This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-20 (CAF040056).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. CAF040056 Hearing Officer – DRP

ORDER DENYING RESPONDENT'S APPLICATION TO VACATE THE TEMPORARY CEASE AND DESIST ORDER

On September 14, 2004, Respondent filed an application seeking to vacate the Temporary Cease and Desist Order of August 30, 2004 (Order), pursuant to Procedural Rule 9850. On September 15, 2004, Enforcement filed its opposition to Respondent's request. For the reasons stated below, Respondent's application is denied.

Pursuant to Rule 9840(d), a temporary cease and desist order remains in effect until a decision is issued in the underlying disciplinary proceeding. Rule 9850 permits a party to request that the hearing panel modify, set aside, limit or suspend the order before the decision is rendered. The moving party must set forth with specificity facts in support of any such request. Presumably, this provision was intended to permit either party to request a modification of the order in light of changed circumstances. It also provides a mechanism for a hearing panel to modify, set aside, limit or suspend the order if the disciplinary proceeding is not being conducted on an expedited basis.[1]

[1] Under Rule 9290, the hearing must be held and the decision rendered at the "earliest possible time." If the proceeding is not being conducted on an expedited basis, the respondent may petition the hearing panel to have the temporary cease and desist order modified, set aside, limited or suspended, pursuant to Rule 9850. *See* Notice to Members 03-35 (June 23, 2003).

Here, Respondent fails to set forth any facts in support of its application to vacate the Order. Rather, Respondent argues that the Hearing Panel erred in ordering Respondent to refrain from certain acts and in holding Respondent liable for material misrepresentations and omissions made by the firm's registered representatives. Moreover, Respondent contends that the GooDéy Declaration (Declaration) cannot form the basis for the Order, and further argues that Respondent's private placement memoranda contained forward-looking statements that essentially immunized Respondent from liability. Though Respondent's arguments do not support an application to vacate the Order under Rule 9850, the Panel will deem this a motion for reconsideration and address Respondent's arguments accordingly.

Rule 9840(b) states that a "temporary cease and desist order shall: (1) be limited … where applicable, to ordering a Respondent to cease and desist from dissipating or converting assets or causing other harm to investors … [and] (3) describe in reasonable detail the act or acts the Respondent is to take or refrain from taking…."

The Panel believes the Order complies with Rule 9840(b). In addition to setting forth Respondent's violative conduct and the significant dissipation or conversion of assets or other significant harm to investors that is likely to result without the issuance of a temporary cease and desist order, the Order describes in reasonable detail the acts Respondent is to take or refrain from taking. It was based on the credible evidence presented at the hearing and narrowly drawn to prevent further harm to the investing public while the disciplinary action is pending.

Furthermore, Respondent is liable for the material misrepresentations and omissions of its registered representatives, who were acting within the scope of their employment. The evidence

does not support Respondent's contention that the Respondent's brokers were independent contractors who were not subject to the firm's supervision and control.[2]

Respondent's arguments regarding the Declaration are also misplaced. The Declaration was not offered, nor admitted, in evidence at the hearing. The Declaration was filed to initiate the temporary cease and desist proceeding, as required by Rule 9810(b)(1). Respondent never raised an objection to the form or content of the Declaration prior to the issuance of the Order, and any deficiency in the Declaration is harmless error, because the Order was based on the credible evidence presented at the hearing.

Finally, disclosures in the two private placement memoranda do not immunize Respondent from liability for material misstatements and omissions made by its representatives regarding the offerings, particularly when Respondent failed to provide the memoranda to many customers, or did not provide the documents to customers until after they had purchased Respondent's preferred stock. Additionally, some of Respondent's brokers gave customers false assurances that the disclosures were standard language intended to meet legal requirements.[3]

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[2] In addition to liability under the doctrine of *respondeat superior*, a broker-dealer is also liable for violations of Section 10(b) of the Securities Exchange Act of 1934 by its registered representatives, even when the representatives are independent contractors. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1572-1578 (9th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991).

[3] Even if the brokers' misstatements constitute "forward-looking" statements under the Private Securities Litigation Reform Act (PSLRA), as Respondent argues, the registered representatives did not use cautionary language disclosing that future results might differ materially. Furthermore the PSLRA, and related case law that prohibits plaintiffs from suing for fraud when disclaimer language in the offering document is adequate, relates to the "reliance" element of Section 10(b) of the Exchange Act, which is not an element in an enforcement proceeding. Thus, the PSLRA is irrelevant to this case.

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For the reasons stated above, Respondent's application to vacate the Order is denied.

SO ORDERED.

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Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: September 17, 2004
Washington, DC