BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Brookes McIntosh Bendetsen, Burlingame, CA, Respondent.	AMENDED DECISION Complaint No. C01020025 Dated: August 16, 2004

Respondent appealed Hearing Panel Decision finding that he violated NASD rules by: (1) making unsuitable recommendations to a customer; (2) creating false account statements; and (3) signing a customer's name to a margin agreement. Held, findings and sanctions affirmed.

Appearances

For the Complainant: David A. Watson, Esq., NASD Department of Enforcement, San Francisco, CA.

For the Respondent: Brookes M. Bendetsen, Burlingame, CA, pro se.

DECISION

I. Background

Brookes McIntosh Bendetsen ("Bendetsen") entered the securities industry in 1986. From 1988 to January 2000, he was registered with D.R. Mayo & Co., Inc. ("Mayo & Co." or "the Firm") as a general securities representative and as a general securities principal. Bendetsen is currently registered with Redwood Securities Group, Inc. in the same capacities.

II. Procedural History

NASD's Department of Enforcement ("Enforcement") filed a complaint on December 12, 2002, alleging that Bendetsen: (1) signed a customer's name to a margin agreement for her account; (2) made unsuitable recommendations to the customer; and (3) created false account statements and provided them to the customer. Bendetsen filed an answer to the complaint and requested a hearing, which was held in San Francisco, California, on May 28, 2003, before a Hearing Panel. On July 8, 2003, the Hearing Panel issued a decision finding that Bendetsen had engaged in the misconduct alleged in the complaint and imposing a bar in all capacities. This appeal followed.

III. Facts

The allegations in the complaint concern Bendetsen's activities relating to the account of ML, a Mayo & Co. customer. An elderly widow, ML opened an account with Mayo & Co. in 1986. According to the account opening form, her investment objective was "conservation of capital with stable income." Beginning in about 1988, Bendetsen became the Mayo & Co. registered representative responsible for servicing ML's account.

In 1992, ML opened a new account in the name of the ML Trust, with herself as the trustee, and transferred her holdings from the 1986 account to the ML Trust account. Bendetsen completed the account opening form for the ML Trust account. The form indicated that ML was 79 years old with an annual income of approximately $40,000 and an approximate net worth of $1 million. The form allowed the investor to "check off" boxes identifying the investment objectives for the account. Utilizing this system, the form listed ML's investment objectives as "conservation of capital with stable income" and "long term growth of capital – income secondary." The form did not include checkmarks in the boxes identifying "short term trading profits" or "speculative capital gains" as an investment objective of the ML Trust account.

The ML Trust account was a margin account. Bendetsen believes that ML signed a margin agreement when the account was opened, but that the agreement was misplaced. Wedbush Morgan Securities, Inc. ("Wedbush") was Mayo & Co.'s clearing firm. In August 1997, Wedbush discovered that it did not have a copy of the ML Trust margin agreement in its files. Bendetsen claimed that he contacted ML to inform her that he needed her to sign another margin agreement and that she suggested that he sign the agreement for her. Bendetsen, however, did not inform the Firm that he was signing the agreement on ML's behalf.

According to the ML Trust account statement generated by Wedbush, as of December 1, 1998, the net worth of the ML Trust account was approximately $898,000, consisting of about $13,000 in cash, $610,000 in fixed income securities and $275,000 in equities. Up to that point, ML had never made a short sale in the ML Trust account. On December 7, 1998, however, Bendetsen effected a short sale of 300 shares of Amazon.com, Inc. ("Amazon") stock for a total of more than $57,000. By December 31, 1998, the share price of Amazon had increased and,

correspondingly, ML's Amazon short position developed a "paper loss" of $39,000.[1] In January 1999, the Amazon stock split 3 for 1, leaving the account with a 900-share short position, which it maintained until April 1999. By March 31, 1999, the paper loss for this position had reached $98,000.

There is no evidence that ML ever executed an options trading agreement for the ML Trust account. Further, because of her age, she was not eligible to trade options under Mayo & Co.'s policies. Nevertheless, in February 1999, Bendetsen began trading Amazon options in the ML Trust account. In April 1999, Bendetsen made approximately 36 Amazon options trades in the ML Trust account. For the options Bendetsen wrote, the account received approximately $326,000 in premiums, but it paid more than $424,000, for a net loss of nearly $100,000. Among these trades, Bendetsen wrote 160 uncovered calls, which were exercised on April 17, 1999. To meet the account's obligations under these calls, Bendetsen sold 16,000 shares of Amazon short on April 19, 1999. Bendetsen subsequently purchased 16,000 shares of Amazon between April 19, and April 27, 1999 to cover the short sale, as well as 900 shares to cover the account's pre-existing short position resulting from the December 7, 1998 short sale.

The account received more than $2.7 million for the premiums on the uncovered calls and the short sales to fill those calls, but it was forced to pay more than $3 million to cover the short positions, for a net loss of nearly $290,000. These losses, however, were not readily apparent from the April 1999 account statement for the ML Trust account generated by Wedbush. In fact, the April 1999 statement showed that the net worth of the account increased from about $816,000 at the end of March 1999 to nearly $913,000 at the end of April 1999, in spite of the losses from the options trading.

The $913,000 balance reflected on the April 1999 account statement was primarily attributable to a single transaction. On April 30, 1999, the last day of the month, Bendetsen purchased RDM Sports Group, Inc. ("RDM Sports") bonds having a par value[2] of $600,000 for about 3% of par, or approximately $18,000. In the ML Trust account statement, however, Wedbush valued the bonds at 75% of par, or $450,000. Before the Hearing Panel, Bendetsen acknowledged that this valuation bore no realistic relationship to the fair market value of the bonds, as established by his purchase at 3% of par.[3] Nevertheless, the over-valuation of the bonds on the account statement masked the losses attributable to Bendetsen's options trading.

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[1] A "paper loss" is an unrealized loss on the purchase of a security calculated by comparing the security's current market price with the original price paid by the purchaser.

[2] The par value or "par" is the face value of a bond or the price the issuer promises to pay on the bond's date of maturity.

[3] At the oral argument, Bendetsen confirmed that he was aware of a "huge value fluctuation" associated with at least one of the RDM Sports Bond purchases and that this purchase created an "illusion" that "definitely buoyed up the level of value in [ML's] account."

The options trading losses were also not apparent from the May 1999 account statement, which indicated that the net worth of the account had remained at about $912,000. This is because Bendetsen once again masked the losses with the purchase of over-valued bonds. The statement shows that on May 11, 1999, Bendetsen canceled the April 30, 1999 purchase of RDM Sports bonds. On May 28, 1999, however, he once again purchased RDM Sports bonds for the ML Trust account. This time he bought bonds with a par value of $625,000 for just 3% of par, or about $18,000, and once again the bonds were over-valued on the account statement, this time at 78% of par, or $487,500.

This pattern continued in June 1999. On June 3, 1999, Bendetsen canceled the May 30, 1999 purchase of RDM Sports bonds, and on June 30, 1999, he bought Hechinger Co. bonds having a par value of $700,000 for less than 2% of par, or about $13,000. As with the RDM Sports bonds, the Hechinger Co. bonds were over-valued on the ML Trust account statement, this time at 78% of par, or $546,000.

As in the prior months, after the June 1999 statement had been issued, Bendetsen canceled the June 30, 1999 Hechinger Co. bond purchase that had inflated the net worth shown on the June 1999 statement. Bendetsen then purchased Hechinger Co. bonds with a par value of $130,000 for roughly $2,400 or about 2% of par. This time, however, Wedbush valued the Hechinger Co. bonds at only 1% of par, or $1,300. As a result, the purchase of these bonds did not conceal the earlier losses from the options trading and the July 1999 statement showed that the net worth of the account had decreased from approximately $952,000 at the end of June 1999 to $203,000 as of July 31, 1999. According to the monthly account statements prepared by Wedbush, the net worth of the ML Trust account continued to drop after July 1999, and by December 1999 it had diminished to approximately $142,000.

Beginning in August 1999, however, Bendetsen provided ML with conflicting information, in the form of falsified account statements that indicated the net worth of the account remained substantial. For example, although the Wedbush-generated statement showed that the account's net value was about $194,000 as of August 31, 1999, Bendetsen created and provided to ML a statement indicating that the account's value as of that date was about $816,000. As of the end of September 1999, according to the Wedbush-generated statement, the net worth of the ML Trust account was about $169,000. Bendetsen, however, prepared and gave ML a statement indicating that the net worth of the account was approximately $791,000. Similarly, Bendetsen created falsified account statements for the months of October, November, and December 1999. Each of Bendetsen's falsified statements indicated that the net value of ML's account was far greater than that shown on the corresponding Wedbush-generated statement.

The statements Bendetsen created were indistinguishable from the statements generated by Wedbush. Bendetsen created them by "cutting and pasting" portions of prior Wedbush-generated statements for the account. The August 1999 statement that he created, for example, incorporated the account holdings and values reflected on the Wedbush-generated statement for March 1999. Before the Hearing Panel, Bendetsen testified that he created these statements and gave them to ML because he believed the statements generated by Wedbush under-valued some of ML's bonds. In fact, however, the August 1999 statement that Bendetsen created included

securities that the ML Trust no longer held as of August 1999, and included information about the account's cash position, equity holdings and values, and the amount of margin interest that the account had paid that differed substantially from the corresponding values on the Wedbush-generated statement. It is unclear which old account statements Bendetsen used to fabricate the statements he provided to ML for the months of September, October and December 1999. In each case, however, the statement that Bendetsen provided differed from the corresponding Wedbush-generated statement not only as to the value of the fixed income securities in the account, but also as to the account's money balance and the value of its equities holdings.

IV. Discussion

The essential facts in this case are largely undisputed and provide a clear picture of Bendetsen's misconduct. After reviewing the record in this matter, we affirm the Hearing Panel's findings as to each of the violations, which we discuss in turn.

A. Bendetsen Made Unsuitable Recommendations to ML

The complaint alleges that Bendetsen made unsuitable recommendations in connection with the ML Trust account's short sale of Amazon stock in December 1998 and its trading of Amazon options in April 1999. Rule 2310(a) provides that in recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed. Likewise, Rule 2860(b)(19) addresses the suitability of options transactions and provides that a member or associated person must have reasonable grounds to believe that any recommended options purchase or sale is suitable for the customer.[4]

There is no dispute that Bendetsen recommended the December 1998 short sale of Amazon stock and the April 1999 options transactions. He claims that he and ML "actively discussed the trades" and that he "outlined the strategy with her," but even if this is true, it would not excuse him from his obligation to recommend only suitable transactions. The Commission has determined that a broker's recommendations must serve his client's best interests and that the test for whether a broker's recommendation is suitable is not whether the client acquiesced in

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[4] Rule 2860(b)(19) states that: "[n]o member or person associated with a member shall recommend to any customer any transaction for the purchase or sale (writing) of an option contract unless such member or person associated therewith has reasonable grounds to believe . . . that the recommended transaction is not unsuitable for such customer [and that] the customer has such knowledge and experience in financial matters that he may reasonably be expected to be capable of evaluating the risks of the recommended transaction, and is financially able to bear the risks of the recommended position in the option contract." See also Patrick G. Keel, 51 S.E.C. 282, 284 (1993) (noting that a broker must ensure that the customer understands the risks involved in a recommended securities transaction, in addition to determining that the recommendation is suitable for the customer).

them, but whether the broker's recommendations were consistent with the client's financial situation and needs. See Wendell D. Belden, Exchange Act Rel. No. 47859, 2003 SEC LEXIS 1154, at * 11 (May 14, 2003); Dale E. Frey, Initial Decisions Rel. No. 221, 2003 SEC LEXIS 306, at *41-42 (Feb. 5, 2003) (concluding that under Rule 2860**,** "an additional level of scrutiny is required for options trading to be determined suitable for an account").

According to the account opening documents that Bendetsen filled out for the ML Trust account, ML was elderly and had an income of just $40,000 per year and assets of $1 million. Moreover, her investment objectives were "conservation of capital with stable income" and "long term growth of capital – income secondary," and did not indicate that she was interested in engaging in speculative transactions. In contrast, the type of short sales and options trading in which Bendetsen engaged was inherently speculative. Cf. Dep't of Enforcement v. Perles, Complaint No. CAF980005, 2000 NASD Discip. LEXIS 9, at *33 (NAC Aug. 16, 2000), aff'd in part, Howard R. Perles, Exchange Act Rel. No. 45691 (April 4, 2002) (stating that engaging in short sales in a rising market is "a strategy that normally increases the risk, potentially in unlimited measure, unless there is appropriate hedging or a prearrangement to cover the short position").

Moreover, there is no evidence that ML had ever completed the various forms required by Mayo & Co. to permit options trading in a customer account. In fact, ML was ineligible for options trading under Mayo & Co.'s supervisory procedures because of her age. Consequently, Bendetsen should have known that these speculative investments were unsuitable for ML. Bendetsen was aware that the short sale and options trading transactions he executed were inconsistent with the investment objectives of the account. Bendetsen also knew that these transactions were highly speculative investments and involved a very substantial downside risk. Through these unsuitable transactions, Bendetsen subjected the ML Trust account to great risk, leading ultimately to substantial losses in the account.

We therefore find that in connection with the December 1998 short sale, Bendetsen violated Rules 2310 and 2110, and that in connection with the April 1999 options trading in the ML Trust account, he violated Rules 2860(b)(19), 2310(a) and 2110.

B. Bendetsen Prepared and Submitted False Account Statements to ML

The complaint also alleges that Bendetsen prepared false account statements and provided them to ML, in violation of Rule 2110. Account statements are critically important documents and the creation of false statements "is the antithesis of a registered representative's [duty to uphold] high standards of commercial honor." Dist. Bus. Conduct Comm. v. Mangan, Complaint No. C10960162, 1998 NASD Discip. LEXIS 33, at *16 (NAC July 29, 1998). Bendetsen admits that he created the false statements and gave them to ML. He contends that he did so because Mayo & Co.'s clearing firm, Wedbush, under-valued some of the ML Trust account's bond holdings. The record, however, does not support his contention. For example, Bendetsen did not identify any particular holdings that he believed were under-valued, or explain how he had arrived at the correct values for those bonds. Further, he did not increase the value of some of the bonds in the ML Trust account's portfolio, but rather used a "cut and paste"

technique to falsify information concerning the account's money balance, the value of its equities, the amount the account had paid in margin interest, and the account's holdings.

The Hearing Panel found that Bendetsen created the false statements in order to conceal the losses in the ML Trust account. We agree. Moreover, even if the values shown on the account statements generated by Mayo & Co.'s clearing firm did not accurately reflect the market value of certain bonds in the account, it was improper for Bendetsen to create false account statements and provide them to the customer. We therefore affirm the Hearing Panel's finding that Bendetsen violated Rule 2110.

C. Bendetsen's Signing of the Margin Agreement Was Improper

The complaint alleges that by signing ML's name to the margin agreement for the ML Trust account, Bendetsen violated Rule 2110 which requires that NASD members and associated persons "observe high standards of commercial honor and just and equitable principles of trade." We have previously stated that Rule 2110 "is not limited to rules of legal conduct but rather . . . it states a broad ethical principle." Dep't. of Enforcement v. Shvarts, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000) (citation omitted). Moreover, we have determined that disciplinary hearings under Rule 2110 are "ethical proceedings, and one may find a violation of the ethical requirements where no legally cognizable wrong occurred [and that] NASD has authority to impose sanctions for violations of 'moral standards' even if there was no 'unlawful' conduct." Id. (citing Benjamin Werner, 44 S.E.C. 622, 623 (1971)).

We find that Bendetsen's actions were plainly unethical. Bendetsen admits that he signed ML's name to the margin agreement. He claims that ML asked him to sign her name, but even accepting that testimony as true, Bendetsen certainly knew or should have known that it was inappropriate to sign her name to the margin agreement, and there was no excuse or justification for him to do so. The record indicates that Bendetsen: (1) had no written authorization to sign the agreement, (2) placed no notation on the agreement to indicate that he had signed on ML's behalf, and (3) did not advise Mayo & Co. that he was signing the agreement. Bendetsen asserts that he did not sign ML's name to the margin agreement for any fraudulent purpose, but to prevent ML from having to re-sign the agreement after the original agreement had been misplaced. Nevertheless, we find that Bendetsen's signing of the agreement was improper and violated Rule 2110. See Dist. Bus. Conduct Comm. v. Bradley, Complaint No. C07920042, 1994 NASD Discip. LEXIS 187, at *8 (NBCC Oct. 31, 1994) (stating that signing customer names under any circumstances without proper written authority cannot be condoned in the securities industry).

V. Sanctions

A. Unsuitable Recommendation Violation

The NASD Sanction Guidelines ("Guidelines") for Unsuitable Recommendations suggest a fine of $2,500 to $75,000.[5] In addition, it recommends a suspension in any or all capacities for 10 business days to one year, and in egregious cases a longer suspension of up to two years or a bar.[6] In setting specific sanctions, we also look to the factors enumerated in the Principal Considerations in Determining Sanctions.[7] We find that Bendetsen's misconduct was egregious and involved a number of aggravating factors. For instance, Bendetsen's highly speculative trading involved a large number of trades resulting in substantial losses to an elderly and vulnerable customer. In addition, we find that Bendetsen's actions were intentional and that he attempted to conceal his customer's losses through both the purchase and sale of over-valued bonds and the falsification of account statements. Bendetsen's misconduct caused significant harm to a client with whom he had an established relationship and exposed this client to considerable risk. We find that allowing Bendetsen to remain associated with the industry would expose investors to unreasonable risk. In light of our mandate to protect investors from such risks, we conclude that a bar is warranted for this violation.

B. False Account Statement Violation

The Guidelines for Falsification of Records suggest a fine of $5,000 to $100,000.[8] In addition, it recommends imposing a suspension in any or all capacities for up to two years where mitigating factors exist, and a bar in egregious cases. In setting specific sanctions, we consider the nature of the documents falsified and whether the respondent had a good faith, but mistaken, belief of express or implied authority, as well as the more general considerations set forth in the Guidelines.[9] In this case, the falsified documents were account statements, which are critically important, and Bendetsen had no good faith belief that he had authority to create such false statements and provide them to ML. Further, Bendetsen created false statements for five consecutive months; his conduct was intentional; and the false statements were directed to an elderly customer and had the effect of concealing large losses in her account. We find that the violation was egregious and that there are no mitigating facts.[10] Therefore, we conclude that a bar is an appropriate sanction for this violation.[11]

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5 See Guidelines (2001 ed.) at 99.

6 Id.

7 See Guidelines (2001 ed.) at 9-10.

8 See Guidelines (2001 ed.) at 43.

9 Id.

10 We acknowledge that Bendetsen expressed remorse for engaging in the misconduct that is the subject of this appeal. We find, however, that the egregious nature of this misconduct,

[Footnote continued on next page]

C. Signing of the Margin Agreement Violation

As noted above, we conclude that Bendetsen's signing of ML's name to the margin agreement was improper regardless of his motivation. We find that Bendetsen's signing of the margin agreement justifies a small to moderate fine.[12] However, in light of our policy determination that in certain cases involving the imposition of a bar, no further remedial purpose is served by the additional imposition of a monetary sanction, we do not impose a fine for Bendetsen's violations.

VI. Conclusion

The record shows that Bendetsen (1) signed a customer's name to a margin agreement, in violation of Rule 2110; (2) made unsuitable recommendations to the customer, in violation of Rules 2310(a), 2860(b)(19) and 2110; and (3) created false account statements and provided them to the customer, in violation of Rule 2110. We reject Bendetsen's argument that the sanctions imposed by the Hearing Panel are excessive and find that a bar is appropriate for Bendetsen's unsuitable recommendations and falsification account statements.[13] In addition, he is ordered to pay hearing costs in the total amount of $1,624.62, which includes a $750 administrative fee and hearing transcript costs of $874.62.[14]

[cont'd]
coupled with his repeated attempts to conceal the misconduct, significantly outweigh any consideration of his remorse as a mitigating factor.

[11] We have also considered and reject Bendetsen's argument that he should not be barred because he has paid full restitution to ML and is currently paying restitution to another customer. The payments to both customers were not voluntary, but arose from mediated settlements and we do not consider them to be a mitigating factor in this case.

[12] We note that this violation is less serious than the suitability and falsification of records violations. Unlike those violations, we do not find that Bendetsen's signing of the margin agreement under the specific circumstances of this case would support a bar independently.

[13] We have also considered and reject without discussion all other arguments advanced by respondent and Enforcement. In light of the bar, no separate sanctions are imposed for signing the margin agreement.

[14] We also order Bendetsen to pay a $1,000 administrative fee plus $ 235.78 in appeal costs.

Accordingly, Bendetsen is barred from associating with any NASD member firm in any capacity. The bar will be effective as of the date of this decision.

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and Corporate Secretary

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary
(202) 728-8062 – Direct
(202) 728-8075 - Fax

August 16, 2004

VIA CERTIFIED MAIL:
A. **RETURN RECEIPT REQUESTED/FIRST-CLASS MAIL**

Brookes McIntosh Bendetsen
729 El Camino Real, Apt. 305
Burlingame, CA 94010

RE: Complaint No. C01020025: Brookes McIntosh Bendetsen

Dear Mr. Bendetsen:

Enclosed is the amended decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The prior version was issued with an incorrect complaint number and this error has been corrected in the amended version.

The NASD Board of Governors did not call this matter for review, and the attached NAC decision is the final decision of NASD. In the enclosed decision, the NAC barred you from associating with any member firm in any capacity based on violations of NASD Conduct Rules 2110, 2310 and 2860.

Please note that under IM-8310-1 ("Effect of a Suspension, Revocation, Cancellation, or Bar"), since the NAC has imposed a bar, effective immediately you are not permitted to associate further with any NASD member firm in any capacity, including a clerical or ministerial capacity.

Pursuant to Article V, Section 2 of NASD's By-Laws, if you are currently employed with a member of NASD, you are required immediately to update your Form U-4 to reflect this action and keep all information on the Form U-4 current and accurate.

In addition, NASD may request information from, or file a formal disciplinary action against, persons who are no longer registered with a member for at least two years after their termination from the member. See Article V, Sections 3 and 4 of NASD's By-Laws. Requests for information and disciplinary complaints issued by NASD during this two-year period will be mailed to such persons at their last known address as reflected in NASD's records. Such individuals are deemed to have received correspondence sent to that address, whether or not the individuals have actually received them. Thus, individuals who are no longer associated with an NASD member firm and who have failed to update their addresses during the two years after they end their association are subject to the entry of default decisions

against them. See *Notice to Members 97-31*. Letters notifying NASD of such address changes should be sent to:

NASD

Decoverly

9509 Key West Avenue

Rockville, MD 20850

Attn: Membership Services/CRD PD

This decision may be appealed to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within 30 days of your receipt of this decision. A copy of this application must be sent to NASD, Regulatory Policy and Oversight, Office of General Counsel, as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD by similar means.

The address of the SEC is:	The address of NASD is:
Office of the Secretary U.S. Securities and Exchange Commission 450 Fifth Street, N.W., Stop 6-9 Washington, D.C. 20549	Attn: Leavy Mathews III Office of General Counsel Regulatory Policy and Oversight NASD 1735 K Street, N.W. Washington, D.C. 20006

If you file an application for review with the SEC, the application must identify the NASD case number and set forth in summary form a brief statement of alleged errors in the NAC decision and supporting reasons therefor. You must include an address where you may be served and a phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD. Attorneys must file a notice of appearance.

The filing with the SEC of an application for review shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a NAC decision. Thus, the bar imposed by the NAC in the enclosed decision will not be stayed pending appeal to the SEC, unless the SEC orders a stay.

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

cc: David A. Watson, Esq.
Anita M. Lightning, CRD/Membership/Public Disclosure