BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 9 Complainant, vs. Michael R. Euripides Virginia Beach, Virginia, Respondent.	DECISION Complaint No. C9B950014 District No. 9 Dated: July 28, 1997

Michael R. Euripides ("Euripides") has appealed, pursuant to NASD Procedural Rule 9310, a December 17, 1996 decision of the District Business Conduct Committee for District No. 9 ("DBCC"). We find that Euripides violated Conduct Rules 2110 and 2120 (formerly Article III, Sections 1 and 18 of the Association's Rules of Fair Practice), Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, by making material misrepresentations and omissions in the sale of securities; making unsuitable recommendations; and executing unauthorized transactions in the course of dealing with customer RL. Accordingly, we order that Euripides be censured, fined $5,000, required to requalify by examination, suspended for 60 days from association with any member of the Association in any capacity, and required to pay $15,488.92 in restitution (plus interest per annum of 11 1/4 percent from June 25, 1993). We also assess DBCC costs of $1,358 and appeal costs of $750.

Factual Background

Euripides passed the Series 7 examination in 1985. He was associated with First Jersey Securities from May 1985 until January 1987 and with Sherwood Capital, Inc. from February 1987 until May 1988. In May 1988, Euripides registered as a general securities representative with F.N. Wolf & Co., Inc. ("Wolf" or "the Firm"). Euripides remained affiliated with Wolf until June 1994, when the Firm withdrew from membership in the Association.

When RL met Euripides in May 1993, RL was neither an experienced nor a wealthy investor. RL was 58 years old, and had retired in 1991 due to a heart condition after many years of driving his own bread truck. His investment experience was limited to mutual funds, including his largest investment of $26,000 in a John Hancock mutual fund. RL had an additional $20,000 in certificates of deposit ("CDs") in an Individual Retirement Account ("IRA") and approximately $6,000 in a savings account. His house was unencumbered and worth approximately $65,000, and his monthly income was $1,300 ($180 from his pension, $960 in Social Security disability, and $160 from his John Hancock investment).

RL lived with his son RL, Jr., who was Euripides' client. In the Spring of 1993, Euripides mailed RL, Jr. a prospectus for convertible, subordinated, 10 percent debentures issued by Primedex Health Systems, Inc ("Primedex"). Primedex was principally engaged in the health care services industry. On April 3, 1993, the California legislature had enacted a law designed to reform the California workers' compensation system. Primedex disclosed the passage of this legislation in its prospectus, which stated that the company believed "that the final regulations under this new law, when adopted, [would] have a negative impact on its business," although Primedex was uncertain of the full extent of that impact. In addition, Primedex disclosed that it might require additional financing to service the bonds; that Primedex=s parent had made substantial advances to Primedex for working-capital purposes and was expected to make future advances; and that the collection cycle for Primedex's accounts receivable was significantly longer than was typical of the health care services industry and amounts collected for services in Primedex's operations was approximately 50 percent of the amounts billed.

Euripides discussed Primedex with RL, first by telephone and later in person, on June 8, 1993, when Euripides visited RL's home. At their June 8 meeting, Euripides completed a new account form for RL. The new account form indicated that RL had yearly income of $15,000, net worth of $75,000, liquid net worth of $28,000, and additional risk capital of $15,000, and that his investment objectives were safety of principal and long-term growth. At this meeting, RL agreed to redeem the CDs in his IRA account to purchase $20,000 of Primedex bonds.

After RL purchased the bonds on June 25, 1993,[1] their value diminished rapidly. RL' s account statements demonstrate that the bonds were worth $19,000 on July 29, 1993; $14,000 on September 24; and $12,000 on October 29. RL received one interest payment of $527 from Primedex on November 12, 1993.

On December 30, 1993, Euripides sold the Primedex bonds from RL's account for $11,491.69, and purchased 4,000 shares of Acorn Venture Capital Corporation common stock ("Acorn") for RL's account for $11,002.75. Acorn was a non-diversified, closed-end management investment company. According to Acorn's public filings, an investment in Acorn involved a high degree of risk based on, but not limited to, the speculative nature, limited liquidity, and lack of diversification of the company's investments.

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[1] Although RL agreed on June 8 to purchase the Primedex bonds, the funds needed to purchase the bonds were not transferred into his new account until June 16. Part of the delay was caused by RL's need to redeem certificates of deposit in his IRA and to borrow money from his son to raise the purchase money.

RL eventually sold the Acorn stock for $3,494.31. Including the sole interest payment from Primedex and the Primedex proceeds which were not re-invested in Acorn, RL lost $15,488.92 of his $20,000 investment in Primedex and Acorn.

On October 6, 1994, RL wrote to the NASD to lodge a formal complaint against Euripides. RL claimed that Euripides had guaranteed RL that an investment in Primedex would be safe and that RL would not lose money. This was important to RL because he "couldn't lose that money and [] had to have income from it." RL also claimed that Euripides sold the Primedex bonds and purchased the Acorn stock without RL's authorization.

The DBCC found that Euripides lacked reasonable grounds to believe that his recommendations of Primedex bonds and Acorn stock to RL were suitable; that Euripides made misrepresentations and omissions of material facts to RL; and that Euripides sold the Primedex debentures and purchased the Acorn stock, without RL's authorization. According to the DBCC, this conduct violated NASD Conduct Rules 2110 and 2120, Section 10(b) of the Exchange Act, and Rule 10b-5 ("Rule 10b-5") thereunder. The DBCC imposed the following sanctions: censure; $5,000 fine; requalification by examination; suspension for 60 days from association with any member of the Association; order to pay $15,488.92 in restitution to RL, plus interest of 11 1/4 percent per annum from June 25, 1993; and $1,358 costs. Euripides appealed.

Discussion

Euripides' appeal raises three issues: (1) whether Euripides made material misrepresentations in the sale of Primedex bonds to RL; (2) whether, based upon RL's financial condition, Euripides' recommendations of Primedex bonds and Acorn stock were unsuitable; and (3) whether the record supports a finding that Euripides' sale of Primedex bonds and purchase of Acorn stock to RL's account were unauthorized transactions. After a thorough review of the record and for the reasons discussed below, we answer each question affirmatively.

As a threshold matter, Euripides has challenged many of the DBCC's credibility determinations. RL and Euripides gave contradictory accounts of significant events underlying the complaint. For instance, RL testified that Euripides guaranteed that the Primedex bonds were safe and that he would not lose his principal; Euripides denied ever using the word "guaranteed." Also, Euripides claimed that he called RL on December 22, 1993, and that RL authorized Euripides to sell the Primedex bonds and purchase Acorn stock; RL denied this. In these and other instances described below, the DBCC found, either explicitly or implicitly, that RL' testimony was credible and that Euripides' testimony was not credible.

The SEC has repeatedly instructed the NBCC to give "considerable weight" to the credibility determinations of the decision makers who actually heard the witnesses' testimony. In re Christopher J. Benz, Exchange Act Rel. No. 38440 (Mar. 26, 1997); In re Frank J. Custable, 51 S.E.C. 643 (1993); In re Robert E. Gibbs, 51 S.E.C. 482 (1993); In re Anthony Tricarico, 51 S.E.C. 457 (1993); In re Mark Foglia,.51 S.E.C. 427 (1993); In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992). The credibility determinations by an

initial fact finder can only be rejected where the record contains "substantial evidence" for doing so. In re Joseph H. O'Brien, II, 51 S.E.C. 1112 (1994). In this case, the DBCC was able to assess RL' testimony over the telephone and to assess both Euripides' testimony and his demeanor. See In re Daniel J. Alderman, Exchange Act Rel. No. 35997 (Jul. 20, 1995) (SEC sustained credibility determinations based on hearing telephonic testimony because forthrightness of manner may be gauged solely by listening to person's voice). After carefully considering the DBCC hearing transcript as a whole and the specific exchanges that Euripides cites in his brief, we affirm the DBCC's credibility determinations.

Unsuitable Recommendations. Euripides contends that we cannot impose sanctions against him for making unsuitable recommendations because the complaint does not specifically allege that Euripides' conduct violated Conduct Rule 2310. The complaint alleged that Euripides made two unsuitable recommendations to RL: the explicit recommendation to purchase Primedex bonds and the implicit recommendation to purchase Acorn stock. Although the language of the complaint[2] mirrors that of Conduct Rule 2310,[3] the complaint only charges Euripides with violating Conduct Rule 2110.

Rule 9212 of the NASD Code of Procedure requires that all complaints "specify in reasonable detail the nature of the charges and the Rule, regulation or statutory provision violated." A complaint is alleged in reasonable detail when it provides a respondent sufficient notice to understand the charges and adequate opportunity to plan a defense. See In re Daniel Joseph Avant, Exchange Act Rel. No. 36423 (Oct. 26, 1995); O'Brien II, supra.[4]

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[2] With respect to Primedex, the complaint states: "In recommending to RL the purchase of the PHS debentures, Euripides did not have reasonable grounds for believing that the recommendation was suitable for RL, upon the basis of the facts disclosed by RL as to his other security holdings and to his financial situation and needs." Complaint, & 6. The allegation regarding Acorn was similar: "In his implicit recommendation to RL of Acorn, Euripides did not have reasonable grounds for believing that the recommendation was suitable for RL, upon the basis of the facts disclosed by RL as to his other security holdings and to his financial situation and needs." Complaint, & 9.

[3] Conduct Rule 2310 provides that "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

[4] Euripides' reliance at the appeal hearing upon In re Leonard John Ialeggio, Exchange Act Rel. No. 37910 (Oct. 31, 1996), was misplaced. In Ialeggio, the Commission remanded because the NBCC had made findings and imposed sanctions based upon a violation which was not charged in the complaint. In that case, the complaint did not allege the specific conduct that was found to have violated the Conduct Rules. Here, the complaint clearly states Euripides' allegedly violative conduct.

We find that Euripides received the notice required by Rule 9212. The complaint signaled Euripides that his recommendations to RL were suspect. Euripides must have understood this allegation because he spent considerable energy attempting to persuade the DBCC that he had a reasonable basis for recommending Primedex and Acorn, referring to his initial meeting with RL, to RL's financial condition and to RL's investment goals. The complaint also stated the provision which Euripides violated -- Conduct Rule 2110.[5] The complaint could also have alleged that Euripides' conduct violated Conduct Rule 2310. It is sufficient, however, that the complaint alleged a violation of Conduct Rule 2110 and that we analyze Euripides' conduct under the rubric of Conduct Rule 2110. See In re Micah C. Douglas, Exchange Act. Rel. No. 37865 (Oct. 25, 1996) (failure to disclose solicitation of outside business found to violate Conduct Rule 2110 rather than Conduct Rule 3040).

Euripides was obligated to make a customer-specific determination of suitability and to tailor his recommendations to RL's financial profile and investment objectives. In re F.N. Kaufman and Co. of Virginia, 50 S.E.C. 164 (1989). At the time Euripides recommended Primedex, RL had $19,000 invested in a mutual fund, $20,000 in certificates of deposit in an IRA, and approximately $6,000 in a savings account. His house was worth approximately $65,000, and his monthly income was $1,300 ($180 from his pension, $960 in Social Security disability, and $160 from his mutual fund. RL testified that, at the time, his income was not sufficient to meet his monthly expenses. RL also testified that he told Euripides that he could not afford to risk any principal.

Despite RL' modest income and savings and his investment objectives, Euripides recommended that RL purchase two speculative securities. The Primedex bonds were unrated, subordinated debentures issued by a company whose core business (operating clinics which provided medical/legal evaluation services and medical services to injured workers compensation claimants) was in a state of regulatory turmoil. The Primedex prospectus disclosed potential financing and cash-flow difficulties, as well as an unusually long accounts receivable collection period. Before recommending that RL purchase the Primedex bonds, Euripides knew or should have known that the bonds were extremely speculative "junk" bonds unsuitable for an investor with RL's level of sophistication, income, savings, and investment goals.

Euripides' conduct is not excused by his claim that RL intercepted the Primedex prospectus that Euripides had sent to RL's son and that RL then approached Euripides about investing in Primedex bonds. Even if a customer wishes to engage in trading that is not consistent with his or her financial needs and investment goals, the registered representative is required to counsel the customer in a manner consistent with his or her financial situation. In re Paul F. Wickswat, 50 S.E.C. 785 (1991); In re Clyde J. Bruff, 50 S.E.C. 1266 (1992). There is no evidence in the record that Euripides fulfilled this obligation.

We do not credit Euripides' assertion that he explained to RL the general risks of buying unrated bonds or the specific risks of Primedex bonds or that RL appeared to understand the risks involved by reading the

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[5] Conduct Rule 2110 provides that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

Primedex prospectus. A broker must be satisfied that the customer understands the risks involved and is not only able but willing to take those risks. In re Arthur Joseph Lewis, 50 S.E.C. 747 (1991). At the very meeting in which Euripides recommended the Primedex bonds, RL filled out an account application form in which he stated that he was investing for safety of principal and long-term growth. There is no evidence in the record that RL had either the investment experience to understand the risks associated with Euripides' recommendation or the financial wherewithal to follow it.

Euripides' recommendation that RL purchase Acorn stock was even less suitable.[6] Acorn was a non-diversified, closed-end venture-capital investment company that invested in and provided managerial assistance to emerging and established companies. Acorn's prospectus disclosed that "[a]n investment in the securities offered hereby involves a high degree of risk including, but not limited to, the speculative nature, limited liquidity and lack of diversification of the Company's investments and the need for the company to make additional investments in portfolio companies, reliance on management, conflicts of interest competition, uncertainty in the valuation of certain net assets, regulation, taxation, and the fact that securities of business-development companies frequently trade at prices below [net asset value]." Again, Euripides should have known that recommending this stock to RL was unsuitable.

Euripides allegedly believed that RL's house was worth three times the $65,000 RL estimated and, therefore, that RL was understating his net worth. A broker has a duty to make recommendations based upon the information he has about his customer, rather than based on speculation. In re Eugene J. Erdos, 47 S.E.C. 985 (1983). The record contains no evidence to support Euripides' assessment of the value of RL's house. A registered representative should make reasonable efforts to obtain information about the customer's financial status and any other information considered to be reasonable in making recommendations. We conclude that Euripides should have made reasonable efforts to investigate the basis for such a profound difference between the value that RL assigned to the house and the value that Euripides assigned to it.

Based upon RL's investment experience, limited financial means, and financial condition, it was unreasonable for Euripides to recommend to RL that RL purchase Primedex bonds and Acorn stock. This conduct violated Conduct Rule 2110.

Misrepresentations and Omissions. The complaint alleges that Euripides, during the sale of Primedex to RL, misrepresented or omitted material facts in violation of Conduct Rules 2110 and 2120 and SEC Rule 10b-5. Each of these provisions is designed to ensure that sales representatives fulfill their obligation to their customers to be accurate when making statements about securities. "A securities dealer occupies a special

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[6] We have concluded, infra, that RL and Euripides did not speak about the Acorn stock before Euripides purchased it for RL's account, and that that transaction was unauthorized. The Commission has determined that unauthorized trades are "recommended" and may be found to be unsuitable as well as unauthorized. In re Patrick G. Keel, 51 S.E.C. 282 (1993) (in executing securities transactions for a customer, the broker implicitly recommended such securities).

relationship to a buyer of securities in that by his position he implicitly represents that he has an adequate basis for the opinions he renders." Hanly v. SEC, 415 F.2d 589, 595 (2d Cir. 1969). "A salesperson has a duty to make an adequate independent investigation in order to ensure that his representations to customers have a reasonable basis." In re Frank W. Leonesio, 48 S.E.C. 544, 548 (1986). "[A] salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant. Regulators must "protect the public not only from professionals in the business who practice deliberate deception, but also from those whose credulity and failure to investigate inflict equal harm on investors and undermine public confidence in the securities market to the same extent." In re Nassar & Co., Inc., 47 S.E.C. 20, 22 (1978).

Conduct Rule 2120, the NASD's anti-fraud rule, parallels SEC Rule 10b-5, and provides that no member shall effect any transactions, or induce the purchase or sale of any security, by means of any manipulative, deceptive, or fraudulent device. To find a violation of Conduct Rule 2120 and Rule 10b-5, there must be a showing that: (1) misrepresentations and/or omissions were made in connection with the purchase or sale of securities; (2) the misrepresentations and/or omissions were material; and (3) they were made with the requisite intent, i.e., scienter.

Scienter has been defined as an "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Scienter may also be established by a showing that the respondent acted recklessly. See, e.g., In re DWS Securities Corp., 51 S.E.C. 814 (1993). "Recklessness" has been defined by a majority of the federal circuit courts of appeals as being "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990).

A misrepresentation may violate Conduct Rule 2110 even where there is no finding of intent to mislead. Kauffman v. SEC, No. 94-3011 (3d Cir. Oct. 20, 1994). "[C]oncepts such as fraud and scienter are irrelevant," and there is no need for a finding of materiality or harm to investors, Id. (citing Eichler v. SEC, 757 F.2d 1066, 1070 (9th Cir. 1985)). "Proceedings instituted by the NASD . . . are instituted to protect the public interest, not to redress private wrongs. Thus it [is] unnecessary for the NASD to show that customers [are] in fact misled." In re Wall Street West, Inc., 47 S.E.C. 677, 679 (1981), aff'd, Wall Street West, Inc. v. SEC, 718 F.2d 973 (10th Cir. 1983).[7]

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[7] Conduct Rule 2110 sets forth ethical requirements that go beyond explicit legal requirements. In re Timothy L. Burkes, 51 S.E.C. 356 (1993), aff'd mem., Burkes v. SEC, 29 F.3d 630 (9th Cir. 1994). The NASD has authority to impose sanctions for violations of "moral standards" even if the conduct was not "unlawful" or fraudulent. In re Benjamin Werner, 44 S.E.C. 622 (1971). The ethical standards imposed in disciplinary proceedings go beyond simple legal requirements and depend on general rules of fair dealing, the reasonable expectations of the parties, marketplace practices, and the relationship between the firm and the customer. In re E.F. Hutton & Co., Inc., 49 S.E.C. 829 (1988).

The DBCC's finding that Euripides misrepresented or omitted material facts when selling Primedex bonds to RL rested largely on its determination that RL' testimony was credible and that Euripides' was not. If believed, RL's testimony revealed four omissions and misrepresentations that were material and recklessly made: (1) Euripides guaranteed that RL's principal would be safe; (2) Euripides failed to disclose that California recently had made major revisions to its workers compensation system and that such changes could have a negative impact on Primedex' core business; (3) Euripides failed to disclose that Primedex might require additional financing to service the debentures and to retire them at maturity, but that no assurances could be given that such financing would be available; and (4) Euripides failed to disclose that the collection cycle for Primedex' accounts receivable was significantly longer than was typical of the health care industry. Euripides denied guaranteeing that RL's principal would remain safe and testified that he disclosed to RL all of the risk factors discussed in Primedex=s prospectus.

After hearing the parties' conflicting testimony and weighing the strengths and weaknesses of each, the DBCC concluded that RL's testimony was credible and Euripides' was not. As discussed above, we affirm the DBCC's credibility determinations. We therefore affirm the DBCC's findings that Euripides made misrepresentations and omissions of material facts in violation of Conduct Rule 2120 and Rule 10b-5. We further find that Euripides was reckless in making the misrepresentations and omissions, in that Euripides made an extreme departure from the standards of ordinary care, which presented a danger of misleading RL that was either known to Euripides or was so obvious that Euripides must have been aware of it.

Euripides' asserted defenses are meritless. First, Euripides claims that he relied on material and information supplied by his superiors or the issuer in recommending Primedex bonds to RL.[8] Euripides, however, cannot shift his responsibility to comply with regulatory requirements to his firm or the issuer. In re Stephen Thorlief Rangen, Exchange Act Rel. No. 38406 (Apr. 8, 1997); In re Thomas Kocherhans, Exchange Act Rel. No. 36556 (Dec. 6, 1995); In re David Joseph Dambro, 51 S.E.C. 513, 516 (1993). Moreover, the information Euripides received from Wolf disclosed material information which Euripides did not share with RL, including the fact that California's regulatory reform could have a negative impact on Primedex' core business. Second, Euripides claims that he believed that RL had read the Primedex prospectus. This does not excuse Euripides' failure to inform RL fully of the investment risks associated with the Primedex offering. See In re Larry Ira Klein, Exchange Act Rel. No. 37835 (Oct. 17, 1996); In re Ross Securities, Inc., 41 S.E.C. 509 (1963).

Accordingly, we conclude that Euripides recklessly made misrepresentations of material facts and

[8] Euripides testified that he participated in meetings in which Wolf officials and Primedex management described Primedex's operations and financial prospects. As a result of these meetings and periodic updates from Wolf=s research department, Euripides was optimistic about Primedex's future. In his newly admitted affidavit, Ellsworth Buck, branch manager of the Wolf office in which Euripides worked, confirmed Euripides' attendance at these meetings and the favorable impression they created regarding Primedex.

omitted material facts in selling the Primedex bonds to RL and that this conduct violated Conduct Rules 2110 and 2120 and Rule 10b-5.

Unauthorized Transactions. The SEC has long recognized that a registered representative who effects unauthorized transactions in a customer's account violates the broad ethical principles contained in Conduct Rule 2110. See In re Keith L. DeSanto, Exchange Act Rel. No. 35860 (Jun. 19, 1995); In re Robert Lester Gardner, Exchange Act Rel. No. 35899 (Jun. 27, 1995).

The complaint alleged that on December 22, 1993, Euripides effected two unauthorized transactions in RL's account: the sale of Primedex bonds and the purchase of Acorn stock. At the DBCC hearing, RL testified that he never authorized Euripides to sell the Primedex bonds or to purchase the Acorn stock; Euripides testified that RL did authorize him to effect those transactions. The DBCC, after hearing the conflicting testimony, concluded that RL' testimony was credible and Euripides' was not and found that Euripides' conduct violated Conduct Rule 2110.

At the DBCC hearing, RL testified that after he purchased Primedex, Euripides told him that the market value of the Primedex bonds was declining, largely because the workers compensation system in California was changing. RL testified that he and Euripides never discussed selling the Primedex bonds until after the sale occurred. Moreover, RL did not have a discretionary account with Euripides. Similarly, he heard about Acorn only after Euripides had bought the stock. RL testified that he orally complained to Euripides about the trade "sometime in December" of 1993, but he did not complain to the Firm until October 1994.

According to Euripides, he called RL on December 22, 1993, and told him that the Wolf research department had issued a "sell" recommendation on Primedex. He told RL (and his wife) that Wolf's research department was recommending that customers switch their money from Primedex to Acorn. Euripides testified that RL agreed to do this. Euripides stated that RL did not complain to him about the selling of Primedex and the purchase of Acorn. Instead, he testified, RL did not complain until October 1994.

We affirm the finding that Euripides' sale of the Primedex bonds and purchase of the Acorn stock were made without RL's authorization. We also affirm the DBCC's credibility determination with respect to the December 22, 1993 trades, as Euripides has not presented substantial evidence that the credibility determination was wrong.

The DBCC reasoned that Euripides' failure to produce telephone records of Wolf which documented telephone calls between RL and Euripides on December 22, 1993, corroborated its credibility determination in RL's favor. We disagree. The telephone records would establish only that a conversation between Euripides and RL occurred; they could not establish that RL actually authorized Euripides to sell the Primedex bonds and to purchase the Acorn stock.[9]

[9] The NBCC denied Euripides= January 22, 1997 motion requesting the Association, pursuant to Procedural Rule 8210, to compel RL and Wolf to produce their telephone records dated November 1993

It is immaterial whether RL complained about the unauthorized transactions immediately upon discovering them, as RL claims, or delayed complaining about them until October 1994, as Euripides claims. "The fact that a customer accepts an unauthorized trade does not affect the NASD's authority to discipline the salesman for effecting it." In re Howard Alweil, 51 S.E.C. 14 (1992). The SEC has held that delay in complaining about an allegedly unauthorized trade is not dispositive. See In re Curtis I. Wilson, 49 S.E.C. 1020 (1989) (SEC found trades to be unauthorized even though customer did not complain immediately).[10]

Sanctions

The DBCC censured Euripides, fined him $5,000, required him to requalify by examination, suspended him for 60 days from association with any member of the Association, required him to pay $15,488.92 restitution (plus interest per annum of 11 1/4 percent from June 25, 1993), and assessed costs of $1,358.

In determining to affirm the $5,000 fine, we have considered that the NASD Sanctions Guideline for any one of Euripides' three violations recommends a fine of at least $5,000. We find, however, that the $5,000 fine is appropriate in light of: (1) the fact that only one customer and two securities are involved; (2) Euripides' lack of prior disciplinary history; and (3) the other sanctions imposed. Moreover, it appears that the DBCC focused, properly in our opinion, on providing restitution to the injured investor, RL. The 60-day suspension and order of requalification are warranted because the breadth of Euripides' violations indicates a general unfamiliarity with the NASD's rules and proper conduct in the industry.

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through January 1994. Procedural Rule 8210 is the NASD=s version of the subpoena power; it gives the NASD the power to compel its members or associated persons to produce information or testimony. The NASD will invoke this provision only if the respondent has shown that: (1) the desired evidence is material to the issues raised in the disciplinary proceeding; (2) the respondent has made a good faith effort but was unable to obtain the information; and (3) each person from whom information is sought is an NASD member or person associated with an NASD member. Neither Wolf nor RL are Association members or associated with an Association member and, therefore, are not within the NASD's jurisdiction. Moreover, the telephone records are immaterial to the issues raised in Euripides' disciplinary appeal.

[10] Euripides argues that RL accepted the unauthorized transactions by failing to complain in writing within 10 days of receiving the trade confirmations, citing Modern Settings, Inc. v. Prudential-Bache Securities, Inc., 936 F.2d 640, 645 (2d Cir. 1991). Modern Settings is distinguishable because that case involved a private contractual dispute between parties who were bound by a customer agreement containing a 10-day ratification clause. This is not a dispute between Euripides and RL regarding their customer agreement (which contains a similar ratification clause). Rather it is a disciplinary action by a self-regulatory organization enforcing its rules and regulations.

Accordingly, Euripides is censured; fined $5,000; required to pay restitution of $15,488.92, at an interest rate of 11 1/4 percent per annum from June 25, 1993 to RL; suspended for 60 days from associating in any capacity with any member of the Association; required to requalify by examination as a general securities representative; and assessed DBCC hearing costs of $1,358 and NBCC appeal hearing costs of $750. The suspension shall commence on a date to be set by the President of NASD Regulation, Inc.[11]

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

[11] We note that these sanctions are consistent with the applicable NASD Sanctions Guidelines (1993 ed.) for misrepresentations or material omissions of fact; suitability; and unauthorized transactions. We have 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.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will be summarily suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will be summarily revoked for non-payment.