matecki sent copies of the letter to Loewen and the future trustees, among others, but not to Newby. (CX-8 at 3, 23-53; Tr. I at 92-93.)

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[7] Although he had been told in January that Raymond James would not permit a pre-pay, in his May 31 e-mail, Newby asked if Putnam would approve "a pre-pay of $47 million while margins are being completed?" Not surprisingly, Putnam replied: "I am confused. What are we pre-paying? We cannot prepay money when we do not have the assets." (CX-8 at 19.)

On June 29, Newby faxed Putnam a letter indicating that he had seen Matecki's letter, and that:

> The letter does not address the facts. Over the weekend I will have my personal attorney compose a letter stating the facts and reveal where permission was granted by a corporate officer and confirmed by another. RightStar International, Inc. has no issue with Raymond James other than the fact that [Matecki's] letter did not address the facts and the fact that it was sent to Loewen. . . .

(CX-8 at 5.) Neither Newby nor his attorney, however, followed up with the promised letter.

On July 5, RightStar's attorney faxed a letter to Matecki stating:

> [Raymond James] issued a loan commitment on which RightStar has in good faith relied upon to its detriment . . . . Mr. Newby held himself out as an authorized representative of Raymond James. Throughout the course of the transaction Mr. Newby shared with the principals of RightStar numerous communications between himself and other representatives of Raymond James regarding this transaction, and RightStar was led to believe that Mr. Newby had obtained whatever authority was necessary for Raymond James to issue the loan commitment. . . . If Raymond James does not honor its loan commitment, RightStar will bring suit to recover its damages.

On August 8, Matecki sent RightStar's attorney a letter asking him to provide the "numerous communications between [Newby] and other representatives of Raymond James" referred to in the July 5 letter. Raymond James received no response to the August 8 letter, and RightStar made no further demands on Raymond James. (CX-8 at 6-8; Tr. I at 94-96.)

Newby testified that when he learned of Matecki's letter on June 28, he became "pretty upset" and "started to rip up this whole entire transaction and to go to all the parties and say we're not doing it." Newby said he was upset because he "knew that [he] would be leaving Raymond James." Newby testified that RightStar thereupon offered to

pay him $2 million to continue his involvement and not "upset the apple cart." (Tr. II at 149-50, 157-60.)

Raymond James subsequently permitted Newby to resign, effective July 13, 2001. He then associated with another NASD member, where he is still registered. RightStar concluded the purchase from Loewen in November 2001 for $47 million. Along the way, RightStar and the new trustees learned that under Hawaii law the trustees could not margin the assets owned by the trust, or loan them to RightStar. RightStar, however, obtained financing from other sources. The new trustees placed the assets under management with Newby, who receives approximately $380,000 a year for managing them. In addition, Newby has received approximately $900,000 of the promised $2 million from RightStar, but he is unsure whether he will receive the balance. (CX-2; Tr. II at 21, 44, 62, 150-51, 160-62.)

3. Discussion

The Complaint charges that Newby executed the January 26, 2001 commitment letter on behalf of Raymond James without authorization and that he subsequently misled Raymond James personnel about the commitment, all in violation of Rule 2110. In Department of Enforcement v. Shvarts, the National Adjudicatory Council explained the reach of Rule 2110:

> Conduct Rule 2110 "is not limited to rules of legal conduct but rather … it states a broad ethical principle." . . . Disciplinary hearings under Conduct Rule 2110 are ethical proceedings, and one may find a violation of the ethical requirements where no legally cognizable wrong occurred. . . . The NASD has authority to impose sanctions for violations of "moral standards" even if there was no "unlawful" conduct.

No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000) (citations and footnote omitted).

It is well-settled that any conduct that violates the securities laws and regulations or NASD rules also violates Rule 2110. In addition, other types of conduct, not specifically addressed by those provisions, violates Rule 2110 "if the surrounding facts and circumstances indicate that the conduct was unethical. The concepts of excuse, justification and 'bad faith' may be employed to determine whether conduct is unethical in these cases." Shvarts, 2000 NASD Discip. LEXIS 6 at *13. One court has explained: "The touchstone … is good faith – the ultimate test of violation of an ethical standard . . . ." Buchman v. SEC, 553 F.2d 816, 820 (2d Cir. 1977). The NAC recently explained in holding that a Registered Representative violated Rule 2110 by making misrepresentations to his employer:

> The SEC has construed Conduct Rule 2110 broadly to apply to all business-related misconduct, regardless of whether the misconduct involved securities. . . . The principal consideration is whether the misconduct reflects on an associated person's ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public. . . .

Department of Enforcement v. Davenport, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8-9 (May 7, 2003) (Citations omitted).

RightStar enticed Newby with the opportunity to earn very large commissions and fees from the trust assets if RightStar could close the purchase from Loewen.[8] To accomplish that, RightStar needed to keep the secret of the surplus funds in the trust and also convince Loewen that it had an independent source of funding. Newby tried to obtain that funding from Raymond James's investment banking department, but was rebuffed, and then sought the money through a pre-pay, but was rebuffed again. By mid-December 2000, RightStar was seeking alternative funding in the form of a bridge loan to

[8] Newby testified that he earns $380,000 per year just for managing the trust assets, compared to total gross commissions of about $300,000 that he earned at Raymond James. (Tr. II at 117-18, 151.)

allow it to close the purchase, after which it planned to use the surplus trust funds to repay the bridge loan, but by January it had not found such financing. Newby admits that, under these circumstances, he issued the commitment letters because RightStar "needed to show the Loewen Group that [it] actually had an ability to pay for the property." Yet, as Newby well knew, this was a lie; Raymond James had not agreed to provide any funding to RightStar. (RX-1, RX-8; Tr. II at 54-55, 120, 133.)

Newby claims that when he issued the January 26 letter, he thought that Bixby had authorized a $30 million margin loan, and that is all he intended to convey in the letter. The letter, however, makes no mention of a margin loan, and the commitment runs not to the trust, which would own the account and the assets to be margined, but to RightStar. This was not a good faith error on Newby's part; rather, he crafted the letter to make it appear that Raymond James would be funding RightStar's acquisition in order to conceal from Loewen and the Bankruptcy Court the facts that RightStar had no funding, and expected to pay for the purchase by tapping surplus value in the trust. Thus, the letter was intentionally false and misleading.[9] (Tr. II at 170-71.)

On February 1, 2001, five days after he issued the January 26 commitment letter, Newby responded to Bixby's January 25 e-mail in which she had advised Newby that Raymond James would not approve a pre-pay and that if he had questions he should contact Raymond James Compliance. In his February 1 e-mail, Newby did not disclose that he had issued the commitment letter on January 26 or that the letter had been placed in escrow to assist RightStar in completing its purchase from Loewen. Instead, he urged that Raymond James should "not be show stoppers." (CX-8 p. 16.)

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[9] As the parties later discovered, under Hawaii law the new trustees could not margin the trust's assets or make any loan to RightStar from the trust assets. Therefore, Newby's January 26 letter could have obligated Raymond James to make an unsecured $30 million loan to RightStar.

Newby testified that by March, even though he had had no further communications with Raymond James, he knew that any funding from Raymond James was "dead." He also became aware, however, that RightStar was still using his January 26 commitment letter (which was in escrow) in its efforts to complete the purchase. In spite of this, although he claims he complained to RightStar, he admits he made no effort to formally withdraw the letter, and he did not notify Raymond James, Loewen or the Bankruptcy Court that RightStar was misusing the letter. In May 2001, Newby approached a different person at Raymond James, Putnam, once again seeking a margin loan or a pre-pay, without disclosing his prior communications with different Raymond James personnel, or that he had issued the January 26 letter. When Raymond James learned about the January 26 letter, Newby was angry because he knew that it would end his career with Raymond James, so he threatened to stop the transaction and obtained a promise from RightStar to pay him $2 million.

It is clear, therefore, that Newby issued the January 26 commitment letter without authority and in bad faith, in order to serve RightStar's and his own financial interests, without regard to the risks that the letter imposed on Raymond James. It is equally clear that Newby's subsequent communications with Raymond James, in which he failed to disclose that he had issued the January 26 letter, were misleading and made in bad faith. Accordingly, the Hearing Panel holds that Newby's actions were unethical and violated Rule 2110, as charged.

4. Sanctions

Enforcement requested that the Hearing Panel bar Newby from associating with any NASD member in any capacity. There are no directly applicable sanction guidelines, but Enforcement suggests, and the Panel agrees, that the Guidelines for falsification of

records provide an appropriate analogy. Those Guidelines recommend a bar in egregious cases, or a suspension of up to two years in cases where mitigating factors exist, together with a fine of $5,000 to $100,000. In addition, in general the Guidelines recommend that adjudicators increase the amount of the fine to include some or all of the financial benefit directly or indirectly derived by the respondent as a result of his misconduct. NASD Sanction Guidelines (2001 ed.) at 7, 43.

In arriving at specific sanctions, the Guidelines for falsification of records urge adjudicators to consider the nature of the document falsified, and whether the respondent had a good-faith, but mistaken, belief of express or implied authority. Sanction Guidelines at 43. In this case, the commitment letter was a highly important document that, on its face, committed Raymond James to provide $30 million in funding to RightStar. Furthermore, as explained above, Newby did not have a good-faith belief that he had authority to issue the letter on behalf of Raymond James.

The Sanction Guidelines also list several other general considerations for adjudicators in setting sanctions. Sanction Guidelines at 9-10. In reviewing these considerations, the Panel noted: (1) Newby did not voluntarily and reasonably attempt, prior to detection, to remedy the misconduct by withdrawing the letter; (2) he engaged in a clear pattern of misconduct; (3) he attempted to conceal his misconduct in his subsequent communications with Raymond James; (4) his misconduct was intentional, or at least highly reckless; and (5) his misconduct was clearly motivated by the potential for substantial monetary gain. All of these factors are aggravating. In contrast, the Panel finds no mitigating circumstances.

Therefore, the Panel finds that Newby's actions were egregious, and agrees with Enforcement that a bar is the appropriate sanction. In light of the bar, no fine will be imposed.[10]

5. Conclusion

Respondent Lance Christopher Newby entered into a commitment agreement on behalf of a member firm without authority, in violation of Rule 2110. He is barred from associating with any NASD member in any capacity. In addition, he is ordered to pay costs in the amount of $3,746.50, which includes an administrative fee of $750 and hearing transcript costs of $2,996.50. If this decision becomes NASD's final disciplinary action in this matter, the bar shall become effective immediately.[11]

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to: Lance Christopher Newby (*via overnight and first class mail*)
Lorrin A. Kau, Esq. (*via facsimile and first class mail*)
David A. Watson, Esq. (*electronically and via first class mail*)
Rory C. Flynn, Esq. (*electronically and via first class mail*)

[10] If the Panel had not imposed a bar, it would have imposed a fine in excess of $1 million in light of the financial benefits that Newby has received.

[11] 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.