NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MICHAEL F. SIEGEL, (CRD No. 1001893) 3413 5th Street Metairie, LA 71446 Respondent.	Disciplinary Proceeding No. C05020055 Hearing Officer – JN **HEARING PANEL DECISION** April 19, 2004

Respondent violated Rules 2110 and 3040 by selling securities outside his firm without giving the firm the required prior notice. He also violated Rules 2110 and 2310 by recommending the purchase of securities that were unsuitable for any investor. For selling away, he was suspended for six months and fined $20,000. For the unsuitable recommendations, he was suspended for six months and fined $10,000. The suspensions for the two offenses are to be served concurrently. He was also assessed hearing costs of $6,607.15.

Appearances

For the Complainant: Mark P. Dauer, Esq. and Joel R. Beck, Esq. (Rory C. Flynn, Esq., of counsel.)

For the Respondent: George C. Freeman, III, Esq. and Meredith A. Cunningham, Esq.

DECISION

I. Introduction

On November 26, 2002, the Department of Enforcement filed a Complaint against Respondent Michael F. Siegel, alleging that he made unsuitable recommendations to two couples (H.D. and L.D., and P.L. and D.L.), in violation of NASD Rules 2110 and 2310, and that he

engaged in private securities transactions without prior notice to and approval from his firm, in violation of Rules 2110 and 3040.

A Hearing Panel, composed of an NASD Hearing Officer and two members of NASD District Committee No. 5, conducted a hearing on October 8 – 10, 2003 in New Orleans, Louisiana. The Department presented six witnesses and introduced twenty-three exhibits, cited as "CX-1," etc. The Respondent testified and presented testimony from two additional witnesses and introduced twenty-one exhibits, cited as "RX-1," etc. Transcript pages are cited with the prefix "Tr." A stipulation submitted as Joint Exhibit 1 at the outset of the hearing is cited as "Stip."

Enforcement and Respondent filed post-hearing briefs on November 28, 2003 and January 16, 2004, respectively. Enforcement filed a Reply Brief on January 21, 2004.

II. Background

Respondent was a general securities representative of Rauscher Pierce Refsnes, Inc. ("Rauscher Pierce"), where he was employed when the transactions at issue occurred. He is currently employed by another firm as a broker, and he has also maintained a career as a local radio and television commentator on financial matters (Tr. 619, 621).

In November 1997, customers H.D. and L.D. purchased securities issued by World IEQ Technologies, Inc. ("World IEQ"), a subsidiary of World Environmental Technologies, Inc. ("World ET"). In February 1998, customers P.L. and D.L. purchased securities issued by World ET. Respondent was involved in those transactions, which are the bases for the suitability and selling away charges in the Complaint.

In early 1997, Respondent learned that World ET, a newly organized corporation, was acquiring the rights to an odor- and bacteria-eradicating product known as "Nok-Out," (Tr. 624-25). The underlying formula had previously been successful in cleaning contaminated buildings, and World ET was organized for the purpose of creating new applications for the product (Tr. 628-29).

World ET asked Siegel to serve as a consultant in helping to raise money and to take the corporation public (Tr. 628, 630-31). On November 24, 1997, he sought and obtained permission from Rauscher Pierce to serve as a director of World ET (CX-1, CX-2; Tr. 632-33). In requesting his firm's permission, Respondent represented that he was not presently recommending World ET securities to his customers (CX-1; Tr. 638). The firm approved his request, stating, inter alia, that he would not be permitted to effect transactions in World ET securities (CX-2; Tr. 637).

Sometime in November or December 1997, Respondent became a member of World ET's board of directors (CX-3, CX-5; Tr. 639-41). On January 27, 1998, Respondent signed an employment agreement with World ET, which provided that he would be compensated for locating investors (CX-5; Tr. 689). Siegel did not provide a copy of this agreement to Rauscher Pierce, and he arranged for World ET to send all materials to his home address (Tr. 691-92, 735-36).

In January and March 1998, Respondent made personal loans totaling over $40,000 to World ET (CX-16; Stip., pars. 15-16). Although World ET promised repayment of these loans with interest and stock compensation, the Respondent has never received any payments (CX-19; Stip., par. 17). Respondent resigned from the board in September or October 1998, but remained as a consultant to help World ET raise capital (Tr. 699-701).

A. Respondent's Dealings with H.D. and L.D.

H.D. and L.D. became Siegel's customers in 1993, while he was with another firm, where they opened various accounts and invested $1.5 million (Tr. 643-45). In October 1997, they followed Siegel to Rauscher Pierce and moved their accounts, leaving most of their investment decisions to him (RX-9, RX-13; Tr. 151-152, 202-03).

In early November 1997, Respondent visited H.D. and L.D. to discuss their investments (Tr. 647-48). Siegel mentioned World ET, a company previously unknown to them; he told them that he was excited about its product, planned to serve on its board, and intended to invest his own funds (Tr. 650-52). After H.D. inquired how he could invest in World ET, Respondent offered to provide the name of his contact (Tr. 653). At H.D.'s request, Respondent shortly thereafter called the company and learned that the subsidiary was seeking $300,000 for a developmental project. He then passed on the information to H.D. (Tr. 655-56). The customer asked Respondent to obtain the paperwork (Tr. 656). Respondent later delivered to the couple a "World IEQ Technologies, Inc. Subscription Agreement" and an attached "World IEQ Technologies, Inc. Subscriber Prospective Offeree Questionnaire" (CX-6; Stip., par. 3).

On November 24, 1997, H.D. signed that agreement and questionnaire (Tr. 660-61). The agreement provides that the subscriber was purchasing 300,000 shares of common stock in World IEQ for $300 and a "120 day debenture" issued by that company for $300,000 (CX-6). The questionnaire recites that the subscriber is buying 300,000 shares of World IEQ "Class Common Stock" [sic] and describes the debenture as a "WIEQ 365 day Debenture in the amount of $300,000.00" (Id.). Neither the agreement nor the questionnaire contains the interest rate or terms of repayment for the loan. H.D. signed both documents.

On November 28, 1997, using a letter of authorization furnished by Siegel, the couple directed him to withdraw $300,300 from their Rauscher Pierce account and to wire the funds to a Texas bank for World IEQ's account (CX-7; Stip., par. 6; Tr. 662-63). On or about December 1, 1997, Rauscher Pierce effected a wire transfer in accordance with those instructions (CX-8; Stip., par. 7).

H.D. and L.D. never received any payment of interest, dividends, or principal on their investment. Nor did they ever receive certificates evidencing that investment (Tr. 171-72, 178, 306).

B. Respondent's Dealings with D.L. and P.L.

After realizing a substantial profit from the sale of her health care business, D.L. and her husband, P.L., opened a discretionary account with Respondent for investment of those proceeds (Tr. 360, 666-67; Stip., par. 14). In November 1997, Siegel visited the couple and discussed investments with them (Tr. 364, 667-68). He initiated a conversation regarding World ET. Respondent mentioned the new formula and its beneficial uses, and told D.L. and P.L. that he was going to become a consultant for World ET, that he hoped to become a member of its board, and that he was planning to invest in the company (Tr. 669).

During a subsequent meeting, D.L. asked Respondent about opportunities to invest in World ET (Tr. 674). He told her about World ET's interest in raising money for possible use of the formula in the poultry industry (Tr. 675). Respondent also suggested that she contact the company to obtain more information, but she asked Siegel to contact the company (Tr. 674-75). The company then sent Siegel a debenture subscription agreement, which he delivered to D.L. and P.L. (Tr. 675-76; Stip., par. 8).

After further discussions with Respondent, the couple decided to purchase the debenture. Their subscription agreement stated no interest rate or maturity date for the debenture (CX-11). In early February 1998, D.L. requested that Rauscher Pierce transfer $100,000 from D.L. and P.L.'s account to their joint checking account (CX-15; Stip., par. 9). Rauscher Pierce effected a wire transfer in accordance with those instructions (Stip., par. 10). On or about February 11, 1998, after signing the subscription agreement, the couple gave Respondent a check for $100,000 and made payable to World Environmental Technologies, Inc. (CX-11; Stip., par. 12). The check was deposited in World ET's account (Stip., par. 13).

As was the case with the first couple, D.L. and P.L. have never received any payments of interest, dividends, or principal on their investment (Tr. 385). Nor have they received any documentation or reports from World ET other than the materials Respondent delivered (Tr. 375-76).

III. Discussion

A. Liability

1. Selling Away

Under Rule 3040, an associated person may not "participate in any manner in a private securities transaction" without prior detailed written notice to his firm (emphasis added). Where the broker may receive selling compensation, the member firm must respond to the notice in writing indicating whether it approves or disapproves of the person's participation in the proposed transaction. If the member approves the transaction, the member must record the transaction in its books and records and supervise the associated person's participation in the transaction as if the transaction had been executed by the member firm.

The Rule covers "an associated person who not only makes a sale but who participates 'in any manner' in the transaction."[1] The phrase "participate in any manner" is construed broadly to "further the important purposes of Rule 3040."[2] Such an interpretation is appropriate, given the "unique relationship in trust between a broker and customer. The broad construction of the phrase implicitly recognizes that a customer may give special weight to a broker's involvement in an investment transaction, which a customer may perceive as having the broker's imprimatur."[3]

Respondent concedes his violation of Rule 3040 (Tr. 78; Br., pp. 8, 28). The record abundantly supports that concession. First, the parties agreed that the "investments" in World ET "involved securities" (Stip., par. 32).[4] Second, Respondent participated in the sales: he brought the securities to the customers' attention, told them of his interest in the company, communicated with the company on their behalf, distributed the subscription agreements to them, and collected and forwarded their money to World ET. Finally, Siegel gave no notice to and received no permission from his firm to engage in these transactions.

Respondent participated in private securities transactions involving the sale of a World IEQ debenture and World IEQ common stock to H.D. and L.D., and a World ET debenture to

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[1] Ronald J. Gogul, 52 S.E.C. 307, 310 (1995).

[2] Dep't. of Enforcement v. Love, Complaint No. C3A010009, 2003 NASD Discip. LEXIS 17, at *31 n.25 (NAC May 19, 2003), aff'd, Exchange Act Release No. 49,248, 2004 SEC LEXIS 318 (Feb. 13, 2004), appeal pending, No. 04-70968, U. S. Court of Appeals, Ninth Circuit. That Siegel did not receive compensation is irrelevant. "The express language of the rule makes clear that a registered representative is required to provide his or her firm notice of the activity regardless of whether he or she expects to receive compensation." Id. at *33 n.27.

[3] Love, 2003 NASD Discip. LEXIS 17, at *32.

[4] Respondent's lawyer referred to the instruments as "these securities" and, for sanctions purposes, described the misconduct as involving "private securities transactions" (Tr. 1084, 1110). The terminology accurately described the debenture, which World ET issued to raise money for general business use. The customers were interested in profit. The debentures were not limited as to offerees; indeed, Siegel contacted several others (in addition to the two couples) as possible investors. He presented the debentures as investments and, indeed, believed that they needed regulatory approval. In these circumstances, the debentures were securities. See Reves v. Ernst & Young, 494 U.S. 63 (1990).

D.L. and P.L. The Panel further concludes that he did so without first giving his firm detailed written notice of his intended participation and obtaining written permission from his firm to participate in the transactions. Siegel thus violated Rule 3040. Such misconduct also constitutes a violation of Rule 2110's mandate for the observance of high standards of commercial honor and just and equitable principles of trade.[5]

2. Suitability (Rules 2310(a))

NASD Rule 2310(a) provides that in recommending the purchase of a security, a representative must have reasonable grounds to believe that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by such customer as to his or her other security holdings and as to his financial situation and needs. Thus, the first question here is whether Siegel's conduct constituted "recommendations." If it did, the next question is whether those recommendations were unsuitable.

a.) Recommendation

The SEC has recognized that "in most situations in which the broker-dealer brings a specific Designated Security to the attention of the customer, a subsequent purchase of the security will involve an implicit or explicit recommendation by the broker-dealer."[6] Where, as here, the conduct involves speculative securities, "a transaction will be considered to be recommended when the member brings a specific security to the attention of the customer through any means, including, but not limited to, direct telephone communication, the delivery of promotional material through the mail, or the transmission of electronic messages."[7]

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[5] See Stephen J. Gluckman, Complaint No. C02980042, 1998 NASD Discip. LEXIS 8, at *15 (NBCC Jan. 23, 1998).

[6] Sales Practice Requirements for Certain Low-Priced Securities, 1989 SEC LEXIS 1603, at *15 (Aug. 22, 1989).

[7] NASD Notice to Members 96-60, 1996 NASD LEXIS 76, "Clarification of Members' Suitability Responsibilities Under NASD Rules with Special Emphasis on Member Activities in Speculative and Low-Priced Securities."

Respondent contends that the NASD "retracted" this language in a 1997 clarification letter (Br., p. 9). That letter said only that the Notice "was not meant . . . to suggest that every statement that includes mention of a security would be considered a recommendation. Whether a particular transaction is in fact recommended depends on an analysis of all the relevant facts and circumstances."[8] That document did not "retract" the principle that bringing the security to the customer's attention is a critical aspect in making a recommendation. Indeed, in a decision issued three years after the so-called "retraction," the National Adjudicatory Council held that a "recommendation" exists when the customers first learned of the investment opportunity from Respondent and based their decision to buy the security on his representations. Dist. Bus. Conduct Committee v. Guevara, No. C9A970018, 1999 NASD Discip. LEXIS 1, at *18 (NAC Jan. 28, 1999), aff'd, Exchange Act Release No. 42,793, 2000 SEC LEXIS 986 (2000).

Respondent brought the investments to the attention of both couples, who each had great faith in Siegel and trusted him to manage their substantial holdings. The customers were previously unaware of World ET. He told them about this new company and its new formula. He told them that he hoped to serve on its board and that he personally intended to invest in the company – statements which certainly reflected his enthusiasm about the company. Finally, he acted as middleman between the customers and the company – communicating with the issuer, delivering subscription agreements to the customers, and facilitating the movement of their money to World ET. The totality of these actions, by a man whose investment advice the customers trusted, clearly amounted to "recommendations."[9]

[8] NASD Interpretive Letter, Staff Clarification of NASD Notice to Members 96-60 Regarding a Member's Suitability Obligation Under NASD Rule 2310 (Jan. 23, 1997).

[9] The Panel's finding that Siegel recommended the securities rests on his own testimony, taken with various undisputed facts. Because these sources alone support liability, the Panel had no reason to address various contentions involving the customers' credibility.

Citing a New York Stock Exchange Interpretation that equates "recommendation" with "statement[s]" that could "reasonably be expected to influence a customer to purchase," Siegel argues that his customers were so sophisticated that they would not have been influenced by him (Br., p. 9).[10] Although that language is not applicable to an NASD proceeding, the standard is nonetheless satisfied here. Respondent was a person to whom these customers had already entrusted the management of large sums. The first couple left most of their investment decisions to him, and the second couple opened a discretionary account with him. Moreover, Siegel's local media prominence as an expert adviser likely gave him even further credibility. His enthusiasm for the company, together with facilitating their investments, amounted to suggesting that they should get in on the ground floor of this start-up enterprise – a company that was previously unknown to them. The customers, whatever their supposed sophistication, were certainly influenced by Siegel.

b.) The securities

Before determining that a security is suitable for a particular customer, no matter how sophisticated, a broker/dealer must first have a reasonable basis "to believe that the recommendation could be suitable for at least *some* customers."[11] This requirement "relates only to the particular recommendation, rather than to any particular customer."[12] "[A] broker may violate the suitability rule if he fails so fundamentally to comprehend the consequences of his own recommendation that such recommendation is unsuitable for any investor, regardless of the investor's wealth, willingness to bear risk, age, or other individual characteristics."[13]

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[10] NYSE Rule Interpretation 472/08 (1985).

[11] F.J. Kaufman and Company of Virginia, Exchange Act Release No. 27,535, 1989 SEC LEXIS 2376, at *10 (1989) (emphasis in original).

[12] Id.

[13] Id. at *11. See also NASD Notice to Members 01-23 at note 4.

The Panel concludes that the investments in this case were unsuitable for anyone. The instant debentures, totally barren in detail, were nothing more than the borrower's statements that it would repay the customers' unsecured loans if and when it felt like doing so, on such terms as it might choose. No investor should loan money to a company on that basis. When asked about the suitability of the investments in World ET, Siegel himself testified that he thought the investment was not suitable for H.D. and L.D. because there was no specified interest rate in it (Tr. 775).[14] Respondent stated: "Yes. They should have had something in there, no matter why." (Tr. 775-76). He agreed that a debenture with no interest rate would not have been suitable for an investor and that one of the subscription agreements was "one of the worst sets of offering documents I have ever seen in my life. I mean you can't tell what these people are investing in." (Tr. 776, 822-23). Respondent conceded: "Had I looked over the documents, yes, I probably would have been discouraged right then and there. I didn't look them over. I wish I had." (Tr. 826).

Respondent failed in his duty to determine whether there was a reasonable basis to believe that the securities would be suitable for at least some customers, and thus violated Rule 2310(a) by making unsuitable recommendations to customers H.D., L.D., P.L., and D.L. to purchase the World ET and World IEQ securities. A violation of Rule 2310 is also a violation of Rule 2110. Gluckman, supra, at *22.

B. Selling Away

For this misconduct, the NASD Sanction Guidelines recommend a fine of $5,000 to $50,000, with suspensions that vary in length according to the amount involved.[15] Where, as here, the amount is between $100,000 and $500,000, the Guidelines recommend a suspension of

[14] Siegel stipulated that the investments made by H.D., L.D., P.L., and D.L. involved securities (Stip., par. 32).

[15] NASD Special Notice to Members 03-65 (Oct. 2003), p. 678.

three to six months, a period which can be increased or decreased as the Panel analyzes aggravating and mitigating factors.

Rule 3040 serves important purposes: “to protect investors from unmonitored sales” and “to protect securities firms from exposure to loss and litigation in connection with sales made by persons associated with them.”[16] Each of those purposes was involved here. The customers lost substantial sums, and the firm was among the defendants in federal and state litigation involving the purchases (RX-21).

Thirteen of the “principal considerations” listed in the Guidelines are applicable to sanctions in selling away cases: (1) dollar volume of sales; (2) number of customers; (3) length of time over which the selling away activity occurred; (4) whether the product had been found violative of federal or state securities laws or federal, state or SRO rules; (5) whether respondent had a proprietary or beneficial interest in or was otherwise affiliated with, the selling enterprise or issuer, and, if so, whether respondent disclosed this information to his customers; (6) whether the respondent attempted to create the impression that his employer sanctioned the activity; (7) whether respondent’s selling away activity resulted, either directly or indirectly, in injury to the investing public and, if so, the nature and extent of the injury; (8) whether respondent sold away to customers of the member firm; (9) whether respondent provided the member firm with verbal notice of the details of the proposed transaction and, if so, the firm’s verbal or written response, if any; (10) whether respondent sold the securities after a prior rejection or warning by the member firm; (11) whether respondent participated in the sale by referring customers or selling the product directly to customers; (12) whether respondent recruited other registered individuals to sell the product; and (13) whether respondent misled his employer about the existence of the

[16] Jim Newcomb, Exchange Act Release No. 44,945, 2001 SEC LEXIS 2172, at *19 (2001).

selling away activity or otherwise concealed the selling away activity from the firm. Guidelines, supra, at pp. 9-10.

On this record, the thirteen factors present a mix of circumstances. The misconduct involved only two couples and two transactions, which occurred over a relatively short time period. There were no adjudicated violations of other laws. Siegel did not attempt to create the impression that his firm backed the activity; nor did he recruit other registered persons to sell the products.

But the majority of these factors (Numbers 1, 5, 7, 8, 9, 10, 11, and 13) cut against Respondent. The total dollar amount involved in the selling away ($400,300) was significant. Siegel unquestionably had a proprietary or beneficial interest in, or was otherwise affiliated with, the issuer. He served as a board member (and told the customers that he was seeking such appointment). He was also as an employee, hired to raise money for compensation. His selling away resulted in injury to his customers, who never received anything from World ET and lost all of their money. Those customers (H.D., L.D., D.L., and P.L.) were also customers of the firm that employed Siegel. Respondent said that he told his supervisor of one of the sales, a conversation which the supervisor denied having. Under any view, he gave no verbal notice of the sales to the second couple. His arrangement with World ET to send materials to his home address and his failure to tell Rauscher Pierce about his employment arrangement are consistent with hiding the activity from the firm. In allowing him to serve on the World ET board, the firm had every reason to assume that he was abiding by its instructions that he not sell the company's securities. He engaged in the misconduct, despite that warning. Finally, Respondent participated in the sale directly by obtaining the subscription agreements from the issuer, providing them to his customers, and processing their wired transactions.

Respondent says that his training and knowledge left him ignorant of the Rule's broad "participate in any manner" language (Br., p. 6). However, brokers are presumed to know the Rules, and it is well settled that ignorance is not a factor in mitigation.[17] He also argues that any suspension beyond thirty days would be an effective "death penalty" because of his notoriety in the media (Br., pp. 39-40). Prominence should not be a mitigating factor. In the Panel's view, there is no legitimate reason why a broker with media presence should receive any lighter sanctions than a less well-known respondent. Nothing in the Guidelines or the cases warrants such an approach and the Panel declines to adopt it here.[18]

The Department here seeks a ten-month suspension and a $20,000 fine. Respondent argues for little or no sanction for this misconduct. The Panel has considered all of the above circumstances and finds that the recommended range of three to six months is appropriate, with no increase for aggravation and no decrease for mitigation. The Panel believes, on balance, that the misconduct requires a serious sanction and that a six-month suspension (the top of the recommended range) is thus appropriate.

As to a fine, the Panel concludes that $20,000 – a figure slightly below the midpoint of the recommended range – is appropriate. In deciding on this monetary sanction, the Panel notes that Respondent received nothing from the sales, and, indeed, lost the $44,000 that he himself had invested in World ET.

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[17] Gluckman, supra, 1999 SEC LEXIS 1395, at *20 n.29, and cases there cited; Prime Investors, Inc. 1997 SEC LEXIS 761, at *28 (1997); Dist. Bus. Conduct Committee v. Joel Dean Moore, Complaint No. C01970001, 1999 NASD Discip. LEXIS 27, at *17 (NAC Aug. 9, 1999); Dist. Bus. Conduct Committee v. Covato/Lipsitz, Inc., Complaint No. C9A920043, 1994 NASD Discip. LEXIS 53, at *23 (NBCC Mar. 15, 1994).

[18] Siegel also emphasized his lack of disciplinary history. The Panel may not consider that factor as mitigating. Dep't. of Enforcement v. Mark S. Balbirer, Complaint No. C07980011, 1999 NASD Discip. LEXIS 29 (NAC Oct. 18, 1999).

C. Suitability Violations

For unsuitable recommendations, the Guidelines recommend that in cases involving non-egregious misconduct, the adjudicator should consider a suspension of 10 business days to one year (with two years to a bar for egregious recommendations) and a fine of $2,500 to $75,000.[19] The Department recommends restitution to the customers, a 60-day suspension, and $20,000 fine for his violations of Rules 2310 and 2110. Respondent urges that the Panel impose little or no suspension and that it not order restitution.

In applying the Guidelines' "principal considerations" (Guidelines, supra, at pp. 9-10), the record again presents a mix of circumstances. As noted, the misconduct involved two couples and two transactions. Siegel did not engage in "numerous acts and/or a pattern of misconduct." Id., at 9. The parties stipulated that the violations "did not occur over an extended period of time" and that "Siegel cooperated fully with NASD's investigation of the matters at issue in this disciplinary proceeding" (Stip., pars. 37, 38). In the Panel's view, the misconduct arose from negligence, not willfulness or recklessness. Guidelines, supra, p. 10. The customers were comparatively sophisticated persons who knew that they were risking money on a start-up enterprise with a new product. There was no evidence that Siegel intentionally recommended unsuitable products. Nor did the misconduct result in monetary or other gain for Respondent. On the contrary, he believed in the investment and lost over $40,000 of his own money, which he had loaned to the issuer. Guidelines, supra, p. 10.[20]

There were also several aggravating circumstances. Respondent recommended investments that were so defective that he ultimately acknowledged their unsuitability for any investor. He was so caught up in admitted "excitement" about the company's prospects that he

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[19] NASD Sanction Guidelines, p. 99 (2001 ed.).

[20] Here, again, the absence of disciplinary history cannot be considered as mitigating. Balbirer, supra.

failed to examine the details of the subscription agreement under which his clients were committing their funds. Finally, his conduct resulted in substantial losses, totaling over $400,000, to the customers.

The Panel has balanced all of these considerations and concludes that the suitability violations were serious, albeit not egregious. For this misconduct, the Panel imposes a suspension of six months (the midpoint of the applicable recommended range) and a fine of $10,000.[21] Because the unsuitability and the selling away overlap and involve the same transactions, the Panel deems it appropriate that the suspensions imposed for each violation be served concurrently.

Enforcement seeks restitution, "a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss." Guidelines, supra, at p. 6. The Panel declines to award restitution here. The customers were, as noted, relatively sophisticated persons, who voluntarily chose to invest in a risky enterprise. Under the Guidelines, restitution is "particularly" appropriate where "a Respondent has benefited from the misconduct." Siegel earned nothing from the transactions and lost his own money on the company. Finally, the record shows that the customers are pursuing arbitration, a filing that preceded the instant Complaint and is going to hearing this month. See Guidelines, supra at p. 6, fn. 3; Dep't. of Enforcement v. John J. Katsock, Jr., No. C9A020018, 2003 NASD Discip. LEXIS 39 at *48-49 (OHO, Sept. 4, 2003). In the circumstances of this case, the Panel concludes that this is not a proceeding where restitution is necessary because "a victim otherwise would unjustly suffer loss."[22]

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[21] In deciding upon this fine, the Panel again notes that Siegel made no profit from the transactions and lost over $40,000 of his own money.

[22] Respondent argues that restitution would be unfair because of delay between the events themselves and the Complaint, citing Dep't. of Enforcement v. Morgan Stanley Dean Witter Inc., No. CAF000045, 2002 NASD Discip.

IV. Conclusion

Respondent Michael F. Siegel violated NASD Conduct Rules 3040 and 2110 by participating in the sale of securities issued by World ET and World IEQ without prior written notice to and approval from the NASD member firm with which he was associated. For selling away, Siegel is fined $20,000 and suspended for a period of six months. Siegel also violated NASD Conduct Rules 2110 and 2310 by making unsuitable recommendations to customers H.D., L.D., D.L, and P.L. For this violation, he is fined $10,000 and suspended for a period of six months. The suspensions shall be served concurrently. These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this decision becomes the final disciplinary action of NASD, except that if this decision becomes the final disciplinary action of NASD, the suspensions shall begin on June 7, 2004 and end at the close of business on December 6, 2004. Finally, Respondent is assessed a total of $6,607.15 in costs (reflecting transcript costs of $5,857.15 and the standard $750 administrative fee).[23]

HEARING PANEL

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Jerome Nelson
Hearing Officer

LEXIS 11 (NAC July 29, 2002) and Jeffrey Ainley Hayden, Exchange Act Release No. 42,772, 2000 SEC LEXIS 946 (2000) (Br., pp. 32-34). The Panel has denied restitution on other grounds and has no need to address this issue. It notes, in any event, that the present case is distinguishable in several ways from the cited cases. Here, for example, Enforcement filed the Complaint about four months after learning of the misconduct. In Morgan Stanley and Hayden, at least five years intervened between the events and the Complaint. See Mark H. Love, Exchange Act Release No. 49,248, 2004 SEC LEXIS 318, at **14-16 (2004).

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

Copies to: Michael F. Siegel (*via overnight and first class mail*)
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