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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. 2005001919501 Hearing Officer—Andrew H. Perkins

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

Pending before the Hearing Panel are the parties' cross-motions for summary disposition. The Department of Enforcement ("Enforcement") seeks summary disposition of its claims that Respondent violated NASD Conduct Rules 2711(h)(1)(A), 2711(h)(1)(C), 2210(d)(1)(A), and 2110 by failing to disclose material conflicts of interest in three research reports she authored while a research analyst at [the "Firm"] concerning [the "Company"] dated February 4, 2005, March 2, 2005, and April 28, 2005; and failing to disclose a financial interest in the Company in connection with the April 28, 2005 research report. Respondent seeks summary disposition and dismissal of all counts of the Complaint. Respondent's motion for summary disposition asserts that, as a matter of law, the Complaint must be dismissed with prejudice because: (1) the obligation to disclose conflicts of interest in published research reports under Procedural Rule 2711(h)(1)(C) applies to member firms, not individual research analysts; and (2) the

undisputed evidence shows that the three research reports on the Company were not misleading.

After careful consideration, and for the reasons set forth below, the Panel grants Enforcement's motion for summary disposition on the issue of liability and continues the case for a hearing on sanctions.[1] Respondent's motion for summary disposition is denied.

I. BACKGROUND

Respondent held the positions of Vice President and Senior Equity Research Analyst in a branch office of the Firm from April 2000 until May 6, 2005.[2] As a research analyst for the Firm, Respondent covered approximately 14 companies in three different industry sectors, including companies in the electronic design automation industry.[3] One of the companies Respondent covered in the electronic design automation industry was the Company, a firm headquartered in _____, _____ that sells products and services used to manufacture semiconductor chips.[4] With the assistance of her research associate, YH, Respondent wrote research reports about the Company that were

[1] The facts discussed below are drawn from the evidence submitted by the parties, including Respondent's statements made during her on-the-record interview on November 1, 2005. Citations to the exhibits attached to the Complainant's Memorandum of Points and Authorities are referenced as "Enf. Ex. CX-__." Citations to the exhibits submitted with the Respondent's Statement of Undisputed Relevant and Material Facts are referenced as "Resp. Ex. __." Citations to transcripts of on-the-record interviews will reference the exhibit number, the witness's last name, and the relevant transcript page and line numbers (e.g., Resp. Ex. C, Resp. Tr. at 1, lines 1-4).

[2] Resp. Ex. C, Resp. Tr. at 12, lines 14-22; Resp. Tr. at 15, lines 8-20; Resp. Ex. B at 1. On May 10, 2005, the Firm filed a Form U5, Uniform Termination Notice for Securities Industry Registration, on Respondent's behalf. (Resp. Ex. B.) Respondent is no longer registered or associated with a FINRA member firm. FINRA retains jurisdiction over Respondent pursuant to Article V, Section 4(a)(i) of FINRA's By-Laws because (1) the conduct that serves as the basis of this disciplinary proceeding commenced prior to the termination of her securities registration, and (2) Enforcement filed the Complaint within two years of the date her registration terminated.

[3] Resp. Ex. C, Resp. Tr. at 22, lines 5-16.

[4] Resp. Ex. X at 1.

disseminated by the Firm to its institutional sales force and to the public through various outlets, including Bloomberg, Reuters, and Thomson First Call Research services.[5]

A. The Company Identifies Respondent as a Candidate to Head its Investor Relations Department

In November 2004, the Company began to search for an individual to head its Investor Relations Department. The Company hired an executive placement agency to assist in the search. Together, they compiled a list of candidates for the position; Respondent was one of the identified candidates.[6] On or about January 13, 2005, a representative of the executive placement agency called Respondent about the opening at the Company.[7] Respondent returned the call the following day and expressed her interest in the position.[8] Shortly thereafter, she sent her resume to the executive placement agency for the Company's consideration.[9] The agency forwarded her resume to the Company.

B. Respondent Interviews for the Company Position

On January 28, 2005, Respondent scheduled meetings with senior management at the Company for February 11 and 16.[10] On January 31, 2005, Respondent met with the managing partner of the executive placement agency to discuss her work experience and the opening at the Company.[11]

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[5] Resp. Ex. C, Resp. Tr. at 25, lines 12-16; Resp. Tr. at 26, lines 10-12; Resp. Ex. D, YH Tr. at 22, lines 1-3; YH Tr. at 110, lines 1-3; Resp. Ex. E, JV Tr. at 116, lines 10-12.

[6] Resp. Ex. C, Resp. Tr. at 60, lines 23-25; Resp. Ex. G.

[7] Enf. Ex. CX-2 (e-mail from CC to Resp. dated Jan. 13, 2005); Ans. ¶ 9; Resp. Ex. C, Resp. Tr. at 60, lines 23-25.

[8] Enf. Ex. CX-3 (e-mail from CC to BP, dated Jan. 14, 2005).

[9] Resp. Ex. I; Resp. Ex. J.

[10] Enf. Ex. CX-5 (e-mail from JM to Resp., dated Jan. 28, 2005).

[11] Resp. Ex. C, Resp. Tr. at 61-62; Ans. ¶ 10.

On February 3, 2005, the Company released its fourth-quarter earnings for 2004.[12] The next day, the Firm issued a research report authored by Respondent and her assistant (the "February Report"), which reiterated a "buy" rating for the Company stock and an increased price target of $16 to $18 per share.[13] The February Report did not disclose the fact that Respondent had engaged in discussions relating to her possible employment at the Company or that she had scheduled meetings with the Company's senior managers to discuss the position.[14] In addition, Respondent did not inform anyone at the Firm prior to writing the report that the Company had identified her as a candidate to head its Investor Relations Department.[15]

On February 11, 2005, Respondent went to the Company's corporate offices in Santa Clara, California and met for three hours with its President and Chief Executive Officer, its Chief Financial Officer, and its General Counsel to discuss the Investor Relations position.[16] During the meeting, they discussed the duties of the job, the fact that the successful candidate would report directly to the Company's CFO, as well as various concerns she had about the position.[17]

On February 16, 2005, Respondent again went to the Company's _____ offices for an interview with the Company's Chairman of the Board.[18] On February 28, 2005, Respondent left a message with the executive placement agency that she was

[12] Resp. Ex. C, Resp. Tr. at 68, lines 13-15.

[13] Resp. Ex. L.

[14] Resp. Ex. C, Resp. Tr. at 72, lines 6-7.

[15] *Id.* at 66-67.

[16] *Id.* at 76-77; Ans. ¶ 13.

[17] Resp. Ex. C, Resp. Tr. at 73, lines 17-20.

[18] *Id.* at 76, lines 12-13.

interested in the job at the Company, but wanted to work out of _____ for the first year.[19]

Following her interviews, Respondent wrote a second research report on the Company, which the Firm released on March 2, 2005 (the "March Report"). Once again, Respondent reiterated her "buy" rating and $18-per-share price target.[20] Respondent did not disclose to the Firm, and the March Report did not disclose, that she had interviewed for the position at the Company.[21] Respondent also did not seek advice from anyone in the Firm's legal or compliance departments about whether she was required to disclose these facts as a potential conflict of interest.[22]

C. The Company Offers Respondent the Position of Vice President of Investor Relations

On March 16, 2005, the Company's Chief Financial Officer orally offered Respondent the position of Vice President of Investor Relations.[23] Thereafter, Respondent conducted additional due diligence regarding the offer. She spoke to other investor relations professionals and research analysts who had left broker-dealers to work in the investor relations departments of various companies.[24]

On March 26, 2005, Respondent met with the Chief Executive Officer of the Company to talk about the investor relations position and the terms of the offer. Among other things, Respondent wanted to clarify that she would have direct access to the Board

[19] Enf. Ex. CX-7.

[20] Resp. Ex. O.

[21] Id.

[22] Resp. Ex. C, Resp. Tr. at 78-80.

[23] *Id.*, Resp. Tr. at 89, lines 15-19; Resp. Tr. at 90, lines 16-22.

[24] *Id.* Resp. Tr. at 92, lines 20-25; Resp. Tr. at 93, lines 1-7.

of Directors and would be able to attend executive meetings.[25] Respondent also wanted to evaluate whether she could work with the Company's executive team.[26] Three days later, Respondent received a letter outlining the terms of the Company's offer.[27] The offer included:

- an annual base salary of $250,000;
- an incentive bonus targeted at 30% of Respondent's base salary under the Company's "Key Contributor Incentive Plan";
- a hiring bonus of $50,000, with $25,000 to be paid in Respondent's first paycheck and the remaining $25,000 to be paid on April 1, 2006;
- an option to purchase 75,000 shares of the Company common stock, 25% of which would vest at the end of Respondent's first year of employment, and the remainder at the end of four years;
- a grant of 15,000 shares of incentive stock, subject to approval by the Board of Directors Compensation Committee, of which 25% would vest on the anniversary of the grant date and 25% would vest on each anniversary date thereafter, for a total of four years;
- $15,000 in assistance for Respondent to relocate from _____ to _____; and
- a five-year, interest-free mortgage loan of up to $1 million to assist Respondent with the purchase of a new home.

[25] Resp. Ex. C, Resp. Tr. at 95, lines 5-12, 24-25; Resp. Tr. at 99, lines 14-19.

[26] Resp. Ex. C, Resp. Tr. at 96, lines 7-10.

[27] Resp. Ex. P.

On March 31, 2005, Respondent responded in writing to the Company's offer.[28] Respondent wrote that she was "honored" that the Company offered her the investor relations position and that she had "no hesitation about the management with whom [she] would be working should [she] accept the offer." Respondent then set out several points that she wanted to resolve before she made a final decision about the offer. Respondent requested "direct access to the CEO, the Board of Directors, and the general counsel[,]" and the title of Senior Vice President. She also requested a written description of the position and its responsibilities, information about the staff support she would receive and the compensation she could anticipate in two to three years, an indemnity agreement, change in control protections, a "better sense of how my performance will be measured and how that performance correlates with bonus compensation," a "reasonable severance package," and a cost of living adjustment.

On or about April 6, 2005, Respondent spoke with the Company's Chief Financial Officer and its General Counsel about the job offer and her response.[29] During that conversation, the Company's Chief Financial Officer and its General Counsel confirmed that if she accepted the offer she would have direct access to the Chairman of the Board, the Chief Executive Officer, and the General Counsel.[30] They further advised her that she would have the title of Corporate Vice President and that she would be covered on the company's directors' and officers' liability insurance.[31]

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[28] Resp. Ex. Q.

[29] Resp. Ex. C, Resp. Tr. at 102, lines 24-25; Resp. Tr. at 103, lines 1-6.

[30] Resp. Ex. C, Resp. Tr. at 103, lines 14-20; Respondent's Statement of Undisputed Facts ¶ 20.

[31] Respondent's Statement of Undisputed Facts ¶ 20.

D. Respondent Accepts the Company's Offer and Notifies the Firm

On Friday, April 8, 2005, Respondent called her supervisor at the Firm, JV, and told him that she had decided to accept a job offer from the Company.[32] JV was the Firm's Director of Research. JV told Respondent that he would check with the Compliance Department and advise JH, the head of Capital Markets, of her decision. JV said he would talk with her further on Monday, April 11, 2005, about her transition.[33]

On April 9, 2005, Respondent sent the Company e-mails stating that she had decided to accept its job offer.[34]

E. Respondent Continues Covering the Company after Accepting the Company's Offer

Notwithstanding Respondent's announcement that she had accepted the Company's offer of employment, the Firm advised Respondent to continue her work through the earnings season and keep her name on the Company research reports until she left the Firm.[35] No one at the Firm questioned whether she should disclose in future reports on the Company that she had accepted a position at the company.[36]

On April 15, 2005, Respondent wrote a letter to JH telling him that she had accepted the position of Vice President of Investor Relations with the Company and that her last day at the Firm would be May 6, 2005.[37]

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[32] Resp. Ex. C, Resp. Tr. at 112, lines 1-4.

[33] Resp. Ex. C, Resp. Tr. at 112, lines 8-13.

[34] Resp. Ex. R; Resp. Ex. S.

[35] Resp. Ex. C, Resp. Tr. at 36-37.

[36] Resp. Ex. C, Resp. Tr. at 117, lines 22-25; Resp. Tr. at 118, lines 1-3; Resp. Ex. D, YH Tr. at 45, lines 14-19; Resp. Ex. E, JV Tr. at 35, lines 10-15.

[37] Resp. Ex. T.

On April 21, 2005, the Company sent Respondent an amended offer letter.[38] The amended offer reflected that her title would be Corporate Vice President instead of Senior Vice President. Otherwise, the terms of the amended offer were identical to the original. Respondent signed the amended offer on April 27, 2005, and sent the signed offer back to the Company.

On April 28, 2005, the day after Respondent signed the amended offer letter, the Firm issued another research report on the Company (the "April Report").[39] Respondent participated in the preparation of report and approved its content before the Firm released it to the public.[40] The April Report raised revenue and earnings per share estimates from Respondent's March Report. Respondent did not disclose her impending employment with the Company in the April Report.

Respondent started work at the Company on May 9, 2005.[41]

II. SUMMARY DISPOSITION

A. Standard of Review

Procedural Rule 9264(a) of NASD's Code of Procedure provides that after a respondent has filed an answer and documents have been made available to the respondent for inspection and copying pursuant to Rule 9251, a party may make a motion for summary disposition as to any or all of the causes of action in the Complaint with respect to that respondent. Under Rule 9264, summary disposition is appropriate where

[38] Resp. Ex. V.

[39] Enf. Ex. CX-13.

[40] Ans. ¶ 26.

[41] *Id.*; Resp. Tr. at 136, lines 2-4.

there "is no genuine issue with regard to any material fact" and the moving party "is entitled to summary disposition as a matter of law."[42]

NASD's summary disposition rules generally are based on the Federal Rules of Civil Procedure governing summary judgment.[43] Summary disposition is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law.[44] All reasonable inferences must be drawn in favor of the party opposing summary disposition.[45]

B. Substantive Standards

1) NASD Conduct Rule 2711

NASD Conduct Rule 2711 is intended "to improve the objectivity of research and provide investors with more useful and reliable information when making investment decisions" and "to restore investor confidence in a process that is critical to the equities markets."[46] The Rule implemented "structural reforms designed to increase analysts'

[42] NASD Procedural Rule 9264(e); *Justin F. Ficken*, Exchange Act Release No. 54,699, 2006 SEC LEXIS 2547, at *14 (Nov. 3, 2006).

[43] *See, e.g., Dep't of Enforcement v. U.S. Rica Fin., Inc*., No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 (N.A.C. Sept. 9, 2003) (stating that federal law provides significant guidance in cases involving motions for summary disposition); *Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the Code of Procedure and Other Provisions*, Exchange Act Release. No. 43,102, 2000 SEC LEXIS 1584, at *7 (Aug. 1, 2000) (approving proposal "to modify NASD Rule 9264(a) to track the language in the [Federal Rules of Civil Procedure] …").

[44] NASD Procedural Rule 9264(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[45] *Frank P. Quattrone*, Exchange Act Release No. 53,547, 2006 SEC LEXIS 703, at *18, n.24 (Mar. 24, 2006).

[46] NASD Notice to Members 02-39, 2002 NASD LEXIS 47 (July 2002).

independence and further manage conflicts of interest, and require increased disclosure of conflicts in research reports and public appearances."[47]

Rule 2711 includes a number of provisions addressing "research reports" and analysts' "public appearances." Among them is Rule 2711(h), entitled "Ownership and Material Conflicts of Interest," which requires members to disclose in research reports, and research analysts to disclose in public appearances, all actual, material conflicts of interest of the research analyst or member of which the research analyst knows or has reason to know at the time of publication. In addition, members must disclose in research reports, and research analysts must disclose in public appearances, if the research analyst (or a member of the research analyst's household) has a financial interest in the securities of the subject company, and the nature of any such financial interest.[48]

2) NASD Conduct Rule 2210(d)(1)(A)

Conduct Rule 2210(d) requires that sales literature, including research reports, be based on principles of fair dealing, be fair and balanced, and provide a sound basis for evaluating the facts in regard to the particular securities discussed. The rule further provides that no member may omit a material fact if the omission would cause the communication to be misleading and prohibits members from making false, exaggerated, unwarranted, or misleading statements in communications with the public.[49] Moreover, IM-2210-1(6)(A) requires a member in making a recommendation in sales material to

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[47] Order Approving Proposed Rule Change Regarding Research Analyst Conflicts of Interest, 67 Fed. Reg. 34968, 34969 (May 16, 2002).

[48] *See* NASD Conduct Rule 2711(h)(1).

[49] *See Department of Enforcement v. Donner Corp.*, No. CAF020048, 2006 NASD Discip. LEXIS 4, at *67 (Mar. 9, 2006). NASD Rule 115 extends NASD rule requirements to persons associated with a member. *See Department of Enforcement v. Keyes*, No. C022040016, 2005 NASD Discip. LEXIS 9 (Dec. 28, 2005).

disclose if the member has any financial interest in the recommended security or any related security. Further, the member is required to disclose the nature of such financial interest, including whether the interest consists of any options or warrants on the recommended security.

The test for materiality under both rules is whether a reasonable investor would consider the information significant with respect to his investment decisions.[50] A misstated or omitted fact is material if a reasonable investor would have viewed the fact as having altered the "total mix" of information available to him.[51]

III. DISCUSSION

Enforcement argues that summary disposition should be granted because its evidence shows that there is no genuine issue as to any material fact necessary to prove its claims against Respondent. Enforcement contends that Respondent was required to disclose in the Company research reports that she was pursuing, and eventually accepted, employment at the Company. Respondent disagrees with Enforcement, claiming that NASD Conduct Rule 2711(h) requires member firms to disclose material conflicts of interest in research reports, not individual analysts. Respondent further argues that she cannot be found to have violated Conduct Rule 2210(d) because that charge is derivative of finding that she violated Conduct Rule 2711(h).[52] In other words, since she cannot have violated Conduct Rule 2711(h), she cannot have violated Conduct Rule 2210(d).[53]

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[50] *See Donner*, 2006 NASD Discip. LEXIS 4, at *34 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)).

[51] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[52] Respondent likewise argues that the Hearing Panel must dismiss the charge that she violated Conduct Rule 2110 because it is derivative of a finding that she violated Conduct Rule 2711(h).

[53] Respondent's Mot. for Summ. Disposition and Supporting Mem. of Law at 21-22.

Finally, Respondent contends that her activities did not require disclosure in the Company research reports because they were not material facts, the omission of which would cause the reports to be misleading.[54]

A. Conduct Rule 2711(h)

As a matter of law, the Hearing Panel is required to make the threshold determination of whether Conduct Rule 2711(h) requires research analysts to disclose actual, material conflicts of interest in research reports published by their firms. In *Department of Enforcement v. Asensio Brokerage Serv. Inc.*, No. CAF030067, 2006 NASD Discip. LEXIS 20, at *40 (July 28, 2006) the National Adjudicatory Council ("NAC") held that NASD Conduct Rule 2711(h) applied to the analysts who author research reports on behalf of their firms. The NAC specifically held that NASD Rule 115(a) made rules such as Conduct Rules 2711 and 2210 that are applicable to members also applicable to persons associated with members.[55]

In addition, the Hearing Panel determines that the primary obligation under Conduct Rule 2711(h) to disclose actual, material conflicts *of the research analyst*—which the *research analyst knows*—rests with the research analyst. The unambiguous wording of Rule 2711(h) applies to research analysts' conflicts and knowledge. For instance, Rule 2711(h)(1)(A) specifically refers to disclosure of analysts' and their immediate family members' financial interests in the securities of the company that is the subject of a research report. Without question, to carry out the Rule's intended purposes "to improve the objectivity of research and provide investors with more useful and

[54] *Id.*

[55] *Asensio*, 2006 NASD Discip. LEXIS at *40, n.25. NASD Rule 115(a) states, "These Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

reliable information when making investment decisions" and "to restore investor confidence in a process that is critical to the equities markets,"[56] the Rule must obligate research analysts to disclose actual, material conflicts.

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[57] If accepted, Respondent's position as it relates to analysts' disclosure in research reports would violate this cardinal rule of statutory construction. The obvious intent of Rule 2711(h) is to require research analysts to disclose all actual, material conflicts even though the member has the ultimate responsibility to include the information in the published research report. Without disclosure by the analyst, the firm cannot include the information in the published report rendering that provision of Rule 2711(h) meaningless.[58] Moreover, if FINRA had intended to limit disclosure in research reports to conflicts known to the member rather than the analyst, FINRA could have drafted the Rule with that limitation. On the other hand, by focusing on the analyst's knowledge, FINRA clearly intended Rule 2711(h) to apply to research analysts as well as members.

Having determined that Conduct Rule 2711(h) applies to Respondent, the next issue the Hearing Panel must decide is whether the information she failed to disclose concerning her employment at the Company is material. The Hearing Panel finds that it

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[56] NASD Notice to Members 02-39, 2002 NASD LEXIS 47 (July 2002).

[57] *Stith v. Thorne*, 488 F. Supp. 2d 534, 545 (D. Va. 2007) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)).

[58] The Hearing Panel further notes that a member can only act through its employees. *See, e.g., Department of Market Regulation v. Yankee Financial Group, Inc.*, No. CMS030182, 2006 NASD Discip. LEXIS 21, at *59-60 (Aug. 4, 2006), *aff'd sub nom. Richard F. Kresge*, Exchange Act Release No. 55,988, 2007 SEC LEXIS 1407 (June 29, 2007).

is. The Hearing Panel concludes that a reasonable investor would consider the information regarding Respondent's employment at the Company significant with respect to his investment decisions. It strains credulity to suggest that a reasonable investor would not have viewed the fact that Respondent had applied for and then accepted a job at the Company as having altered the total mix of available information. The relationship between Respondent and the Company could be viewed as an incentive to report favorably about, or to suppress or tone down negative aspects of, the Company's business prospects and financial status.[59] Contrary to Respondent's argument, whether the omitted information is material does not depend on a finding that any other facts or statements in the reports were false or misleading.[60]

The Hearing Panel further finds that the facts and circumstances surrounding Respondent's contacts with the Company, taken in their entirety, created an "actual conflict of interest," as that term in used in Rule 2711(h). An "actual conflict of interest" exists where the facts create a reasonable impression of partiality. The term "actual conflict of interest" means a real or genuine conflict, as opposed to a conflict that is hypothetical or theoretical. Respondent's active pursuit and acceptance of employment at the Company clearly created a reasonable impression of partiality.[61] Accordingly, the Hearing Panel concludes that Respondent violated Conduct Rule 2711(h) by not disclosing those facts in the research reports she authored.

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[59] *Cf. Department of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17 (N.A.C. June 25, 2001) (fact that the covered company paid printing and publication costs of a report was held to constitute a material fact that should have been disclosed in the published report).

[60] *See* Respondent's Reply Br. to Complainant's Opp'n to Respondent's Mot. for Summ. Disposition at 8.

[61] Under the facts of this case, the Hearing Panel need not reach the issue of when during Respondent's application process the duty to disclose her activities first arose. Here the evidence is clear that during the process that led to her acceptance of the Company's job offer she acquired an actual, material conflict of interest, which she was obligated to disclose pursuant to Rule 2711(h).

The Hearing Panel further finds that Respondent failed to disclose her financial interest in the securities of the Company. Under her employment contract, Respondent was entitled to receive 15,000 shares of common stock as incentive compensation as well as an option to purchase an additional 75,000 shares over the first four years of her employment. NASD Conduct Rule 2711(h)(1) broadly defines the term "financial interest in the securities" to include "without limitation … any option, right, warrant, future, long or short position[.]" Respondent's interest under the terms of her employment agreement with the Company meets this definition. For the purposes of Conduct Rules 2711(h) and 2210(d), her interest in the securities of the Company was sufficiently tangible as to require disclosure. The fact that the grant of stock and options were conditional upon her employment at the Company did not make the resulting conflict of interest less genuine. From the perspective of a reasonable investor, her financial interest in the securities of the Company was sufficient to create the reasonable impression of partiality. Accordingly, the Hearing Panel finds that Respondent violated Conduct Rule 2711(h) by failing to disclose her financial interest in the securities of the Company in the last report issued on April 28, 2005.

B. Conduct Rule 2210(d) and IM-2210-1(6)(A)

Respondent's failure to disclose her financial interest in the securities of the Company also constitutes a violation of Conduct Rule 2210(d)(1)(A). IM-2210-1(6)(A)(ii) specifically requires members and associated persons to disclose if they have financial interests in recommended securities unless the extent of the financial interests is

nominal.[62] The Hearing Panel rejects Respondent's argument that a violation of Rule 2210(d)(1)(A) and IM-210-1(6)(A) requires a showing that the research report is otherwise misleading. Respondent cannot excuse her omission by arguing that the remainder of the report is accurate.

C. Reliance on Employer

Respondent further contends that she cannot be found to have violated either Conduct Rule 2711(h) or 2210(d) because the Firm approved her continued coverage of the Company after she advised the Firm that she was leaving to accept a position at the Company. Respondent argues that she is entitled to rely on the Firm's apparent conclusion that the matter of her future employment with the Company was not a material conflict.[63] The Hearing Panel rejects this defense. "As a registered person in the securities industry, [Respondent] had a duty to comply with applicable laws, and that duty cannot be avoided by reliance on an employer."[64] As the author of the Company research reports, Respondent had an independent duty to ensure that the information in the report was not misleading and that material information was not omitted.[65]

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[62] As stated above, Rule 115(a) makes Conduct Rule 2210 applicable to associated persons as well as members. *See also* NASD Notice to Members 99-79, 1999 NASD LEXIS 50, at *21 (Sept. 1999) (IM-2210-1(6)(A) clarified that "a member making a recommendation in sales material must disclose if the member or any officer, director, *or the associated person making the recommendation* has any financial interest in the recommended security or any related security.") (emphasis added).

[63] *See* Respondent's Reply to Complainant's Opp'n to Respondent's Mot. for Summ. Disposition at 12.

[64] *Donner*, 2006 NASD Discip. LEXIS 4, at *59 (Mar. 9, 2006) (citing *Richard H. Morrow*, 53 S.E.C. 772, 779 n.10 (1998) and *Department of Enforcement v. Faber*, No. CAF1009, 2003 NASD Discip. LEXIS 3, at *31 (N.A.C. May 7, 2003), *aff'd*, 2004 SEC LEXIS 277 (Feb. 10, 2004)).

[65] *Id.* at *60.

IV. CONCLUSION

For the foregoing reasons, Enforcement's Motion for Summary Disposition is granted as to liability, and this case is continued for a hearing on the issue of sanctions. The Hearing Panel denies Respondent's Motion for Summary Disposition.

IT IS SO ORDERED.

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Andrew H. Perkins
Hearing Officer

Dated: October 16, 2007