BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	DECISION
Department of Enforcement,	Complaint Nos. C02990042 and C02980085
Complainant,	Dated: January 23, 2001
vs.	
Robert Tretiak Las Vegas, NV,	
Respondent.	

Respondent, a general securities principal, president and owner of a broker-dealer's parent company, and president of the broker-dealer for a portion of the period at issue, drafted the prospectus for and sold securities in the parent company's initial public offering ("IPO"). The prospectus contained materially misleading information, and the respondent failed to comply with an IPO contingency. Respondent also failed properly to establish an escrow account for the IPO, causing the firm to violate SEC Rule 15c2-4, and failed to satisfy a final arbitration award. Held, Hearing Panel findings affirmed, and sanctions affirmed in part and modified in part.

Robert Tretiak ("Tretiak") appealed these matters pursuant to NASD Procedural Rule 9311. Under review are two decisions of NASD Regulation, Inc. ("NASD Regulation") Hearing Panels in Complaint Nos. C02990042 and C02980085. Under Complaint No. C02990042, we find that Tretiak fraudulently sold securities in an initial public offering ("IPO") while using a materially misleading prospectus and in violation of the contingency requirements contained in the prospectus and that he failed properly to establish an escrow account for the IPO. Under Complaint No. C02980085, we find that Tretiak failed to satisfy a final arbitration award that had been reduced to a civil judgement against him.

Under Complaint No. C02990042, we bar Tretiak as a principal, suspend him in all capacities for two years and six months, and fine him $25,000. Under Complaint No. C02980085, we fine

Tretiak $10,000 and suspend him until the arbitration award is paid in full plus an additional 30 days. If, after 30 months from the date of this decision, the arbitration award is not paid in full or otherwise satisfied to the claimants' satisfaction, the suspension imposed herein will convert to a bar in all capacities. We also affirm the Hearing Panel's imposition of costs in Complaint No. C02990042.

I. Procedural History

During proceedings before the Hearing Panels, Tretiak requested that these two actions be consolidated into one disciplinary proceeding. The Deputy Chief Hearing Officer denied Tretiak's request, and the two complaints were considered by two separate Hearing Panels (which issued two separate decisions). On appeal, the Office of General Counsel notified the parties that the proceedings would be consolidated for briefing, argument, and issuance of our decision. Neither party objected to the consolidation.[1]

[1] Tretiak moved to adduce on appeal a total of 19 exhibits applicable to both cases. Motions to adduce additional evidence are governed by NASD Procedural Rule 9346. Under Rule 9346, a party seeking to adduce additional evidence must request leave to introduce the evidence and must demonstrate that there was good cause for his failure earlier in the proceeding to introduce the evidence and that the evidence is material. We have determined to admit into the record Tretiak's proposed Exhibits 17 (checks dated July 2, 1999 through March 28, 2000 from Tretiak to the Family Trust) and 19 (various pieces of correspondence involving Tretiak and/or his counsel) and to reject the remaining exhibits.

Tretiak failed to demonstrate good cause for failing to adduce the remaining evidence below and, in fact, has offered little excuse for not introducing the evidence earlier other than that many of the documents were lost or misplaced. With respect to Complaint No. C02980085, in which staff was awarded summary judgement, Tretiak argued that he was precluded by the Hearing Panel's grant of summary judgement from adducing evidence regarding his inability to pay. We do not agree. In a Hearing Officer Order regarding a May 19, 1999 pre-hearing conference, the Hearing Officer directed Tretiak to file in support of his defenses, including his claim of inability to pay, "all financial documents . . . . on which [Tretiak intended] to rely at the hearing." Tretiak argued with respect to Complaint No. C02990042 that he was precluded by the Hearing Panel from introducing additional evidence because the Hearing Panel provided him with insufficient time at the hearing to present his defense. Tretiak did not, however, at the conclusion of the hearing object to its conclusion or otherwise indicate that he required additional time. A respondent may not "gamble on one course of action and, upon an unfavorable decision, try another course of action." In re David T. Fleischman, 43 S.E.C. 518, 522 (1967).

Tretiak also has not demonstrated the materiality of the evidence that we have rejected. Indeed, much of the evidence is cumulative of evidence already contained in the record. (Later in this decision, we discuss, in more detail, specific items of evidence that Tretiak sought to adduce. See notes

II. Background

From February 1993 to the present, Tretiak has been registered with RFCA Financial Services, Inc. ("RFCA" or "the Firm") as a general securities representative and principal and has served as chairman of the Firm's Board of Directors. Tretiak served as RFCA's compliance officer throughout the period, and as its president for a portion of the period. RFCA is a wholly-owned broker-dealer subsidiary of Retirement Financial Centers of America, Inc. ("Retirement").[2] Tretiak was the founder, Chief Executive Officer and president of Retirement, and a Tretiak family trust owned 88 percent of Retirement's stock prior to the IPO at issue in Complaint No. C02990042.[3]

III. Complaint No. C02980085 - Failure to Honor an Arbitration Award

The Department of Enforcement ("Enforcement") filed the complaint in this matter after determining that Tretiak had not satisfied an NASD arbitration award that had been reduced to judgement. The Hearing Panel granted Enforcement's motion for summary disposition.

A. Facts. On September 21, 1994, an NASD arbitration panel entered an award (the "Arbitration Award" or "Award") against Tretiak in the amount of $52,360 (Arbitration No. 93-03693). On December 18, 1995, the arbitration claimants reduced the Arbitration Award to judgement in the amount of $52,360, plus 10 percent interest from September 21, 1994, in the California Superior Court for the City and County of San Francisco. Tretiak did not seek to vacate the Award and did not pay the Award.

5, 19.) In sum, we have determined to accept into the record only proposed Exhibits 17 and 19.

[2] The IPO at issue involved the stock of Retirement. In the IPO prospectus, Tretiak described Retirement's business as a "unique, full-service, one-stop financial center catering to retired clients" who seek estate planning, financial planning, and tax planning. The prospectus indicated that Retirement offered its services through store-front operations and that, through subsidiaries like RFCA, it also offered insurance, investment services, and discount stock trading. Retirement was incorporated in 1992.

[3] As discussed in more detail in connection with our discussion of Complaint No. C02990042, in October 1994, Tretiak, who originally served as the president of RFCA, obtained the approval of RFCA's Board to appoint another individual to assume the role of president of RFCA. The Board quickly discovered, however, that the individual had not qualified in the capacity of a general securities principal. Tretiak thereafter remained as president until his successor became appropriately registered in May 1995.

Nearly five years after issuance of the Award, on April 29, 1999, Tretiak entered into a settlement agreement with the family of the arbitration claimants.[4] In full satisfaction of the judgement, Tretiak agreed to pay the Family Trust a total of $54,000 without interest in $500 monthly payments for the first year, $1,000 monthly payments for the second year, and $1,500 monthly payments thereafter. According to the terms of the settlement agreement, as of April 29, 1999, Tretiak had paid only $2,000 toward satisfaction of the 1994 award.[5]

B. Discussion. We find that Tretiak failed to honor an arbitration award and that, in doing so, he violated Conduct Rule 2110.

At the outset, we find that the Hearing Officer appropriately granted Enforcement's motion for summary disposition. Procedural Rule 9264 states that a Hearing Panel may grant a motion for summary disposition if there is no genuine issue with regard to any material fact, and the party that files the motion is entitled to summary disposition as a matter of law. The moving party (in this case, Enforcement) bears the burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). If the moving party meets this burden, the opposing party must come forward with specific facts showing that there is a genuine issue in dispute. Matsushita Elec. Indus. Corp. v. Zenith Radio Co., 475 U.S. 574 (1986). In so doing, the non-moving party "must do something more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586.

Enforcement clearly established that Tretiak violated Rule 2110 and the absence of a genuine issue of material fact. Tretiak did not dispute the existence of the Arbitration Award or that he had not fully satisfied the Award. He also did not dispute that he had not attempted to vacate the Award and that the Award had been reduced to judgement. NASD Interpretive Release IM-10100 (Failure to Act Under Provisions of the Code of Arbitration Procedure) indicates that it may be deemed conduct

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[4] Subsequent to the issuance of the Arbitration Award, the arbitration claimants died, and a family trust ("the Family Trust") became the successor in interest to the Award.

[5] On appeal, Tretiak asserted that he has paid approximately $10,000 towards satisfaction of the Arbitration Award. Tretiak sought on appeal to adduce 19 additional exhibits. (See our discussion of Tretiak's motion to adduce additional evidence later in this decision.) One of the exhibits that Tretiak sought to adduce, Proposed Exhibit 17, included copies of eight negotiated checks dated July 1999 through March 2000 from Tretiak to the Family Trust. Since these checks were not available for presentation to the Hearing Officer, we have determined to allow them into the record. We note, however, that the checks total only $3,750. Coupled with the $2,000 that Tretiak had paid prior to entering into the settlement with the Family Trust, the record establishes that Tretiak has paid toward satisfaction of the Award a total of $5,750, not $10,000 as claimed in his appeal brief.

inconsistent with just and equitable principles of trade and a violation of Rule 2110 for an associated person to fail to honor an arbitration award where a timely motion has not been made to vacate or modify the award.

Conduct Rule 2110 states in its entirety: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Thus, the rule's language requires that two tests be met: (1) the misconduct occurred "in the conduct of" the respondent's business; and (2) the misconduct contravened high standards of commercial honor or violated just and equitable principles of trade. We find that both tests are met here.[6]

Tretiak's misconduct occurred in the conduct of his business, thereby satisfying the first prong of the test. He failed to satisfy an NASD arbitration award that had been awarded against him based on his sales of securities to members of the public. Tretiak's misconduct also contravened high standards of commercial honor and just and equitable principles of trade, thereby satisfying the second prong of the test. "[D]isciplinary hearings to require compliance with 'high standards of commercial honor and just and equitable principles of trade' are ethical proceedings; hence the concern is with ethical implications of [a respondent's] misconduct." In re Timothy L. Burkes, 51 S.E.C. 356, 360 (1993), aff'd, Burkes v. SEC, No. 93-70527 (9th Cir. July 25, 1994). We find that Tretiak acted unethically and in bad faith when he failed to satisfy the Award.

Tretiak's claimed defenses were that he had made good faith efforts to negotiate a settlement with the arbitration claimants and that he had a bona fide inability to pay. Tretiak, however, presented insufficient evidence to overcome Enforcement's case and to demonstrate a genuine issue as to a material fact.[7]

We find that Tretiak has not established an inability to pay the Award. A respondent bears the burden of establishing an inability to satisfy an arbitration award, and the NASD is entitled to make a searching inquiry into the respondent's assertions. In re Daniel Joseph Avant, 52 S.E.C. 442 (1995); In re Bruce Martin Zipper, 51 S.E.C. 928 (1993). The obligation to pay an arbitration award arises upon receipt of the award,[8] and associated persons are obligated to pay such awards promptly. See In re

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[6] Rule 115 indicates that persons associated with a member shall have the same duties and obligations under the NASD's Rules as members. Thus, the ethical standards imposed on members in Rule 2110 apply equally to persons associated with members.

[7] During the pre-hearing portion of this case, the Hearing Officer ordered Tretiak to present all of the evidence upon which he intended to rely to support his defenses. Tretiak presented numerous documents. As discussed in more detail in the body of our decision, the documents that Tretiak presented were not sufficient to demonstrate a genuine issue as to any material fact.

[8] See IM-10100 (all awards shall be honored by cash payment of the exact amount stated and shall be honored upon receipt thereof or within such other time period as may be prescribed by the

Richard J. Lanigan, 52 S.E.C. 375 (1995) (respondent who disregarded obligation until second contact by the NASD violated Rule 2110); In re Eric M. Diehm, 51 S.E.C. 938 (1994) (respondent's disregard of a May 1991 arbitration award until notified by the NASD that it was considering disciplinary action and his failure to make contact with the claimant until November or December of that year violated Rule 2110). Thus, in order to demonstrate inability to pay, Tretiak must show an inability to satisfy the award or any portion thereof for the final months of 1994 and from 1995 to the present.

In an effort to demonstrate an inability to pay the Arbitration Award, Tretiak produced his 1994 income tax return, which indicated that in 1994 (the year that the arbitration panel entered the Award), Tretiak reported total income of $71,741 and charitable donations of $9,573. Tretiak failed to provide federal tax returns for 1995 and 1996, the two years subsequent to the Award. Tretiak produced 1997 and 1998 income tax Forms 1040. The Forms 1040 indicated that he also had filed Schedules A, C, D and SE, but Tretiak produced only Schedule C. In 1997, Tretiak reported total income of $70,108. In 1998, he reported total income of $9,781. The 1997 and 1998 Schedules C (Profit or Loss from Business) contained somewhat inconsistent information. The 1997 Schedule C reported gross business income of $90,310 and business expenses of $21,799, while the 1998 Schedule C reported gross business income of $183,219 and business expenses of $154,032. Tretiak offered no explanation for the dramatic increase in business expenses. In our view, Tretiak's tax returns do not demonstrate his insolvency from the date of the award to the present.

Tretiak also submitted a financial disclosure form for 1997 (with accompanying schedules) and a financial disclosure form for 1998 (without accompanying schedules). Neither of these documents support Tretiak's contention regarding inability to pay. First, these documents provide no information regarding Tretiak's finances in 1994, 1995 or 1996. The 1997 financial form was dated July 31, 1997 and reported total income from the prior 12 months of $124,487, which included a $25,500 IRA distribution.[9] In a schedule that accompanied Tretiak's 1997 financial disclosure form, he valued his personal residence at $330,000, but failed to describe his form of ownership or explain how he determined its value. The 1997 asset schedule also failed to disclose other land that, in Tretiak's 1998 financial disclosure form, he indicated that he had sold for $13,000. The 1998 disclosure form is dated April 22, 1999, purports to provide financial information as of December 31, 1998, and references asset and liability schedules that Tretiak neglected to include. The 1998 form indicates that Tretiak earned just $9,781, but paid expenses of $38,365, including "tithing donations" of $5,500. In subsequent correspondence with Enforcement staff, he stated that he had covered his expenses with

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award).

[9] Tretiak reported this amount in the summary section. In an itemized section, he reported total income of $114, 487. In a similar itemized section, he reported expenses (including $4,749 in donations and $17,000 in legal fees) of $122,833. Additionally, although Tretiak listed as income/payments received an IRA distribution of $25,500, he listed the value of his IRA, 401(k) and pension accounts as only $1,500.

proceeds from the sale of land ($13,000 for the land that he did not disclose on his 1997 form) and $22,000, which he described as a "non-cash figure for use of his home office."[10] The 1998 form listed a $1,600 IRA distribution, but Tretiak listed no IRA accounts as assets (and neither the 1997 nor the 1998 forms identified the IRA accounts from which distributions purportedly were made). We find that neither of these forms establish Tretiak's inability to pay and that they in fact suggest that he could have paid at least a portion of the Award.

Tretiak also submitted to the Hearing Officer bills for attorney fees that Tretiak incurred subsequent to the entrance of the Award (for an attorney that Tretiak hired to negotiate a settlement with the claimants), newspaper articles regarding an action against Tretiak by the Nevada Securities Division (which, Tretiak claimed, had ruined his reputation and his business), and documents regarding federal income tax liens. The tax liens, however, are dated August 1996, March 1997 and June 1998, all well after issuance of the Award on September 21, 1994. Tretiak also submitted a January 30, 1997 notice of default on a deed of trust, 1999 denials of loan applications and credit card applications, 1999 credit card statements, legal bills and other documents connected to the Nevada state action, and other documents. None of the documents that Tretiak presented demonstrate his inability to pay some or all of the Award. To the contrary, the documents indicate that he could have paid substantially more toward satisfaction of the Award in 1994 and 1997, and they do not demonstrate with any certainty what his financial situation was in 1995 or 1996. See In re Herbert Garrett Frey, Exchange Act Rel. No. 39007 (Sept. 3, 1997) (defense of inability to pay arbitration award rejected where respondent failed to meet burden of establishing inability); In re Bruce Martin Zipper, 52 S.E.C. 240 (1995) (defense of inability to pay arbitration award rejected where respondent demonstrated that he did not have the financial resources to pay the entire award but failed to demonstrate that he could not pay any part thereof).

Tretiak's duty to satisfy the Award was absolute. Lanigan, supra; In re Peter Thompson Higgins, 51 S.E.C. 865 (1993). Tretiak nonetheless also argued as a defense that he had made a "good faith" effort to settle. We do not consider this to be a defense. Although Tretiak submitted copies of correspondence and electronic mail messages between himself, his attorney and the claimants' counsel, these documents do not evidence a good faith effort to pay. The earliest communication between Tretiak and the claimants' counsel was October 1995, over one year subsequent to the issuance of the Award. The next document was dated March 1996 and indicated that Tretiak would be tendering a "reasonable settlement offer" by April 1996. In May 1996, Tretiak rejected the claimants' offer to accept a payment of $23,000 plus $37,200 in installments with discounts for early payment and no interest accrued on installment payments. Tretiak requested from the claimants' counsel a "bottom-line cash settlement, lowest possible amount" and indicated that he could "come up with" $8,000. This notwithstanding, Tretiak did not pay the $8,000; instead, in September 1996, he sent them a check for

[10] The Schedule C that accompanied Tretiak's 1998 Form 1040 reported a $22,775 expense for the business use of his home.

$1,000 with a cover letter indicating that he had enclosed "the first of many monthly checks." There is no evidence, however, that Tretiak made any monthly payments thereafter. The next piece of correspondence was dated March 6, 1998, after the commencement of the NASD's investigation of this matter. In March 1998, Tretiak's counsel indicated that Tretiak could pay $1,000 per month toward satisfaction of the Award. In July 1998, Tretiak reduced his offer to pay monthly installments to $500 per month. In November 1998, the claimants' counsel accepted a payment schedule, but there is no evidence that Tretiak has abided by the schedule. Additionally, the correspondence indicates that the claimants' counsel repeatedly requested information from Tretiak regarding his financial condition and that Tretiak was not forthcoming with the requested information.

"The mere fact that [Tretiak] may have believed that he was engaged in good faith negotiations with respect to the [A]rbitration [A]ward is not dispositive." In re James M. Bowen, 51 S.E.C. 1152, 1154 (1994). An objective, not subjective, analysis must be used. Id. In our view, the documents submitted by Tretiak do not suggest that he made prompt or good faith efforts to settle with the arbitration claimants. Indeed, his first communication with the claimants' counsel occurred more than one year subsequent to the Award. Thereafter, his efforts were inconsistent and his representations were not corroborated by actual payments. See Frey, supra (failure to make prompt good faith efforts to satisfy an arbitration award constitutes conduct inconsistent with just and equitable principles of trade); Zipper, supra (initial settlement offer made in 1991 to settle May 1990 award, even if made in good faith, does not afford a basis for exoneration); Bowen, supra (evidence of good faith settlement negotiations should include a "prompt, steady interchange of specific offers and counter-offers"). In any event, an arbitration claimant has no obligation to settle. In re Daniel Joseph Avant, 52 S.E.C. 442 (1995). The obligation rested with Tretiak to pay the award promptly. Lanigan, supra, (arbitration awards are due and payable upon receipt, in full, and in cash); Higgins, supra (same).

We find that Tretiak failed to satisfy the Arbitration Award as alleged and that, in doing so, he acted in bad faith and contrary to high standards of commercial honor and just and equitable principles of trade. We affirm the Hearing Panel's findings that his actions violated Conduct Rule 2110.

C. Sanctions. Under Complaint No. C02980085, the Hearing Panel fined Tretiak $10,000 (to increase by $100 for every day that the Award remains unpaid) and suspended him until the award is satisfied and thereafter for 30 days. We find Tretiak's conduct to be egregious. "The NASD's Code of Arbitration Procedure is designed to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public." Frey, supra at 8. The NASD therefore is authorized to make the arbitration process effective by taking disciplinary action and imposing sanctions when awards remain unsatisfied. Avant, supra. Tretiak not only failed to satisfy the Award in full, as he was required under NASD Rules to do, he also failed to comply with his agreement to send the claimants regular payments toward satisfaction of the Award. As such, we have determined to modify the sanctions imposed by the Hearing Panel.

Turning to the principal considerations listed in the NASD Sanction Guidelines ("Guidelines"), we note that Tretiak has paid only a small portion of the $52,360 award. (The evidence that Tretiak has submitted demonstrates payments totaling approximately $5,750.) We also note that, although he has entered into a settlement agreement with the Family Trust whereby he has agreed to an installment payment plan, there is no evidence that he has maintained the agreed-upon payment schedule. Thus, we affirm the $10,000 fine and suspension (until the Award is paid and thereafter for an additional 30 days) imposed by the Hearing Panel. In addition, if the Award is not paid in full (or otherwise satisfied in accordance with terms agreed to by the Family Trust) within 30 months (approximately the term of Tretiak's agreed-upon installment payment plan) of the date that this decision becomes final, the suspension imposed herein will convert into a bar in all capacities. The sanctions that we have imposed are appropriately remedial and consistent with the applicable Guideline.[11]

IV. Complaint No. C02990042 - Misleading IPO Prospectus; Failure to Comply with Contingency; Failure Properly to Establish an Escrow Account

Enforcement filed the complaint in this matter after receiving a referral from the State of Nevada, which had filed its own action against Tretiak related to the Retirement IPO.

A. Facts

1. The Retirement IPO. On September 23, 1994 Tretiak filed documents with the Nevada Securities Division on behalf of Retirement to conduct an IPO under Nevada's Small Corporate Offering Registration ("SCOR") program. The SCOR program was designed to enable small companies to raise up to one million dollars using a simplified registration and offering process. Under the SCOR program, issuers were allowed to use a fill-in-the-blank form ("Form U-7") to draft an

[11] See Guidelines (1998 ed.) at 18 (Arbitration Award -- Failure to Honor or Failure to Honor in a Timely Manner).

The Hearing Panel indicated in its decision that the $10,000 fine that it imposed would increase by $100 per day for every day (subsequent to 30 days after its decision became final) that the Award remained unpaid. Although we acknowledge that a daily escalator may serve as an incentive to certain respondents to satisfy unpaid arbitration awards, we conclude that, in this case, the daily escalator would be counter-productive. Tretiak has reached a settlement agreement with the claimants, according to which he agreed to abide by an installment payment plan. In our view, the claimants are better served by the sanctions that we have imposed, which indicate that, if at the end of 30 months (approximately the term of Tretiak's agreed-upon installment payment plan), Tretiak has not fully satisfied the award, he will be barred from the industry.

offering prospectus. Tretiak admitted that he completed and filed the Form U-7 (or prospectus) for the Retirement IPO and that he used that prospectus to solicit investors. The Retirement IPO was RFCA's first IPO.

The effective date of the Retirement offering was October 21, 1994. According to the prospectus, Retirement would issue a minimum of 38,461 shares of Class A common stock and a maximum of 153,846 shares of Class A common stock at a price of $6.50 per share. Sales of the minimum amount would have raised $249,997, and sales of the maximum amount would have raised $999,999. The prospectus indicated that the stock was offered on a part or none basis, that is, if the minimum proceeds were not raised within 90 days after the effective date of the offering (on or about January 19, 1995), the escrow agent would return all of the subscribers' funds.

The prospectus indicated that Retirement intended to build a full-service center and home office at its new building site on Lake Mead Boulevard in Summerlin, Nevada ("Lake Mead Property") and that it intended to franchise numerous Retirement centers in demographically appropriate locations. It indicated that Retirement had just "committed to acquire" the Lake Mead Property for $475,000 and that the entire cost of the acquisition would be financed by the proceeds of the offering. In the "use of proceeds" section of the prospectus, Tretiak indicated that, if Retirement raised only the minimum, it would secure financing for the purchase of the Lake Mead Property through the issuance of a first deed of trust on the land in the amount of $380,000.[12] It further indicated that the financing was contingent, since it was assumed that funds in excess of the minimum would be raised. The prospectus indicated that the minimum proceeds from the offering would satisfy Retirement's cash requirements for the following 12 months.

The Form U-7 stated that, if Retirement had lent money to, had conducted business with, or had intended to conduct business with any of its directors, it would state the principal terms of any such arrangements in the completed Form U-7.[13] In the prospectus (the completed Form U-7), Tretiak disclosed prior dealings with directors, but made no mention of any future dealings, notwithstanding that two of Retirement's directors had lent money to Retirement in November of 1994 to fund the Lake Meade Property purchase. (See our discussion of the Lake Meade Property purchase below).

The instructions that accompanied the Form U-7 indicated that, after the registration became effective and while the offering remained pending, if any portion of the form required changing to ensure

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[12] Specifically, the prospectus indicated that, if Retirement raised the minimum, it would use $95,000 toward the purchase of the Lake Mead Property; $100,000 for marketing franchise offices; and $26,497 for working capital and contingencies. It indicated that, if Retirement raised the maximum proceeds, it would use $475,000 to acquire the Lake Mead Property; $200,000 to market franchise offices; and $258,999 for working capital and reserves for contingencies.

[13] The prospectus listed as directors: Tretiak, JC, and DJ.

accuracy, it should be changed, revised or supplemented. Tretiak never amended or revised the Retirement prospectus once the offering went effective.

2. The Lake Mead Property Purchase. On August 11, 1994, more than two months prior to the Retirement IPO effective date, Retirement entered into an agreement to purchase the Lake Mead Property for $475,000. Retirement deposited $5,000 towards the purchase and agreed to close on the purchase by October 15, 1994. On October 26, 1994, five days after the IPO's effective date, the parties amended the purchase agreement, increased the purchase price to $480,000 and extended the time for closing to November 15, 1994. Tretiak signed both agreements as president of Retirement. Retirement closed on its purchase of the property on November 22, 1994, while he was selling IPO interests to investors.

In order to obtain funds to close on the purchase of the Lake Mead Property, between November 15 and November 18, 1994, Tretiak obtained on behalf of Retirement bridge loans totaling $503,153 and issued a series of promissory notes in return for the loans. (Tretiak signed the notes as president of Retirement.) Two of the loans were secured by deeds of trust on the Lake Mead Property. Two of the loans (one for $127,667 and one for $5,000) came from two of Retirement's directors, JC and DJ. In May and June 1995, Retirement borrowed additional funds from unaffiliated lenders to pay off the November bridge loans and refinanced the Lake Mead Property. The lenders formed a limited liability company in June 1995 and obtained a $534,458 mortgage on the Lake Mead Property.

Retirement ultimately initiated a federal bankruptcy proceeding (under Chapter 7 of the Federal Bankruptcy Code), and the lenders foreclosed on the Lake Meade Property. In foreclosure, the lenders sold the Lake Meade Property for an amount that exceeded Retirement's outstanding indebtedness on the property, but due to the company's outstanding debts (including federal tax debts), the IPO investors did not recover anything on their investments.

3. Retirement IPO Sales. RFCA was the exclusive selling agent for the Retirement IPO. Sales commenced on November 4, 1994, and continued through October 1995. Most of the sales occurred after Retirement closed on its purchase of the Lake Meade Property on November 22.

Tretiak admitted responsibility for selling at least 80 percent of the IPO, and commission records suggest that Tretiak was responsible for more than 90 percent of the sales. Sales occurred less quickly than Tretiak had expected, and RFCA did not raise the minimum proceeds of $249,997 by the 90-day deadline established in the prospectus (January 19, 1995). As of January 19, RFCA had raised only $173,266.15 ($76,730.85 less than the required minimum). Tretiak nonetheless continued to sell the Retirement IPO to investors after January 19, 1995. He ultimately met the minimum on February 14, 1995, nearly one month after the contingency date had passed. Tretiak was able to meet the minimum, in part, by convincing RFCA employees to purchase stock in the IPO.

4. Retirement's IPO Escrow Agreement. Under the terms of the IPO prospectus, when RFCA was unable to raise the minimum by the contingency date (January 19, 1995), the escrow agent should have returned all of the investors' funds. The escrow agent failed to return the funds, however, because the escrow agreement misstated the date of the contingency deadline.

Initially, when drafting the prospectus, Tretiak planned to use a local office of Bank of America as escrow agent. He asked Retirement's part-time, in-house counsel, JK, to draft an escrow agreement and arrange for an escrow account with Bank of America. JK drafted an escrow agreement ("JK's Draft") listing Bank of America as escrow agent. JK's Draft misstated critical dates. JK's Draft incorrectly stated on page one that the offering would terminate on November 21, 1995 unless extended to a date not later than April 21, 1996 and that if the minimum had not been subscribed by that date, subscribers' funds would be returned. Both of these dates were incorrect.[14] The signature page of JK's Draft stated that, in the event the minimum was not raised by April 21, 1996 (rather than January 19, 1995), the investments would be refunded to the investors. It also stated that, in the event the minimum was not raised within one year from the effective date, the subscribers' funds would be returned. Again, all of these dates were incorrect. See note 14.

JK testified that he prepared JK's Draft, presented it to Tretiak, and had no further involvement in the negotiation of an escrow agreement for the Retirement IPO.

After JK's initial contact with Bank of America regarding the escrow agreement, Tretiak learned that Bank of America required that escrow agreements be handled out of the bank's California offices rather than in Nevada, where Tretiak lived. Tretiak was not interested in establishing an escrow account in California, so he subsequently arranged for a local bank, First Security Trust Company of America ("First Security"), to act as escrow agent.

Someone revised JK's draft to replace Bank of America with First Security as escrow agent ("the First Security Agreement"). The record contains two signed versions of the First Security Agreement, both dated November 14, 1994. The only notable difference between the two versions of the First Security Agreement is that Tretiak signed one version both as president of Retirement and as president of RFCA. Tretiak signed the other version of the First Security Agreement (the version maintained in First Security's files) only as president of Retirement. Bradford Barker ("Barker") signed the second version as president of RFCA.[15]

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[14] According to the terms of the prospectus, the offering was to terminate no later than October 21, 1995, and the IPO had to raise the minimum required amount by January 19, 1995.

[15] On October 19, 1994, RFCA's Board of Directors, of which Tretiak was chairman, appointed Barker as president of RFCA, effective October 24, 1994. Barker was to replace Tretiak as president of RFCA. (As of October 24, 1994, Tretiak already had filed a completed Form U-7 for the Retirement IPO with the Nevada Securities Division, and the offering had gone effective on October

Both versions of the First Security Agreement are identical with respect to key provisions. Both contain the erroneous provision contained on the first page of JK's Draft with one exception: JK's Draft stated that the offering would terminate no later than November 21, 1995. The First Security Agreements stated that the offering would terminate no later than October 21, 1995 (the correct date). Both JK's Draft and the First Security Agreements erroneously indicated on page one that the escrowed funds would be returned if the minimum was not raised "by such date," rather than by the true contingency date, January 19, 1995. Both First Security Agreements also contained the second erroneous provision (on the signature page) included in JK's Draft, but with one notable change. In JK's Draft, the signature page indicated that the escrow agent would return the escrowed funds if the minimum was not raised within one year of the approval date. The two First Security Agreements stated that, in the event that the minimum was not raised by October 21, 1995, the escrow agent would return the investors' funds. Although both JK's Draft and the First Security Agreements misstated the contingency date of January 19, 1995, the documents clearly reflect that the offering termination date set forth on page one and the signature page was changed after JK's initial preparation of JK's Draft.

Tretiak did not accept responsibility for revising JK's Draft, but he admitted to having reviewed and signed the First Security Agreements. He contended, however, that he only reviewed the price that the escrow agent intended to charge. (Tretiak's review resulted in an addendum to the agreement on this issue.) Tretiak offered no explanation for why he signed two versions of the First Security Agreement with the same date.

Since the First Security Agreements misstated the contingency deadline, the escrow agent did not return the investors' funds when RFCA failed to raise the minimum by the deadline (January 19, 1995). Instead, the offering proceeded and First Security released the proceeds of the offering to Retirement when the minimum was met on February 14, 1995.

21.) Soon thereafter, Tretiak learned from NASD Regulation that Barker was not appropriately registered to serve as president and that he could not serve as president until he had earned a Series 24 principal's license. On December 7, 1994, RFCA's Board accepted Barker's resignation as president. Barker's resignation letter indicated that he had resigned because he had not earned a Series 24 registration and that he intended to return as president of RFCA once he qualified as a general securities principal. Barker subsequently passed the Series 24 examination and assumed the position of president in May 1995. Meanwhile, Tretiak remained as president until Barker resumed his duties. Barker testified that, even after he assumed the position of president, he continued to report to Tretiak, who remained chairman of RFCA's Board of Directors. (As of December 7, 1994, Tretiak was the sole member of the Board of Directors.)

B. Discussion

1. Cause One - Misrepresentations and Omissions in the IPO Prospectus. As alleged in cause one, we find that Tretiak violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5 and NASD Rules 2110 and 2120 by disseminating the Retirement IPO prospectus in connection with his sales of the IPO securities while the prospectus contained material misrepresentations and/or omissions.

In order to establish a violation of Rule 10b-5, we must find that Tretiak (1) made material misrepresentations or omissions (2) in connection with the purchase or sale of a security and (3) acted with scienter. SEC v. First Jersey Sec., Inc., 101 F.3d 1450 (2d Cir. 1996). Conduct Rule 2120, the NASD's anti-fraud rule, parallels 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.

Turning first to the second prong of the test, the misrepresentations and omissions at issue occurred in connection with the purchase or sale of a security. Tretiak did not dispute that he used the Retirement prospectus in connection with sales of the Retirement IPO to investors. We therefore find that the evidence meets the second prong of the test.

As to the first prong of the test, the complaint alleged, the Hearing Panel found, and we agree that the Retirement IPO prospectus that Tretiak used to solicit the investments at issue failed to disclose that Retirement already had purchased the Lake Meade Property, that Retirement already had obtained financing for the purchase, and that Retirement had obtained loans from two of its directors. We concur with the Hearing Panel that the omissions and misrepresentations in the IPO prospectus were material, thereby satisfying the first prong of the test. A fact is considered to be material within the meaning of Section 10b-5 "if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available." In re Time Warner, Inc. Securities Litigation, 9 F.3d 259 (2d Cir. 1993). Material facts include not only information disclosing a company's earnings, but also those facts which affect the probable future of a company and which may affect the desires of investors to buy, sell or hold the company's securities. SEC v. Hasho, 784 F. Supp. 1059 (S.D.N.Y Feb. 13, 1992) (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968)).

We find that Retirement significantly altered its financial position by purchasing the Lake Meade Property when it did and that the misrepresentations and omissions related to the Lake Meade purchase were therefore material. The prospectus indicated that Retirement had "committed to acquire" the Lake Meade Property for $475,000 and that it intended to fund the purchase from the proceeds of the offering. The prospectus stated that, if Retirement did obtain financing to fund the purchase, it would secure a first deed of trust in the amount of $380,000 and that it was assumed that sufficient funds would be raised to forego financing. In reality, in early November when the first sales occurred,

Retirement had not only signed a purchase agreement, but also had amended it and agreed to increase the purchase price to $480,000. Contrary to the representations in the prospectus, Retirement also had closed on the purchase and had obtained bridge loans in the amount of $503,153 before the end of the November and before most of the IPO purchases occurred. By mid-1995, Retirement had secured a mortgage on the Lake Meade Property in the amount of $534,458, well over the amount ($380,000) indicated in the prospectus. Before knowing the outcome of the IPO and before receiving any IPO proceeds, Retirement had incurred significant debt, far more than it had forecasted, and for which it already owed interest. Retirement's actions did not conform to the representations in the prospectus and resulted in Retirement's incurring significant, undisclosed debt.

We also find that Tretiak's failure to disclose in the prospectus that Retirement had accepted loans from two of its own directors was material. The Form U-7 contained a specific provision for disclosure of whether Retirement was "doing business with" its directors.[16] Retirement received more than $130,000 in loans from two directors to fund the Lake Meade purchase. Potential investors were entitled to know all information related to Retirement's financial condition, including that the company had incurred indebtedness to its own directors. We find that the omission of this information from the prospectus was material.

Tretiak argued that the misrepresentations were not material because investors invested in Retirement based on its plans to expand through franchising, not based on the Lake Meade Property purchase. Even if the investors were interested in growth through franchising, the fact remains that through the Lake Meade purchase, Retirement had incurred undisclosed, significant financial commitments that dramatically affected its financial situation and the amount of money that Retirement would have available to pursue its franchising plans. "[T]he materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge." SEC v. Stephen Murphy, 626 F.2d 633, 653 (9th Cir. 1980). Moreover, proof of investor reliance is not necessary in a disciplinary proceeding to establish a violation of the anti-fraud provisions when the material misrepresentation is in the prospectus. In re Lester Kuznetz, 48 S.E.C. 551 (1986).

Tretiak also argued that the prospectus disclosed Retirement's intent eventually to purchase the property and mentioned that the company might incur debt in doing so, thereby making the misrepresentations not material. We do not agree. As set forth above, the representations in the prospectus regarding the property purchase did not disclose that the purchase had in fact occurred, misstated the ultimate purchase price, neglected to mention the significant debt that the company already had incurred (and, in fact, suggested that it might not incur debt), and failed to note that it had obtained

[16] Tretiak argued that, since the loans at issue were from directors rather than to directors, he did not have to disclose them. Tretiak's contention is without merit because we find that potential investors are entitled to weigh all financial information, we find no difference as to materiality on this basis.

loans from two of its directors. The disclosures included in the prospectus were inaccurate and misleading as to important financial information about the company.

Finally, Tretiak argued that the investors benefitted from the purchase because the value of the Lake Meade Property subsequently increased significantly. Assuming arguendo that the value of the property did increase subsequent to Retirement's purchase of it,[17] the fact remains that the timing of and circumstances surrounding Retirement's purchase were misrepresented in the prospectus. Potential investors were entitled to be presented with a clear and complete picture of the circumstances surrounding the Lake Meade purchase so that they could make informed decisions as to the value of the property, the reasonableness of the debt that Retirement incurred in the purchase, and whether Retirement paid a fair price. Regardless of the ultimate value of the property, investors were entitled to this information. "[M]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." Texas Gulf Sulphur at 849. In sum, we find that the misrepresentations and omissions at issue were material.[18]

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[17] Evidence in the record suggests that the value of the Lake Meade Property had increased by the time that the mortgage lender ultimately sold it in foreclosure.

[18] Tretiak also asserted that no one at the Nevada Securities Division or in the NASD's Department of Corporate Finance suggested that he needed to revise the Retirement prospectus. The record does not demonstrate that the regulators to whom Tretiak referred were aware of the details of Retirement's Lake Meade purchase or the significant debt that the company had incurred in connection with the purchase. As such, they may not have realized that the prospectus contained materially misleading misrepresentations and omissions. In any event, "participants in the industry must take responsibility for their compliance with applicable regulatory requirements and cannot be excused for lack of knowledge, understanding or appreciation of these requirements." In re Jeffrey D. Field, 51 S.E.C. 1074 (1994). Furthermore, Tretiak cannot shift his responsibility for regulatory compliance to the NASD or other regulators. See Field, supra; In re Sherman, Fitzpatrick & Co., Inc., 51 S.E.C. 1048 (1994).

Additionally, Tretiak claimed as a defense "reliance on counsel." "The 'advice of counsel' defense requires that applicant: 1) make a complete disclosure to the attorney of the intended action, 2) request the attorney's advice as to the legality of the action, 3) receive counsel's advice that the conduct would be legal, and 4) rely in good faith on that advice." In re William H. Gerhauser, Exchange Act Rel. No. 40639 (Nov. 4, 1998). In proceedings before the Hearing Panel, Tretiak did not establish as a defense reliance on the advice of counsel. On appeal, Tretiak sought to adduce in support of an "advice of counsel" defense a September 20, 1994 letter to Tretiak from a Las Vegas law firm. Tretiak did not, however, demonstrate good cause for failing to adduce this evidence below. Furthermore, the evidence is not material in that the body of the letter itself indicates that the law firm had not been asked to review or comment on the Form U-7 (prospectus) and had not undertaken any independent

We also find that Tretiak acted with scienter or, at a minimum, recklessly, thereby satisfying the final prong of the test for Rule 10b-5 and Rule 2120 violations. The Supreme Court has defined scienter as an "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Generally, Circuit Courts of Appeal are in agreement that recklessness satisfies the scienter requirement. See Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991); Kehr v. Smith Barney, Harris Upham & Co. In re Coastline Financial, Inc., Exchange Act Rel. No. 41989 (Oct. 7, 1999).

Tretiak admitted that he drafted and signed the Retirement prospectus. His signature on various documents related to Retirement's purchase of the Lake Meade Property (including purchase agreements and promissory notes) indicated that he was aware, when he sold interests in the Retirement IPO, of the status of the Lake Meade Property purchase and the debt that Retirement had incurred in connection with the purchase. He was Retirement's president during the period at issue, and he orchestrated Retirement's purchase of the Lake Meade Property and its financing of the deal. As such, he knew, or was reckless in not knowing, that the prospectus did not accurately represent the state of Retirement's financial affairs or its then-current situation with respect to the Lake Meade purchase. Tretiak also accounted for the vast majority of the Retirement IPO sales. Tretiak expected to raise significant capital for Retirement in the IPO. He placed the interests of Retirement before those of the investors and knowingly solicited investments while using a prospectus that he had drafted that contained materially misleading information. We find that, in doing so, he acted with scienter or, at a minimum, recklessly. See SEC v. Falstaff Brewing Corporation, 629 F.2d 62 (D.C. Cir. 1980) (knowledge of one's actions and the consequences of those actions (or a reckless disregard of the consequences), not the labels that the law attaches to those actions, is sufficient to support a finding of scienter).[19]

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investigation or verification of the matters set forth in the prospectus. We therefore reject this evidence. Furthermore, we note that Tretiak should not have needed the advice of counsel to determine that the contents of the prospectus were false and misleading. See In re Coastline Financial, Inc., Exchange Act Rel. No. 41989 (Oct. 7, 1999) ("[Respondent] did not need a lawyer to tell him that it was false to describe the notes as 'secured' when they were not.").

[19] Tretiak argued that he had provided more accurate and up-to-date information to investors through other means, such as verbal representations, press releases, and letters. The record contains no evidence of this. Indeed, in testimony taken during the staff's investigation of this matter, Tretiak indicated that he had not discussed with prospective IPO purchasers the debt that Retirement had incurred for the Lake Meade purchase or any other aspect of the purchase.

On appeal, Tretiak also sought to adduce a letter signed by Tretiak dated January 5, 1995 that was addressed "Dear Shareholder" and was printed on Retirement's letterhead. This document indicated that Retirement had "recently closed escrow" on the Lake Meade Property and that other comparable property had been placed on the market at a price higher than Retirement's purchase price.

Tretiak also asserted that, even if the NAC finds that the prospectus was defective, he should not be held responsible for the violations, since Barker assumed the position of president of RFCA in October 1994. We do not agree. We find that Tretiak is responsible for the violations at issue for several reasons. First, he held the positions of president, chairman of the board and compliance officer at RFCA. Additionally, he was a registered individual who sold most of the Retirement stock to members of the public.

At the outset, we note that "the president of a brokerage firm is responsible for the firm's compliance with applicable requirements unless and until he or she reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties." In re Everest Securities, Inc., 52 S.E.C. 958 (1996). Tretiak asserts that Barker assumed the presidency of RFCA in late October 1994 and thereby relieved him of responsibility. The evidence indicates, however, that Barker was not appropriately registered and therefore was not qualified to assume the position of president in October 1994. Indeed, he officially resigned due to his lack of principal registration on December 4, 1994. Furthermore, Barker testified that, between October and December 1994, he continued to report to Tretiak, had little involvement in the Retirement IPO, and never really assumed the position of president. Indeed, one version of the First Security Agreement, signed November 14, 1994, the period during which Barker purportedly was president, listed Tretiak as president. The record demonstrates that Barker assumed the position of president of RFCA in name only in late October, well after Tretiak prepared the prospectus, and that Barker relinquished the title on December 4, well before the majority of the Retirement IPO sales occurred. Furthermore, Barker was never qualified to replace Tretiak as president. In any event, even if Tretiak had been replaced as president for the period from October 24 through December 4, 1994, he remained the firm's compliance officer throughout 1994 and up to May 1995, and he was at all times the chairman of the board. In sum, we find that the purported temporary insertion of Barker as president was irrelevant because Tretiak retained ultimate executive authority throughout the relevant period.

Finally, notwithstanding his official positions, we hold Tretiak responsible as a registered person who participated in the perpetration of a fraud. Tretiak sold the Retirement IPO to investors, thereby

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As discussed in more detail later in this decision, we have determined not to accept this document into the record. Tretiak has not shown good cause for his failure earlier in this proceeding to adduce this evidence and the evidence is not material. The language of the letter and the date of the letter suggest that it was sent to investors after they had already invested and would not have negated misrepresentations in the prospectus. Furthermore, the letter does not contain information regarding the debt that Retirement had incurred to finance its purchase of the Lake Meade Property, and respondent has not demonstrated that the letter was in fact mailed to specific IPO purchasers or that the purchasers actually received the letter.

incurring the "duties under the NASD Rules to treat those investors in accordance with high standards of commercial honor and just and equitable principles of trade and to refrain from fraud." In re Wilshire Discount Securities, Inc., 51 S.E.C. 547, 550 (1993). Tretiak drafted the Retirement prospectus, signed all of the relevant documents related to Retirement's Lake Meade purchase and the financing of the purchase, was responsible for more than 80 percent of the IPO sales, and generated more than $44,000 in commissions on IPO sales. He knew what he wrote in the prospectus. We find that he also knew that the prospectus was misleading when he used it to sell stock to customers.

Based on the conclusions discussed above, we find Tretiak responsible for violations of Section 10(b) of the Exchange Act, Rule 10b-5, and Conduct Rules 2110 and 2120 for use of a fraudulently misleading prospectus in sales of the Retirement IPO.

2. Causes Two and Three - Failure to Comply with Contingency and Failure Properly to Establish an Escrow Account in Connection with the Retirement IPO. As alleged in causes two and three of the complaint, we find that Tretiak violated Exchange Act Rule 10b-9 and Conduct Rule 2110 by failing to comply with the Retirement IPO contingency and by failing properly to establish an escrow for the Retirement IPO.

Rule 10b-9 states that it shall constitute a violation of Section 10(b) of the Exchange Act for any person, directly or indirectly, in connection with the offer or sale of any security to make any representation to the effect that the security is being offered on the condition that a specified number of units will be sold within a specified time unless at least that number of units is sold within the period specified. "Rule 10b-9 is designed to provide an investor with assurance that an issuer will have sufficient capital after the offering and that, if a minimum number of shares are not sold, the investor's funds will be returned." In re William Jason Blalock, 52 S.E.C. 77, 82 (1994), aff'd, Blalock v. SEC, 96 F.3d 1457 (11th Cir. 1996) (table). An issuer's agreement to return investors' money if it is unable to sell the minimum is an important safeguard for investors, since an inability to sell the minimum may "reflect the market's judgement that the risk is too great" or that the stock is valued too highly. Blalock at 82, (citing In re C.E. Carlson, Inc., 859 F.2d 1429, 1434 (10th Cir. 1988)). The Retirement IPO prospectus indicated that if the minimum proceeds were not raised within 90 days of the effective date of the offering, i.e., by January 19, 1995, investors' funds would be returned. The minimum funds were not in fact raised by January 19, 1995. The escrow agreement should have instructed the escrow agent to return the funds if the minimum had not been raised by January 19, 1995 but, as discussed above, Tretiak did not ensure that the escrow agreement indicated the correct contingency date. As such, investor funds were not returned when the minimum was not sold by January 19, and Tretiak continued to sell shares in the Retirement IPO well beyond the contingency deadline. Indeed, Tretiak did not meet the minimum until February 14, 1995, and the escrow agent never returned the investors' funds.

Tretiak argued that he chose the 90-day contingency date arbitrarily and that the date meant very little, since under the rules applicable to SCOR offerings, he could have inserted any deadline up to one year after the offering became effective. He also asserted that he could have obtained the consent

of the investors to extend the contingency deadline. He argued that the Rule 10b-9 violation therefore is merely technical in nature. We disagree. "Courts and [the Securities and Exchange Commission ("Commission" or "SEC")] repeatedly have stressed the importance of [the requirements of Rule 10b-9], which [give] investors assurance that the offering will go forward only if enough investors demonstrate by their purchases that the risk associated with the offering is worth taking and the price being paid for the securities is fair." In re Richard H. Morrow, Exchange Act Rel. No. 40392 (Sept. 2, 1998). Indeed, in this instance, Tretiak was not able to sell the Retirement IPO as quickly as he had anticipated, possibly indicating, as stated in Morrow, that other investors believed the risk associated with the offering to be too great. The Retirement offering is precisely the type of offering to which the protections of Rule 10b-9 should have applied.

Tretiak also argued that he did not act with scienter and that he was merely negligent, since he simply forgot the deadline. The record belies this assertion. Tretiak drafted the prospectus and admittedly chose the contingency deadline himself. He sold at least 80 percent of the offering himself, and he testified that he generally monitored how much the offering had raised throughout the course of the offering. He knew when and if the contingency had been met. He knew that the minimum had not been raised by the contingency date, and he knowingly continued to sell the IPO beyond the contingency deadline. We conclude that the evidence supports our finding that Tretiak acted with scienter or, at a minimum, recklessly by ignoring the contingency that he established, to the detriment of Retirement's investors. See Morrow, supra (argument that respondent was merely negligent because he mistakenly believed the offering to have been extended rejected); In re Gallagher & Co., 50 S.E.C. 557 (1991) (argument that respondents relied to their detriment on the representations of the escrow bank rejected).

With respect to our finding that Tretiak violated Rule 2110 by causing RFCA to violate Rule 15c2-4, we find that Tretiak was responsible for the inaccurate escrow agreement.[20] Tretiak denied his responsibility and argued that JK was to blame. We disagree. JK prepared an initial draft (JK's Draft),

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[20] Cause three alleged that Tretiak also violated Rule 15c2-4. Rule 15c2-4 states that it shall constitute a fraudulent act for any broker-dealer participating in a distribution of securities to accept any part of the sale price of a security unless, if the distribution contemplates that disbursement of funds will not occur until a contingency is met, all funds are promptly transmitted to a bank which has agreed to hold the funds in escrow and to transmit or return the funds when the appropriate contingency has occurred. Rule 15c2-4 is a rule that applies to broker-dealers. Since the complaint did not allege that Tretiak had aided and abetted RFCA's Rule 15c2-4 violation, the Hearing Panel did not find that Tretiak had violated Rule 15c2-4. Instead, the Hearing Panel found that Tretiak violated Conduct Rule 2110 by causing the firm to violate Rule 15c2-4. Although we do not necessarily adopt the Hearing Panel's conclusion that we can find that an individual has violated Rule 15c2-4 only if he is alleged to have aided and abetted a firm's violation, for purposes of this case, we affirm the Hearing Panel's finding of violation of Rule 2110.

which listed Bank of America as escrow agent, then turned the draft over to Tretiak. Thereafter, JK had no involvement in subsequent revisions of the document. We affirm the Hearing Panel's determination to credit JK's testimony in this regard. The Securities and Exchange Commission consistently has held that the credibility determinations of the initial fact-finder are entitled to considerable weight and deference. See In re Jon R. Butzen, 52 S.E.C. 512 (1995); In re Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992). Moreover, JK's testimony is consistent with other evidence in the record regarding JK's position as a subordinate of Tretiak's and Tretiak's handling of all other aspects of the Retirement offering.

In any event, even if Tretiak did not revise JK's Draft, he signed the revised version, both as president of RFCA (one version) and as president of Retirement (both versions). As a principal of RFCA who sold more than 80 percent of the Retirement IPO, he should have ensured the accuracy of the contingency date in the escrow agreement. In this regard, his culpability is not affected by his claimed reliance on JK. See Gallagher, supra at 564 ("Contrary to respondents' further claim, their culpability is not affected by any reliance on counsel. The counting of 150 days from the date of the prospectus did not require a legal opinion."). The incorrect dates were on the cover page and the signature page of the document. Tretiak controlled all aspects of the offering, from drafting the prospectus to making the sales. Based on his knowledge of the offering and his involvement in securing an escrow agent, he knew or was reckless in not knowing that incorrect dates were included in the First Security Agreement.

We find, based on the conclusions discussed above, that Tretiak violated Conduct Rule 2110 and Exchange Act Rule 10b-9 by failing to comply with the Retirement IPO contingency and Conduct Rule 2110 by causing RFCA to fail properly to establish an escrow account for the Retirement IPO.

3. Procedural Arguments. In connection with Complaint No. C02990042, Tretiak raised numerous procedural arguments. First, he argued that this proceeding should be dismissed based on the doctrine of laches. A successful laches defense requires a demonstrated 1) lack of diligence by the party against whom the defense is asserted, and 2) prejudice to the party asserting the defense. In re Rafael Pinchas, Exchange Act Rel. No. 41816 (Sept. 1, 1999). Tretiak has demonstrated neither. The misconduct at issue occurred between late 1994 and early 1995. The Nevada Securities Division investigated the matter and commenced a state action in 1996. The state referred the matter to the NASD in late 1997. NASD staff initiated investigative testimony in this matter in February 1998, thereafter continued to investigate the matter, and filed a complaint in July 1999. We do not find a lack of diligence on the part of the NASD in investigating and filing a complaint against Tretiak. Furthermore, Tretiak has not demonstrated that he was prejudiced by the time that the NASD required to complete its investigation of this matter. Tretiak has not identified any additional evidence that he could have obtained and presented had the complaint been filed earlier. See Pinchas, supra (laches defense rejected because respondent failed to demonstrate lack of diligence or prejudice); In re Stephen J. Gluckman, Exchange Act Rel. No. 41628 (July 20, 1999) (same). We thus reject Tretiak's laches defense.

Tretiak also asserted that the three-year statute of limitations applied by the United States Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) to civil actions involving Rule 10b-5 should apply to NASD proceedings in which violations of Rule 10b-5 are alleged. We reject this argument because "neither the federal securities laws nor the NASD's rules require such a limitation." In re Steven B. Theys, 51 S.E.C. 473, 480 (1993). Furthermore, the SEC has long held that the three-year statute of limitations applied in Lampf does not apply to actions by self-regulatory organizations. See Gluckman, supra (the disciplinary authority of private self-regulatory organizations is not subject to any statute of limitations); In re Henry James Faragalli, 52 S.E.C. 1132 (1996) (Lampf held inapplicable to NYSE disciplinary proceeding); Theys, supra (Lampf held inapplicable to NASD disciplinary action). We conclude that no statute of limitations applied to this matter.

Tretiak also argued that the NASD's action should be barred by the doctrine of res judicata, since the Nevada Securities Division brought an action against Tretiak based on the Retirement IPO. "To establish a res judicata defense, a party must establish: '(1) a final judgement on the merits of a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits.'" Jones v. SEC, 115 F.3d 1173 (4th Cir. 1997). All three elements must be met. Tretiak has not met two. Although the allegations in the Nevada State action also involved the Retirement IPO, they were not the same as the allegations of this complaint. Additionally, the Department of Enforcement, the complainant in this matter, is neither a party to nor a privy to the Nevada state action. The privity requirement assumes that the person in privity represents "precisely the same legal right" as the party involved. Jones at 1180. In this matter, the Nevada Securities Division represents the State of Nevada, but the NASD is a self-regulatory organization in the securities industry. Indeed, "it is not at all unusual for several actions to be instituted in different forums against the same parties regarding the same alleged securities violations." In re Stephen S. Knepp, Complaint No. C9A930048 (NBCC June 9, 1995), at 13. See also Jones, supra (NASD disciplinary action does not preclude SEC from pursuing enforcement action for the same fact scenario); In re Richard J. Rouse, 51 S.E.C. 581 (1993) (SEC Enforcement Division decision not to proceed against respondent did not estop NASD from pursuing enforcement action involving similar facts); In re Kirk Knapp, 51 S.E.C. 115 (1992) (NASD not precluded by SEC consent injunction from initiating disciplinary action arising, in part, from similar facts). We thus reject Tretiak's res judicata defense.

Tretiak also argued that the Hearing Panel erred in not honoring Retirement's bankruptcy stay. We reject this argument. Retirement, not Tretiak, filed for protection under the United States bankruptcy laws. Therefore, the automatic bankruptcy stay applied to Retirement, not to Tretiak individually. Tretiak has not filed personally for bankruptcy protection, and he cannot claim the protection of a stay in connection with Retirement's bankruptcy proceeding. See Knepp, supra (respondent cannot claim the protection of the bankruptcy stay in connection with a bankruptcy that has been filed by an issuer with which he was associated).

Tretiak also argued that the Hearing Officer erred when he advised Tretiak during the proceedings below that the NASD does not recognize a registered person's Fifth Amendment right to refuse to testify in an NASD proceeding. We reject this argument and concur with the Hearing Officer. It is well established that the constitutional privilege against self-incrimination does not apply to questioning in proceedings by self-regulatory organizations such as the NASD, since such entities are not part of the government. In re Vladislav Steven Zubkis, Exchange Act Rel. No. 40409 (Sept. 8, 1998).

Finally, Tretiak argued that the NASD engaged in selective prosecution when it filed this complaint against him. In support of this assertion, Tretiak argued that the NASD generally does not file complaints on matters that it has been investigating for more than two years.[21] We reject this argument. In order to prove selective prosecution, Tretiak must show both that he was singled out for enforcement action while others similarly situated were not and that the action was motivated by arbitrary and unjust considerations. In re Maximo Justo Guevara, Exchange Act Rel. No. 42793 (May 18, 2000). Tretiak has made no such showing, and we therefore reject his arguments in this regard.

C. Sanctions. Under Complaint No. C02990042, the Hearing Panel fined Tretiak $25,000, barred him as a principal, suspended him for two years and six months, and assessed costs. For the reasons discussed below, we affirm the sanctions imposed by the Hearing Panel.[22]

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[21] Tretiak filed a motion to compel the staff to produce NASD internal guidelines that purportedly demonstrate that the usual and customary time limitation on NASD actions is two years from the date of the misconduct. Enforcement staff denied the existence of any such two-year limitation period and noted that NASD staff routinely files complaints in investigations that have been pending for more than two years. The Hearing Officer denied the motion and noted that the NASD's guidelines for limitations on actions are contained in Article V, Sections 3 and 4 of the NASD's By-Laws, which indicate that the NASD retains jurisdiction to commence an action against a registered and/or associated person for two years after the termination of the person's registration and/or association with a member firm. We concur with the Hearing Officer that the only binding limitation on the NASD's authority to commence a disciplinary action is the limitation contained in the NASD's By-Laws. This finding has been reinforced by the numerous cases, cited above, that indicate that there is no statute of limitations applicable to NASD proceedings. Tretiak was not "entitled to go on a 'fishing expedition' in the hope of finding something that might be helpful to his cause." In re Keith L. DeSanto, 52 S.E.C. 316, 322 (1995). The Hearing Officer thus appropriately denied Tretiak's motion to compel.

[22] The Hearing Panel imposed a principal bar, two-year suspension and $10,000 fine for the violations under cause one (misrepresentations and omissions) and a six-month suspension and $15,000 fine for the violations under causes two and three (relating to the contingency requirement and the escrow account). We concur with the Hearing Panel's allocation of sanctions between causes. Since the violations alleged in causes two and three are so closely related, we find it appropriate to impose one set of sanctions for the violations under those two causes of action.

Tretiak's misconduct involved serious violations of customer trust. He fraudulently misrepresented important information in order to persuade customers to invest in the Retirement IPO, and he deprived customers of the benefits of important customer protection rules. We find his misconduct to be egregious and deserving of significant sanctions.

Turning to the principal considerations listed in the applicable Sanction Guidelines, we note that Tretiak was affiliated with the issuer and that he generated significant commissions with his IPO sales. He therefore stood to benefit appreciably from his misconduct. Tretiak wholly ignored the contingency date indicated in the prospectus and sold IPO interests for nearly one month subsequent to the contingency date before meeting the minimum. Additionally, he sold IPO interests for nearly one year while using a materially misleading prospectus. Tretiak's actions exposed customer funds to significant risk, and his misconduct affected numerous customers. Furthermore, Tretiak has not accepted responsibility for or otherwise acknowledged his misconduct. Throughout the course of this proceeding, Tretiak attempted to shift the blame for his own actions to regulators, other RFCA employees, and the state of Nevada. Finally, we find that Tretiak's actions were intentional or, at the least, reckless. Based on these considerations, we find that the sanctions that we have imposed are appropriately remedial.[23]

V. Conclusion

Accordingly, for the violations found under Complaint No. C02990042, Tretiak is barred as a principal, suspended in all capacities for two years and six months, and fined $25,000. The bar as a principal is effective as of the date of this decision. Additionally, for the violations found under Complaint No. C02980085, Tretiak is fined $10,000 and suspended until the arbitration award is paid in full plus an additional 30 days. If, after 30 months from the date of this decision, the arbitration award is not paid in full or otherwise satisfied to the claimants' (or claimants' successors in interest) satisfaction, the suspension imposed herein will convert to a bar in all capacities. The suspensions imposed under

[23] These sanctions are consistent with the applicable Guidelines. See Guidelines (1998 ed.) at 21 (Escrow Violations -- Prohibited Representations in Contingency Offerings; Transmission or Maintenance of Customer Funds in Underwritings); 80 (Misrepresentations or Material Omissions of Fact). The Hearing Panel did not order restitution because the record did not contain adequate information regarding customer loss. We agree and therefore have not ordered restitution to the injured customers.

Complaint Nos. C02990042 and C02980085 are effective as of the date indicated in the cover letter that accompanies this decision. We also affirm the Hearing Panel's imposition of costs of $4,559.24 in Complaint No. C02990042.[24]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and
Corporate Secretary

[24] 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, 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 summarily be revoked for non-payment.