

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A990031
v.	:	
	:	Hearing Officer - DMF
CHARLES W. TESTINO	:	
(CRD #1216651)	:	HEARING PANEL DECISION
Tucson, Arizona,	:	ON REMAND
	:	
	:	October 3, 2000
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint charging that respondent Charles W. Testino violated Rules 3040 and 2110 by engaging in private securities transactions without giving prior written notice to his employer. After a hearing, the Hearing Panel issued a Decision finding that Testino committed the violations as alleged and imposing sanctions. The National Adjudicatory Council called the Decision for review and remanded the case for reconsideration of the sanctions. After receiving additional evidence and reconsidering the sanctions, the Hearing Panel ordered: (1) that Testino be suspended from associating with any member firm in any capacity for six months; (2) that he requalify by examination as a Series 6, Investment Company and Variable Contracts Products Representative before again associating with any member firm; and (3) that he be fined a total of \$177,000, including a base fine of \$10,000 and an additional \$167,000 representing disgorgement of the full amount he earned through the private securities transactions.

Appearances

Roger D. Hogoboom, Jr., Esq., Regional Counsel, Denver, CO, and Rory C. Flynn, Esq., Chief of Litigation, Washington, DC, for Complainant.

Lindsay Brew, Esq., Haralson, Miller, Pitt & McAnally, P.L.C., Tucson, AZ, for Respondent.

DECISION ON REMAND

1. Procedural History

The Department of Enforcement filed a Complaint on May 13, 1999, charging that respondent Charles W. Testino violated NASD Conduct Rules 2110 and 3040 by engaging in private securities transactions without giving prior written notice to his employer. Testino filed an Answer and requested a hearing.

On March 9, 2000, following the hearing, the Hearing Panel issued its Decision holding that Testino violated Rules 2110 and 3040 as alleged. As sanctions, the Hearing Panel ordered: (1) that Testino be suspended for 60 days in all capacities; (2) that he requalify as a Series 6; and (3) that he be fined \$60,000, of which \$50,000 represented disgorgement of a portion of the commissions he earned through his private securities transactions. In explaining its sanctions determinations, the Hearing Panel noted that it “thought it appropriate to consider that there is no evidence that [Testino], who has been in the securities business since 1993, ever engaged in any similar misconduct,” and the Panel found that Testino “does not have the financial means to disgorge the full amount of his selling commissions”

On April 13, 2000, the National Adjudicatory Council called the Decision for review and remanded it “for the limited purposes of: (1) reevaluating the seriousness of Testino’s misconduct regardless of the absence of similar misconduct ...; and (2) a determination of whether Testino’s claim

of inability to pay is substantiated, and if his financial circumstances are in fact such that they would not permit Testino to disgorge some or all of his ill-gotten gains.” The NAC expressly directed that there should be no “reconsideration of the findings of violation by the Hearing Panel.”

Following the remand, Testino filed documents in support of his inability to pay claim and Enforcement requested a hearing to address that issue. The Hearing Panel conducted such a hearing in Tucson, Arizona on August 31, 2000, during which Testino testified regarding his financial circumstances. Based on the evidence adduced by the parties, and in accordance with the NAC’s directions, the Hearing Panel has reconsidered the sanctions to be imposed.

2. Prior Decision

As explained in the Hearing Panel’s original Decision in this matter, from November 1993 to September 1998, Testino was associated with SunAmerica Securities, Inc. and registered with the NASD as a Series 6, Investment Company and Variable Contracts Products Representative. Testino admitted that from April 1997 through August 8, 1998, he referred approximately 32 individual investors to Oxford Development, LLC for the purpose of investing in Oxford promissory notes. These 32 individuals purchased 40 Oxford notes totaling approximately \$1,216,161. Eleven of the individual investors maintained accounts at SunAmerica and purchased approximately \$490,000 in Oxford notes from Testino, their registered representative. Testino received approximately \$167,000 in compensation from Oxford for his referrals. Testino admitted he failed to provide SunAmerica with prior written notification of his participation in selling the Oxford notes and that his conduct violated NASD Conduct Rule 3040. The Hearing Panel found that Testino’s conduct also violated Rule 2110.

In light of Testino’s admissions, the original hearing focused on sanctions. Several witnesses testified in support of Testino, but the Hearing Panel found that the testimony of only two of these

witnesses, customers who had purchased the Oxford notes, was relevant. Both witnesses testified in Testino's favor.

In determining sanctions, the Hearing Panel referred to the Sanction Guideline for "Selling Away (Private Securities Transactions)," which recommends a fine of \$5,000 to \$50,000, a suspension for up to two years and, in egregious cases, consideration of a bar. The Guideline advises that adjudicators may consider increasing the fine by adding the amount of the respondent's financial benefit. NASD Sanction Guidelines, p. 15 (1998 ed.).

The Hearing Panel noted that, in addition to the principal considerations adjudicators always should consider in determining sanctions, the applicable Guideline advises adjudicators to consider: (1) whether the respondent had a proprietary or beneficial interest in, or otherwise was affiliated with, the selling enterprise; (2) whether the respondent intended to create the impression that his member firm sanctioned the activity; (3) whether the selling away involved customers of the firm; and (4) whether the respondent provided his member firm with verbal notice of his activity. With regard to these considerations, the Hearing Panel found that Testino did not have a proprietary or beneficial interest in the selling enterprise and that he did not intend to create the impression that SunAmerica sanctioned the activity, which weighed in Testino's favor, but the Panel also found that Testino's conduct involved customers of SunAmerica and that he did not give his firm verbal notice of his activity, which weighed against him.

In addition, in its original Decision the Panel considered in mitigation the facts that Testino accepted full responsibility for his conduct, candidly admitted that he made a mistake and that his conduct violated NASD Conduct Rule 3040, and was cooperative with the NASD during its investigation. The Hearing Panel also noted that Testino did not attempt to mislead anyone or to

conceal his conduct, and that the customer witnesses, who had been investing with Testino for many years, supported Testino, testifying that they trusted him and that he did not misrepresent the nature of the investment.

As explained above, the Hearing Panel also pointed out that Testino had no prior disciplinary history, and, noting that Testino was terminated by SunAmerica in September 1998 and, as a result, suffered adverse financial consequences, the Panel concluded that Testino lacked the financial means to disgorge the full amount of his selling commissions. The Panel concluded that a 60-day suspension, a requirement that Testino requalify as a Series 6, and a \$60,000 fine, which included disgorgement of \$50,000 of the \$167,000 Testino admitted earning through the sale of the Oxford notes, were appropriate sanctions under these circumstances.

3. Evidence on Remand

On May 25, 2000, following the remand, Testino filed a Statement of Financial Condition on the standard form employed by NASD, together with supporting documents, including his personal tax returns for 1997 and 1998. On June 8, 2000, Testino filed additional schedules to support his Statement, including lists of Non-Liquid Assets, Current Liabilities, and Notes Payable. Enforcement filed its Response to Testino's Submission of Financial Information and Request for a Hearing on June 14, 2000, in which Enforcement expressed "serious reservations" about the information Testino had submitted. The Hearing Officer then issued an order setting a hearing on remand for August 31, 2000, at which the Hearing Panel would receive "evidence and argument regarding respondent's financial circumstances."

On August 17, 2000, prior to the hearing, Enforcement filed a Pre-Hearing Submission that included as exhibits Testino's Statement of Financial Condition (without all of the supporting schedules

and documentation) (CX1), as well as copies of statements for Testino's personal (CX 2) and business (CX 3) bank accounts that Enforcement obtained from Testino through Rule 8210 requests after the remand. On August 21, 2000, Testino filed his own Pre-Hearing Submission, which included copies of certain promissory notes, judgments and foreclosure notices to support his claim. At the hearing on August 31, Testino testified and both parties offered argument regarding his financial condition. The Hearing Panel considered Testino's testimony, his Statement of Financial Condition, together with all supporting schedules and documentation, and the materials included in Enforcement's and Testino's Pre-Hearing Submissions in reaching its conclusions.

4. Discussion

A respondent who claims inability to pay monetary sanctions bears the burden of establishing his financial circumstances. District Business Conduct Committee for District No. 10 v. Gerald Cash McNeil, Complaint No. C3B960026 (NAC Jan. 21, 1999). Testino failed to satisfy this burden.

Testino completed a Statement of Financial Condition, but failed to provide key documentary evidence to support the Statement. First, Testino failed to provide his personal tax returns for 1999. At the hearing, Testino stated that he "assumed" his income for 1999 was "minimal," but also said he had "no idea" what his reportable income would be for 1999, explaining that he had only given his accountant the records needed to prepare his return the week before the hearing. (Tr. 14-15.) Testino also offered nothing to establish his income for the current year, and stated that he was not able to estimate what he expected his monthly income to be over the next two to three years. (Tr. 12.) As a result, Testino failed to offer evidence that would allow the Panel to conclude that his income is inadequate to allow him to disgorge the full amount he received for selling the Oxford notes.

Second, Testino failed to submit any tax returns or other financial information regarding Arizona Investment Advisors, Inc., through which he conducts his business. (Tr. 40-41.) Indeed, his ownership of that company was not shown on his Statement of Financial Condition. As a result, Testino failed to offer evidence that would allow the Hearing Panel to conclude that Arizona Investment Advisors does not have sufficient assets and is not generating sufficient income to allow Testino to disgorge the full amount he received for selling the Oxford notes.

In addition, the documentation Enforcement offered raised serious questions about Testino's financial circumstances. The bank statements for an account held in the name of Arizona Investment Advisors, for example, showed total deposits for January 2000 of nearly \$50,000, total deposits for February 2000 of more than \$15,000, total deposits for March 2000 of more than \$10,000, total deposits for April 2000 of nearly \$40,000, and total deposits for June 2000 of nearly \$59,000.¹ (CX 3.) Testino's personal account also showed a number of substantial deposits. (CX 2.) Testino offered some general explanations, but no documentation to establish the sources of these funds or precisely how they were disbursed. (Tr. 24-25, 45.) In the absence of such evidence, the Hearing Panel cannot conclude that Testino has satisfied his burden to establish his current financial condition.

In his Statement of Financial Condition, Testino acknowledged non-liquid assets worth more than \$1 million, including three rental properties and a residence of which Testino is the sole owner. Although the properties are mortgaged, during the hearing Testino estimated that he had between \$200,000 and \$300,000 in equity in the rental properties alone. (Tr. 34-35.) Testino also testified that he had been unable to sell his residence while some construction was ongoing nearby, but that the construction was now completed and he expected to put the residence on the market. (Tr. 13.)

Testino did not offer evidence that would allow the Panel to determine the precise value of his equity interest in the home, but as discussed below, in his testimony Testino appeared to indicate that his equity would be at least \$360,000.

Testino claimed liabilities of nearly \$1.9 million in his Statement of Financial Condition, more than \$800,000 of which represented mortgages on his residence and rental properties. He also claimed \$960,000 in Notes Payable, including \$505,000 owed to Northern Life Insurance Co. According to the Statement of Financial Condition, his debt to Northern Life is secured in part by \$120,000 in deferred compensation due from Northern Life, and Testino testified that he has a “very good” on-going business relationship with Northern Life and that he is paying down the note through commissions that Northern Life withholds. (Tr. 36-37.) Thus, it appears that the obligation owed to Northern Life would not, in itself, preclude Testino from applying other assets or income to disgorgement of the money he earned by selling the Oxford notes.

Testino testified he owes an additional \$360,000 in notes payable to two friends who loaned him funds for a business venture; both notes having been reduced to judgments against him, but he also stated that he might generate enough funds to pay off these judgments through the sale of his residence. (Tr. 11-13, 37.) The other Notes Payable referred to in his Statement of Financial Condition represent amounts loaned to him by friends, his fiancée and her father. (Tr. 38-39.) In addition, Testino claims he owes more than \$100,000 on an equity line of credit secured by his home and various credit cards. Testino failed to establish that these obligations preclude him from disgorging the amounts he earned through sale of the Oxford notes.

¹ Neither party offered statements for this account for any other month.

Undoubtedly, Testino is in difficult financial circumstances. The standard for inability to pay, however, is demanding, and, as noted above, Testino bore the burden of proof on that issue. Testino failed to satisfy that burden, because he failed to offer evidence sufficient to establish that his current income, or his business, or his other current assets (especially the equity in his rental properties) are all inadequate to allow him to disgorge the full amount he earned through sale of the Oxford notes in violation of NASD Rules 3040 and 2110.

5. Sanctions

The Hearing Panel generally adheres to the sanctions analysis set forth in its original Decision. The violations were serious, but there were a number of mitigating circumstances, which are described in the original Decision and summarized above. Nevertheless, disregarding the fact that Testino has no prior disciplinary history, as directed by the NAC, and in light of Testino's failure to establish an inability to pay, the Hearing Panel concludes that the sanctions should be greater than those set forth in the original Decision.

Therefore, the Panel will order that Testino be suspended in all capacities for six months. In addition, as it did in its original Decision, the Hearing Panel will order Testino to requalify by examination as a Series 6. Finally, the Hearing Panel will order Testino to pay a fine of \$177,000, representing a \$10,000 base fine plus the full amount he earned by selling the Oxford notes.

6. Conclusion

Having determined in its prior Decision that Testino engaged in private securities transactions without prior written notice to his employer, in violation of Rules 2110 and 3040, and having reconsidered the sanctions for those violations in accordance with the National Adjudicatory Council's Remand Order, the Hearing Panel hereby orders that: (1) Testino be suspended from associating with

any member firm in any capacity for six months; (2) he requalify by examination as a Series 6, Investment Company and Variable Contracts Products Representative before again associating with any member firm; and (3) he be fined a total of \$177,000.

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 if this decision becomes the final disciplinary action of the Association, Testino's suspension shall become effective with the opening of business on Monday, December 4, 2000, and end at the close of business on Monday, June 4, 2001.²

HEARING PANEL

By _____
David M. FitzGerald
Deputy Chief Hearing Officer

Copies to: Charles W. Testino (via over-night delivery and first class mail)
Lindsay Brew, Esq. (via facsimile and first class mail)
Roger D. Hogoboom, Esq. (via first class and electronic mail)
Rory C. Flynn, Esq. (via first class and electronic mail)

² 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.