NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C07990033
v.	:	
LEN K. FURMAN (CRD #1964317),	:	**HEARING PANEL DECISION**
Bradenton, FL	:	
	:	Hearing Officer - DMF
and	:	
Sarasota, FL	:	June 8, 2000
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint alleging that respondent Len K. Furman (1) violated NASD Rules 2120 and 2110 by failing to disclose to customers who purchased promissory notes that the issuer would pay commissions on the sales of up to 11% to a company owned by Furman; (2) violated Rules 3040 and 2110 by selling the notes outside of his regular employment with a member firm without giving prior written notice to or receiving written approval from the firm; and (3) violated Rule 2110 by signing false and misleading affidavits for use in an NASD arbitration proceeding. Furman filed an Answer and requested a hearing on the charges. Following the hearing, the Hearing Panel found that Furman had violated NASD Rules as alleged in the Complaint. As sanctions, the Hearing Panel ordered that Furman be barred from associating with any member firm in any capacity

and that he pay restitution to two customers in the total amount of $12,561.36, plus interest. In addition, the Hearing Panel ordered Furman to pay costs in the amount of $1,819.25.

Appearances

William Brice La Hue, Regional Counsel, Atlanta, GA (Rory C. Flynn, Washington, DC, Of Counsel), for the Department of Enforcement.

Len K. Furman, pro se.[1]

DECISION

Procedural History

The Department of Enforcement filed a Complaint on May 10, 1999, alleging that respondent Len K. Furman (1) violated NASD Rules 2120 and 2110 by failing to disclose to customers who purchased promissory notes that the issuer would pay commissions on the sales of up to 11% to a company owned by Furman; (2) violated Rules 3040 and 2110 by selling the notes outside of his regular employment with a member firm without giving prior written notice to or receiving written approval from the firm; and (3) violated Rule 2110 by signing false and misleading affidavits for use in an NASD arbitration proceeding. Furman filed an Answer on June 24, 1999 and requested a hearing on the charges.

A hearing was held in Tampa, Florida on April 28, 2000, before a Hearing Panel that included a Hearing Officer, a current member of the District Committee for District 7 and a former member of that Committee. Enforcement offered the testimony of five witnesses, including Furman, and 37 exhibits

[1] For a period of time, Furman was represented by counsel in this proceeding, but Furman's counsel withdrew prior to the hearing.

(CX 1, 1A, 1B, 2-35), all of which were received in evidence. Furman testified on his own behalf, but did not offer any exhibits.

Facts

1. Background

Furman was registered with NASD member firm MCC Securities, Inc. as an investment company and variable contracts products representative until December 19, 1995. On December 23, 1995, Furman signed a Form U-4 to effect registration with Locust Street Securities, Inc. in the same capacity. Locust Street submitted the Form U-4 to the NASD on January 4, 1996. Furman's registration with Locust Street was approved by the NASD and became effective on January 18, 1996; his registration was approved by the state of Florida and became effective on January 25, 1996. The termination of Furman's registration with Locust Street became effective on July 11, 1997, but Locust Street filed an amended Form U-5 on December 2, 1997. Furman was subsequently associated with several other member firms, without being registered, but he is not now registered or associated with any firm.[2] (Tr. 71-72, 85-86, 88-101; CX 1, 1A, 1B.)

2. Furman's Sale of Jetlease Notes

Furman became involved in the sale of promissory notes issued by Jetlease Finance Corp. in 1995, while he was associated with MCC. (Tr. 133-35; CX 32, p. 5, CX 33.) Jetlease raised money from investors through the sale of notes from September 1992 until February 1996. Jetlease represented that the funds it obtained through the note sales would be used to purchase aircraft that Jetlease would then lease to its customers, and that the notes would be secured by liens on the aircraft.

During its period of operation, Jetlease obtained approximately $19 million from approximately 460 investors. In 1996, the SEC brought an action charging that Jetlease had made a variety of misrepresentations in the sale of the notes and that the notes were unregistered securities, which resulted in a stipulated final permanent injunction against Jetlease. The SEC's action led to Jetlease being placed in involuntary bankruptcy. (Tr. 103, 128-29; CX 35.)

Jetlease sold the notes through independent agents such as Furman, who formed a company called LKF Corp. as a vehicle through which to conduct his Jetlease note sales. Furman owned 100% of LKF and employed Robert Phillips through LKF to sell Jetlease notes. (Tr. 152-53.) Although Furman's sales of Jetlease notes began while he was associated with MCC, the charges against him relate only to his involvement in the sale of Jetlease notes to three customers after the termination of his association with MCC in December 1995.

In January 1996, Furman and Phillips met with DC and BA, who was the husband of DC's granddaughter and held power of attorney over her affairs. Furman and Phillips recommended Jetlease notes as an investment for DC. Furman and Phillips explained that the notes paid 9% interest per year. On January 21, 1996, Furman faxed investment forms to DC. DC signed the forms and submitted them to Jetlease, along with a check in the amount of $20,000, on January 27, 1996. Jetlease subsequently issued a promissory note dated February 5, 1996, payable to DC and her granddaughter in the principal amount of $20,000, plus interest payable monthly at the rate of .75% per month (9% per year) for a term of 12 months. (Tr. 46-66; CX 5-7, 10-11.)

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[2] NASD has jurisdiction over this proceeding pursuant to Article V, Section 4 of the NASD By-Laws because Furman's conduct occurred while he was registered with Locust Street and the Complaint was filed within two years after Locust Street filed the amended Form U-5.

In December 1995 or January 1996, Furman also discussed an investment in Jetlease notes with PK, daughter of FH and manager of FH's financial affairs. Furman recommended the notes as an investment for FH, telling PK that the notes were a good investment paying 9% interest. On January 19, 1995, Furman faxed PK a note and investment forms for the Jetlease notes. PK signed the forms and submitted them to Jetlease along with a $26,000 check dated January 19, 1996. Jetlease subsequently issued a promissory note dated January 23, 1996, payable to FH and PK in the principal amount of $26,000, plus interest payable monthly at the rate of .75% per month (9% per year) for a term of 12 months. (Tr. 21-45; CX 19-21, 23-27.)

On January 18, 1996, Furman faxed DS investment forms for Jetlease notes. DS signed the forms and submitted them to Jetlease along with a $25,000 check dated January 23, 1996. Jetlease subsequently issued a promissory note dated February 2, 1996, payable to DS and RS in the amount of $25,000, plus interest payable monthly at the rate of .75% per month (9% per year) for a term of 12 months. (CX 12-15, 18.)

3. Failure to Disclose Commissions

In selling the notes to these investors, Furman did not disclose that he would be receiving any commission or payment from Jetlease. (Tr. 30-31, 53, 159) In fact, however, Furman expected to receive substantial commissions on the sales from Jetlease through LKF. Jetlease agreed to pay a total commission of 11% on sale of the notes, including an up-front payment and monthly payments over the period of the note. (Tr. 148-49.)

For the note sold to DC, Furman expected to receive an up-front payment of $600 (3%) plus $83.33 per month for the life of the note (8%) payable from Jetlease to LKF. (CX 8-9.) For the note sold to FH, Furman expected to receive an up-front payment of $780 (3%) plus $130 per month for

the life of the note (6%) payable from Jetlease to LKF, and also expected that Jetlease would pay Robert Phillips, who helped Furman sell the notes, an additional $43.33 per month for the life of the note (2%). (CX 22.) For the note sold to DS, Furman expected to receive an up-front payment of $750 (3%) plus $166.67 per month for the life of the note (8%) payable from Jetlease to LKF. (Tr. 153; CX 16-17.) Furman actually received, through LKF, the up-front payments due from Jetlease for the note sales to FH and DS, but after Jetlease filed for bankruptcy it failed to pay the up-front payment due for the note sale to DC or any of the monthly commission payments for any of the note sales. (Tr. 145-47; CX 28.)

4. Failure to Notify Locust Street

As noted above, Furman submitted a Form U-4 to Locust Street on December 23, 1995. At that time, Furman had already formed LKF and was engaged, through LKF, in marketing and selling Jetlease notes, but he did not disclose the existence of LKF or his involvement in the sale of Jetlease notes in the Form U-4. Under the U-4 heading "Employment and Personal History," Furman's response to Question 19, which requested "all employment experience [for the past 10 years, including] full and part-time work [and] self-employment …" stated only "self employed selling life & health ins." And in response to Question 20, which asked "Are you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?" Furman answered: "Yes. Life & health ins products. Mortgage product. Own rental property." (CX 1.)

Furman also admitted that he did not make any other written disclosure of his involvement in the sale of the Jetlease notes to Locust Street prior to his activities in connection with the sale of those notes

to DC, FH and DS, and that he did not obtain permission from Locust Street to participate in those transactions. (Tr. 76-78, 157-58.)

5. False Affidavits

Jetlease stopped payments on all of its outstanding notes as of March 1, 1996, including the notes issued to DC, FH and DS. Jetlease subsequently was placed in involuntary bankruptcy and defaulted on the notes, which, in fact, were not fully secured by liens on aircraft. DC, FH and DS did not receive any payments on their notes, but they did receive a return of a portion of their investments through the bankruptcy proceedings. (Tr. 34-38, 58-60; CX 24-27.)

DC, FH and DS subsequently filed an arbitration claim against Locust Street based on Furman's involvement in the sale of the notes. (CX 29.) In the course of the arbitration, Furman signed two affidavits on behalf of Locust Street. In one affidavit, dated February 20, 1997, Furman stated: "To the best of my knowledge, I never received any commission from [DS's] participation in Jet Lease." (CX 30, ¶ 24.) In the other, dated May 30, 1997, Furman stated: "I never received any commission from [DC's] participation in Jet Lease." In fact, LKF actually received the up-front portion of the commission due from Jetlease on the sale of the note to DS. He also expected to receive an up-front commission payment for the sale to DC and monthly trail commission payments for both sales, but did not receive those payments because of Jetlease's bankruptcy. (Tr. 145-47; CX 28.) Locust Street and the customers later settled the arbitration claim after they learned that Furman had received a commission payment on the sale to DS. (Tr. 39, 61, 137, 178-79.)

Discussion

1. Failure to Disclose Commissions

There is no dispute that, through LKF, Furman expected to receive up to 11% in commissions on the three sales, and no dispute that he failed to disclose that fact to any of the three customers. The Complaint charges that Furman thereby violated Rules 2120 and 2110.

Rule 2120, the NASD's anti-fraud Rule, prohibits "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." "To find a violation of Conduct Rule 2120 …, there must be a showing that: (1) misrepresentations and/or omissions were made in connection with the purchase or sale of securities; (2) the misrepresentations and/or omissions were material; and (3) they were made with the requisite intent, i.e., scienter." District Business Conduct Committee for District No. 9 v. Michael R. Euripides, Complaint No. C9B950014, 1997 NASD Discipl. LEXIS 45, *18-19 (NBCC July 28, 1997). In contrast, Rule 2110 sets forth the general requirement to "observe high standards of commercial honor and just and equitable principles of trade." According to Euripides, "[a] misrepresentation may violate Conduct Rule 2110 even where there is no finding of intent to mislead." Id. at 19.

Furman's failure to disclose the commissions he expected to receive was in connection with the sale of Jetlease notes. The notes were securities; the governing legal principles are set forth in Reves v. Ernst & Young, 494 U.S. 56 (1990). Under the Reves analysis, whether a note is a security is determined by considering four factors: (1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction, (2) the plan of distribution of the note, (3) the reasonable expectations of the investing public, and (4) whether the existence of another regulatory scheme

significantly reduces the risk of the instrument, thereby rendering the application of the Securities Acts unnecessary.

With regard to the motivations of the buyer and seller, "[i]f the seller's purpose is to raise money for the general use of a business enterprise … and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'" 494 U.S. at 66. This accurately describes Jetlease's purpose in selling the notes and the goals of the investors. Thus, this factor weighs in favor of holding that the Jetlease notes were securities. With regard to the plan of distribution, the fact that the notes were "offered and sold to a broad segment of the public … is all that [is] necessary to establish the requisite 'common trading' in an instrument." Id. at 68. The Jetlease notes were offered broadly through independent agents and sold to more than 450 investors. Thus, this factor, too, weighs in favor of holding that the Jetlease notes were securities.

With regard to the expectations of the investing public, "the fundamental essence of a 'security' [is] its character as an 'investment.'" Id. at 69-70. It is clear that Furman sold the Jetlease notes as investments and that his customers reasonably understood them to be investments. Again, this factor weighs in favor of holding the notes to be securities. Finally, there is no indication that any other regulatory system would render application of the securities laws unnecessary to protect investors in the Jetlease notes. The Hearing Panel therefore finds that under the Reves analysis, the Jetlease notes were plainly securities.

The Hearing Panel also finds that Furman's failure to disclose the commissions he expected to receive from the sale of the notes was material. An omission is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable investor as significantly altering the total mix of information available. Time Warner Securities Litigation, 9 F.3d 259, 267-68

(2d Cir. 1993), cert. denied, 511 U.S. 1017 (1994). Courts have held specifically that "omitting to disclose a broker's financial or economic incentive in connection with a stock recommendation constitutes a violation of the anti-fraud provisions" because such omissions "deprive[] the customer of the knowledge that his registered representative might be recommending a security based upon the registered representative's own financial interest rather than the investment value of the recommended security." SEC v. Hasho, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992), citing Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (2d Cir. 1970). In this case, any reasonable investor would have concluded that the fact that Jetlease was paying 11% as a selling commission on the notes significantly altered the total mix of information about the investment. Not only would that fact have reflected on Furman's possible motivations in recommending the investment, but to any reasonable investor the fact that Jetlease was paying a total of 20% in interest and commissions would have signaled that the notes were highly speculative, not the safe, secure investments described by Furman. Thus, Furman's failure to disclose the commissions was plainly material.

Finally, the Hearing Panel finds that Furman had the requisite "scienter" to establish a violation of Rule 2120.

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

Euripides, 1997 NASD Discipl. LEXIS 45, *18-19.

Furman's excuse for failing to disclose the commissions he expected to receive from the sales of the notes was that he had "always been trained [that] commissions shouldn't be brought up, whether you're selling cars or an insurance product or anything." (CX 32, p. 32; see also Tr. 159.) Furman also acknowledged, however, that in the sale of securities, commissions are disclosed to investors. (Tr. 186.) Furthermore, as noted above, in this case Furman expected to receive commissions on the sale that exceeded the interest payments that the investors expected to receive for lending their funds. The danger that investors would be misled about Furman's motivations and about the safety of their investment if this information was not disclosed was so obvious that Furman must have been aware of it. The Hearing Panel therefore finds that it was at least reckless, if not a deliberate effort to mislead the investors, for Furman to fail to disclose the amount of commissions that he expected to receive.

Thus, the Hearing Panel finds that Furman violated Rule 2120 as alleged in the Complaint. Because proof of scienter is not required to establish a violation of Rule 2110, the Hearing Panel finds that it is even clearer that Furman violated that Rule.

2. Private Securities Transactions

Rule 3040 prohibits any "person associated with a member" from "participat[ing] in any manner in a private securities transaction" without first giving prior written notice to the member with which the person is associated and, if the person may receive compensation for the transaction, receiving written approval from the member. A "private securities transaction" is "any securities transaction outside the regular course or scope of an associated person's employment with a member," and "compensation" includes "any compensation paid directly or indirectly from whatever source … including … commissions …."

The Hearing Panel has already held that the notes were securities. Furman argues, however, that he relied on claims by Jetlease that the notes were not securities. (CX 33.) The SEC has recently reemphasized that

> A registered person cannot rely … on an issuer's representations [as to whether an investment is a security] but must seek an official opinion by appropriate firm personnel. Frank W. Leonesio, 48 S.E.C. 544, 548 (1986) (registered representative may not rely on self-serving statements of an issuer); see Gilbert M. Hair, 51 S.E.C. 374, 377 (1993) (registered representative's reliance on representation printed on the instrument stating that instrument was not a security, rather than seeking the opinion by appropriate member firm personnel is an insufficient basis for concluding that a transaction is not subject to the rule prohibiting private securities transactions).

In re Maximo Justo Guevara, Exchange Act Release No. 42793 (May 18, 2000), at n. 11.

Based on the undisputed Evidence, the Hearing Panel also finds Furman "participated in any manner" in the sales of the notes, that he sold the notes outside the regular course or scope of his employment with Locust Street, that the commissions he expected to receive for the sales through LKF were "compensation" for purposes of the Rule, and that he did not give prior written notice to Locust Street or receive written approval from Locust Street for his participation in the sales.

The only substantial issue is whether Rule 3040 applied to Furman at the time he participated in the sale of the notes. Rule 3040 applies to participation in private securities transactions by "persons associated with a member." The record establishes that Furman transmitted materials regarding the investment to PK on behalf of FH on January 19, 1996; to DC on January 21, 1996; and to DS on January 26, 1996. (CX 5, 14, 19.) Therefore, the question is whether Furman was "associated with" Locust Street as of those dates.

It is undisputed that Furman signed the Form U-4 to register with Locust Street on December 23, 1995; that Locust Street submitted the Form U-4 to the NASD on January 4, 1996; that the

NASD registered Furman with Locust Street as of January 18, 1996; and that Florida approved his registration as of January 25, 1996. The record also includes a letter from Locust Street to Furman dated January 26, 1996, advising him that he was "authorize[d] … to begin selling Investment Products for Locust Street " that a witness from Locust Street testified would have been sent to him on or about that date. (CX 2.) Furman, however, argued repeatedly that he did not recall receiving the letter and was unaware that he had been approved to sell for Locust Street until early March. On that basis, he contended that the Rule did not apply to his sales of the Jetlease notes in January. (Tr. 15, 79-82, 139, 166, 168-70, 180-81.)

"Person associated with a member" is defined in Article I of the NASD By-Laws; that definition is incorporated in Rule 3040, pursuant to Rule 121. At the time in question, the definition included "any natural person engaged in the investment banking or securities business who is directly or indirectly … controlled by [a] member, whether or not any such person is registered …." The Hearing Panel finds that Furman was "associated with" Locust Street under this definition, which should be construed liberally to effect the purposes of the Rules, for the protection of the investing public. Furman became "controlled by" Locust Street, for purposes of the definition, when he submitted a Form U-4 to associate with the firm. Furman intended to associate with the firm in order to engage in the securities business, and, as explained above, he did in fact engage in the sale of securities, in the form of the Jetlease notes, albeit without the knowledge or permission of Locust Street, in direct contravention of the purposes of Rule 3040.

Subsequent amendments to the definition of "person associated with a member" erase any doubt that Rule 3040 applied to Furman's participation in the sale of the Jetlease notes. Effective January 15, 1998, the definition was amended to include specifically "a natural person registered under

the Rules of the Association," and effective December 1, 1999, it was amended once again to include specifically any person who "has applied for registration." In both cases, the NASD explained that the amendments were designed to clarify, rather than expand, the reach of the definition. See Exchange Act Release No. 39175, 1997 SEC LEXIS 2093 (Sept. 30, 1997) at *17 (amendment to "clarify that the term includes any natural person registered under the Rules of the Association); Notice to Members 99-95 (Nov. 1999) (amendment "clarifies that any person who signs and submits a Form U-4 is an associated person"). Because Furman signed and submitted a Form U-4 and became registered prior to his January 19, 21 and 26 participation in the three Jetlease note sales, it is clear that Rule 3040 applied to him as of those dates.

The Hearing Panel rejects Furman's contention that applying the Rule to his January activities it is unfair, even assuming he was unaware until March that his registration with Locust Street had become effective. Furman admits that he completed and signed the Form U-4 to register with Locust Street on December 23, 1995. In signing the Form U-4, Furman stated that he was applying for registration with the NASD and that he agreed to submit to the NASD's authority and to be bound by its rules. (CX 1, p. 4.) Furthermore, Furman should have disclosed his ownership of LKF and his involvement in the sale of the Jetlease notes in response to Questions 19 and 20 of the Form U-4, which required Furman to disclose, among other things, all self-employment in which he had been engaged for the past 10 years and any business in which he was currently engaged. Instead of disclosing his ownership of LKF and his involvement in the sale of Jetlease notes, he omitted any clear reference to LKF or the Jetlease sales. In that regard, the Hearing Panel rejects Furman's contention that his oblique statement in response to Question 20 of the Form U-4 that he was involved with "mortgage product" was an adequate

disclosure that he was selling the Jetlease notes.[3] (CX 1.) Furman has only himself to blame for not making a forthright disclosure of his involvement in selling the notes in the Form U-4; if he had done so, it would have satisfied his obligation under Rule 3040 to give notice.

Therefore, the Hearing Panel finds that Furman violated Rule 3040 as alleged in the Complaint. By violating Rule 3040, Furman also violated Rule 2110.

3. False Affidavits

For this charge, Enforcement relies on Rule 2110's general requirement that associated persons adhere to "high standards of commercial honor and just and equitable principles of trade." Furman admits that he signed the two affidavits in question, which appear to have been prepared by the attorneys for Locust Street in the course of the arbitration proceeding. In one affidavit, Furman swore: "To the best of my knowledge, I never received any commission from [DS's] participation in Jet Lease." (CX 30, p. 3.) In fact, there is no dispute that prior to the time he signed the affidavit Furman, through LKF, had received the "up-front" portion of the commission due from the sale of the note to DS. (Tr. 144-45; CX 28.) In the other affidavit, Furman swore: "I never received any commission from [DC's] participation in Jet Lease." (CX 31, p. 3.) In fact, while that statement was literally true, there is no dispute that Furman, through LKF, expected to receive a commission for the sale to DC, but did not receive any part of the commission because of Jetlease's bankruptcy. (Tr. 146-47.)

The statement in the affidavit regarding the sale to DS was false; the statement in the affidavit about the sale to DC was highly misleading. The integrity of the arbitration program through which

[3] Furman argued that the reference to "mortgage product" was adequate because the notes were supposedly secured by chattel mortgages on airplanes. Furman should have recognized, however, that Locust Street would not understand a reference to "mortgage product" as signifying anything like the Jetlease notes. Instead, without any further explanation, the reference suggested that Furman was involved in marketing residential mortgages, which are clearly not securities. Indeed, it is likely that Furman intended to create just such a misimpression.

customer complaints are resolved is vitally important. In In re John F. Noonan, 52 S.E.C. 262 (1996), the SEC, in upholding a bar imposed by the NASD on an associated person who fabricated evidence for use in opposing an arbitration claim filed against him, stated:

> The NASD's arbitration procedure provides members, their employees, and public customers with an important mechanism for the speedy resolution of disputes. If arbitration is to be a meaningful alternative to litigation, its processes must be fair and free of abuse. Actions such as Noonan's totally subvert the arbitration process. Under no circumstances can such conduct be tolerated.

Although Furman was not a party to the arbitration, it was his conduct in selling the notes that was at issue, and he was still associated with Locust Street. Furman signed the affidavits under oath and should have recognized the importance of ensuring that they were accurate and not misleading. The Hearing Panel finds that by signing false and misleading affidavits under these circumstances, Furman violated Rule 2110 as alleged in the Complaint.[4]

Sanctions

The Sanction Guidelines for "Misrepresentations or Material Omissions of Fact" recommend, in cases involving intentional or reckless misconduct, a fine of $10,000 to $100,000 and a suspension of 10 days to two years or, in egregious cases, a bar. NASD Sanction Guidelines, p. 80 (1998 ed.). For "Selling Away (Private Securities Transactions)," the Sanction Guidelines recommend a fine of $5,000 to $50,000 and a suspension of up to two years or, in egregious cases, a bar. Id. at 15. There are no

[4] Because Furman's conduct did not violate a specific provision of the securities laws or regulations or NASD Rule, a finding of "bad faith" may be required. In this case, either Furman signed the affidavits under oath for submission to the arbitrators without bothering to verify that they were accurate and not misleading, or he read the affidavits, in which case he must have recognized that his sworn statements concerning commissions were false or highly misleading, and signed the affidavits anyway. In either case, Furman's bad faith is established. See Department of Enforcement v. Shvarts, Complaint No. CAF 980029 (NAC June 2, 2000) (bad faith analysis "is a flexible evaluation of the surrounding circumstances with attention to the ethical nature of the conduct").

Sanction Guidelines directly applicable to the false affidavits charge. Enforcement requests that Furman be barred for all three violations.

The Hearing Panel finds that all three violations were egregious and warrant bars, as Enforcement requests. Turning to the Principal Considerations under the Sanction Guidelines (id. at 8-9), the Hearing Panel finds the following aggravating circumstances: (1) Furman has never accepted responsibility for his actions. Even during the hearing, he did not acknowledge that his failure to disclose the commissions he expected to receive was wrong or misleading, or that he should have disclosed his sale of the Jetlease notes to Locust Street, or that his statements in the affidavits he signed were false and misleading. (2) There is no evidence that Furman ever made any effort to pay restitution or otherwise remedy his misconduct. (3) As explained above, to the extent that Furman relied on representations by Jetlease that the notes were not securities, that reliance was unreasonable. (4) Furman's misconduct resulted in substantial injury to the investors and Locust Street. (5) His misconduct was the result of intentional or reckless behavior. (6) He intended to reap substantial personal monetary gain from his misconduct. (7) While there are only three transactions at issue, they were substantial and the evidence strongly suggests that Furman would have continued to sell the notes without disclosing his commissions and without notifying Locust Street but for the SEC's action and the bankruptcy of Jetlease. (8) The injured customers were unsophisticated, elderly (91, 85 and 75) investors who were receiving some assistance from unsophisticated family members. The Hearing Panel finds no significant mitigating facts. Therefore, the Hearing Panel will bar Furman for each of the three violations.

With regard to monetary sanctions, NTM 99-86 provides that ordinarily fines will not be imposed when a respondent is barred. Therefore, the Hearing Panel will not impose any fines on

Furman. NTM 99-86 also provides, however, that restitution may be ordered even if the respondent is barred, and Enforcement requests that it be ordered in this case. According to the Sanction Guidelines, restitution may be ordered "when an identifiable person … has suffered a quantifiable loss as a result of a respondent's misconduct, particularly where a respondent has benefited from the misconduct." Sanction Guidelines at 6. In this case, there are three identifiable customers who suffered losses as a result of Furman's misconduct. The remaining question is whether those losses are reasonably quantifiable.

The evidence establishes that customer FH invested $26,000 in Jetlease. She received approximately $4,400 through the bankruptcy proceeding and just over $14,000 after attorneys' fees, out of a total of settlement of $29,295 in the arbitration case against Locust Street. Thus, the evidence indicates actual repayment to FH of $18,556.64, leaving a remaining loss of $7,443.36. (Tr. 37-39, 137.) The evidence also indicates that DC invested $20,000 in Jetlease. The evidence is less specific, however, as to her recoveries through the bankruptcy and arbitration processes. The testimony was that she received "around 3,500 maybe 4,000" from the bankruptcy and "around 10,000" after attorneys' fees from a total arbitration settlement of $22,534. (Tr. 60-61, 136-37.) Assuming that DC received $4,000 from the bankruptcy and paid the same percentage of her arbitration settlement in attorneys' fees as FH (which appears reasonable because DC and FH were co-claimants in a single arbitration represented by the same attorney), her total net recoveries would have been approximately $14,882, leaving a remaining loss of $5,118. The third customer, DS, did not cooperate with the NASD staff in the investigation and did not testify. The only evidence in the record is that she invested $25,000 in Jetlease and received a total arbitration settlement of $28,171. (Tr. 137.) There is no evidence regarding the amount she may have obtained through the bankruptcy proceeding, or the

amount of attorneys' fees she paid. Without such information, the amount of her net losses is not reasonably quantifiable.

The Hearing Panel will order Furman to pay restitution to FH and DC equal to the amount of their net losses, plus interest. Under the unusual circumstances of this case, the Hearing Panel believes it is appropriate to calculate the customers' losses based on their net recoveries from the arbitration settlements, after deducting attorneys' fees. Furman was not a party in the arbitration proceeding, yet his misconduct away from Locust Street led directly to the proceeding, and the false and misleading affidavits he made during the proceeding may well have contributed to the costs incurred by the parties. (See Tr. 178-79 (arbitration settled shortly after Furman gave Locust Street's attorneys documents revealing that Jetlease had paid him commissions, and Locust Street's lawyers, in turn, provided the documents to counsel for the claimants).) Therefore, the Hearing Panel concludes that it is appropriate to require Furman to make restitution to the customers for their net out of pocket losses.

Conclusion

Accordingly, respondent Len K. Furman is barred from association with any member firm in any capacity. Furman is also ordered to pay restitution to FH in the amount of $7,443.36 and to the estate of DC in the amount of $5,118, together with interest at the rate established for the underpayment of federal income tax in 26 U.S.C. §6621(a)(2), from January 24, 1996 as to FH and from February 1, 1996 as to DC, until payment of the restitution.[5] Furman shall also pay costs in the total amount of $1,819.25, which includes an administrative fee of $750 plus hearing transcript costs of $1,096.25. These sanctions shall become effective on a date set by the Association, but not earlier than

30 days after this decision becomes the final disciplinary action of the Association, except that the bar shall become effective immediately upon this decision becoming the final disciplinary action of the Association.[6]

HEARING PANEL

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By: David M. FitzGerald
Hearing Officer

Copies to:

Len K. Furman (via overnight courier and first class mail)
William Brice La Hue, Esq. (electronically and via first class mail)
Rory C. Flynn, Esq. (electronically and via first class mail)

[5] January 24, 1996 was the date Jetlease deposited FH's funds in its account; February 1, 1996 was the date Jetlease deposited DC's funds in its account. (CX 6, 20.) Specific identifying information regarding FH and DC is contained in Complainant's Exhibits, which were served on Furman in the course of the proceeding.

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