

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

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DEPARTMENT OF ENFORCEMENT,	:	
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Complainant,	:	Disciplinary Proceeding
	:	No. C01990014
v.	:	
	:	
STEPHEN EARL PROUT	:	<b>Hearing Panel Decision</b>
(CRD #857060)	:	
Clovis, CA,	:	Hearing Officer - Ellen B. Cohn
	:	
	:	March 20, 2000
	:	
Respondent.	:	

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***Digest***

The Department of Enforcement’s Complaint alleges that the Respondent, Stephen Earl Prout (“Prout” or the “Respondent”), a registered general securities principal, violated NASD Conduct Rule 2110 by falsifying customers’ dates of birth on three variable annuity applications. Respondent filed an Answer in which he admitted that he violated Rule 2110, as alleged in the Complaint, but requested a hearing on the issue of sanctions. The Hearing Panel suspended Respondent from associating with any NASD member in all capacities for nine months and fined him \$10,000.

***Appearances***

David A. Watson, Esq., Regional Counsel, San Francisco, California (Rory C. Flynn, Chief Litigation Counsel, Washington, DC, Of Counsel), for the Department of Enforcement.

Douglas B. Martin, Jr., Esq., San Francisco, California, for Respondent Steven Earl Prout.

## DECISION

### I. Introduction

On August 16, 1999, Enforcement filed a one-cause Complaint alleging that Prout, while associated with Titan Value Equities Group, Inc. (“Titan”), an NASD member firm, falsely represented customers’ dates of birth on three variable annuity applications he submitted to Pacific Mutual Life Insurance Company (“Pacific Mutual”), and thereby violated NASD Conduct Rule 2110. Prout, through his counsel, filed an Answer on October 1, 1999, in which he admitted that he engaged in the misconduct alleged in the Complaint, but requested a hearing on the issue of sanctions.

On December 1, 1999, the Hearing Panel, composed of one current and one former member of the District Committee for District 1 and the Hearing Officer, conducted a hearing for the purpose of receiving evidence and hearing argument on the issue of sanctions.<sup>1</sup> Enforcement did not offer any witness testimony but relied on the Parties’ pre-hearing stipulations<sup>2</sup> and their joint exhibits (JX 1-6), and on its cross-examination of Respondent and Respondent’s witness. Respondent, in addition to testifying on his own behalf, offered the testimony of Michael Catania, who is the President of the member firm with which Respondent currently is associated (Tr. 18-19),<sup>3</sup> and offered three additional exhibits (RX 1-3), which were admitted in evidence without objection.<sup>4</sup>

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<sup>1</sup> References to the transcript of the hearing are cited as “Tr. \_\_\_\_.”

<sup>2</sup> References to the “Joint Stipulations of the Parties,” which were filed on November 16, 1999, are cited as “Stip. ¶ \_\_\_\_.”

<sup>3</sup> Respondent also intended to offer testimony from two additional witnesses, Duane Kaitforf and Joseph Willis (see Amendment to Respondent’s List of Witnesses, filed November 29, 1999), and the Hearing Officer granted his request to introduce their testimony by telephone. (See Transcript of November 24, 1999 Pre-Hearing Conference, pp. 23-24.) At the hearing, when Respondent’s counsel was unsuccessful in contacting either Mr. Kaitforf or Mr. Willis, Respondent elected to waive his right to offer their testimony. Tr. 100-01.

<sup>4</sup> See Tr. 25, 53.

On December 22, 1999, in response to the Hearing Panel's request, Prout submitted additional documentary evidence pertaining to the amount of commissions he received from the sale of the subject annuities and evidence of an additional restitution payment he made to Pacific Mutual.<sup>5</sup>

## **II. Facts and Legal Conclusion**

There is no dispute as to any of the underlying facts giving rise to this disciplinary proceeding.

### **A. Prout's Background in the Securities Industry**

Prout became registered with the NASD as an investment company and variable contracts products representative and direct participation program representative in September 1978, while he was associated with Southmark Financial Services, Inc. Thereafter, from June 1982 through April 1996, Prout was associated with four other member firms and, in 1985, became registered as a general securities principal and general securities representative. From April 1996 to May 1998, and during all times relevant, Prout was registered as such through Titan. (Stip. ¶ 1; JX 1.) On May 15, 1998, Titan electronically filed a Uniform Termination Notice for Securities Industry Registration (Form U-5) disclosing that it had "discharged" Prout as of May 8, 1998, because Prout had violated the firm's policies and procedures by misrepresenting "clients' birthdates on annuity applications." (Stip. ¶ 2; JX 2.)

Almost immediately after Titan terminated him, Prout sought employment with Russian River Financial Services, Inc. ("Russian River"). (Tr. 63-64.) Since May 22, 1998, he has been registered as a general securities principal and general securities representative through Russian River. (Stip. ¶ 1; JX 1.) On September 1, 1999, in response to the institution of this proceeding and after learning that

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<sup>5</sup> Respondent's post-hearing materials consist of a statement from his counsel and a Declaration of Marjorie Prout ("M. Prout Decl."), Respondent's wife, and three accompanying exhibits. The Panel has determined to include the

Enforcement had proposed a six-month suspension in the context of settlement discussions, Russian River suspended Prout from engaging or participating in the offer or sale of securities until the earlier of November 30, 1999 or the resolution of this proceeding. (Tr. 22-23, 25, 31-33; RX 3.) During this three-month period, Prout did not conduct any mutual fund, variable annuity, or other securities business for Russian River, and only engaged in activities related to fixed annuity and other non-security products. (Tr. 29-30, 71-73.)<sup>6</sup> Prout has no disciplinary history (Stip. ¶ 1; JX 1) and prior to his termination from Titan was never terminated for cause by a member firm. (Tr. 45.)

**B. Prout's Falsification of Customers' Dates of Birth on Variable Annuity Applications**

Prout considers himself primarily a "financial planner" (Tr. 40), providing services to more than 1,000 clients, 90 percent of whom are retired, senior citizens. (Tr. 44-45.) Sometime prior to September 1997, Prout attended a Titan sales conference where he was introduced to Pacific Mutual products. After performing research about the company and its products, Prout began offering and selling Pacific Mutual variable annuities to his customers. (Tr. 46.)

On September 7, 1997, Prout submitted to Pacific Mutual an application for a variable annuity, with an initial purchase payment amount of \$466,000, for customer WV. On the application, Prout indicated WV's birth date as October 28, 1922 (Stip. ¶ 3; JX 3), when he knew that WV's actual birth date was October 28, 1910. (Stip. ¶ 4.) On September 26, 1997, Prout submitted to Pacific Mutual an application for a variable annuity, with an initial purchase payment amount of \$30,000, for customers LW and MW. On the application, Prout indicated LW's birth date as November 19, 1923 and MW's

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declaration and accompanying exhibits in the record as a Hearing Panel exhibit (HX 1).

<sup>6</sup> As a practical matter, because Russian River is not engaged in the sale of insurance or any other non-security products, Prout had no business dealings with Russian River during the three-month suspension. (Tr. 30.)

birth date as April 2, 1924 (Stip. ¶ 5; JX 4), when he knew that LW's actual birth date was November 19, 1913 and MW's actual birth date was April 4, 1914. (Stip. ¶ 6.) On January 20, 1998, Prout submitted to Pacific Mutual an application for a variable annuity, with an initial premium of \$23,500, for customers GS and RS. On the application, Prout indicated GS's birth date as June 22, 1927 and RS's birth date as November 17, 1930 (Stip. ¶ 7; JX 5), when he knew that GS's actual birth date was June 22, 1917 and RS's actual birth date was November 17, 1920. (Stip. ¶ 8.)<sup>7</sup> Although another Titan representative, Gregory J. Weirich, executed as selling agent the application for customers GS and RS (see JX 5), Prout admitted that Weirich played no role in falsifying their ages (JX 6), explaining that he had allowed Weirich to sign the application because Weirich was experiencing difficulty satisfying Titan's production requirements. (Tr. 68, 70-71, 78, 85-86, 92.)<sup>8</sup>

On or shortly prior to April 26, 1998, Titan's legal counsel notified Prout that Pacific Mutual had learned about the falsifications and had terminated him as a Pacific Mutual agent.<sup>9</sup> At Titan's request, Prout prepared a letter to explain his conduct. (Tr. 69-70; see JX 6.) In his letter, Prout acknowledged that he had misrepresented the customers' dates of birth on the subject annuity applications, expressed remorse, and assured Titan that he would "never again misrepresent a clients [sic] age." (JX 6.) As for his motive, Prout informed Titan that "[t]he only reason for changing the [customers'] ages was for commission purposes. Pacific Life has commission . . . reduction for ages over 75." (Emphasis added.) (Id.)

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<sup>7</sup> See generally Tr. 46-47; JX 6.

<sup>8</sup> Although Prout's testimony was less than entirely consistent, it appears that Weirich was not aware, when he signed the application, that the customers' dates of birth were misstated. (Tr. 78-79, 86, 91-92; see also JX 6.)

At the hearing, Prout further explained that Pacific Mutual utilized so-called “age break points” in determining an agent’s commissions. (Tr. 46.) According to Prout, pursuant to Pacific Mutual’s commission schedule, the company paid “full” commissions, which were calculated based on a fixed percentage of the premium payment,<sup>10</sup> on contracts for annuitants who were under 75 years old; the company reduced the commission percentage paid, based on a sliding scale related to the age of the annuitant, on contracts for annuitants who were over 75 years old. In other words, Prout understood that Pacific Mutual paid increasingly lower commissions depending upon the extent to which the annuitant was over 75 years old. He also understood that Pacific Mutual would not accept contracts for individuals who were 85 or older. (Tr. 55-59, 75.)

With respect to each of the subject annuity applications, Prout falsely represented that the customers were under 75 years, thereby ensuring that he received the maximum commission pay-outs. And, although Prout indicated in his testimony that he did not receive any commissions from the sale of the annuity to GS and RS because Weirich, as the selling agent of record, was credited with the commissions (Tr. 87), in fact, Weirich remitted to Prout the commissions he received from the sale of the annuity, i.e., \$526.88. (HX 1.) During the time Prout served as a Pacific Mutual agent, with the exception of the three subject applications, all the annuity applications he submitted to Pacific Mutual were for annuitants who were actually under 75 years old. (Tr. 66.) Simply put, Prout falsified

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<sup>9</sup> Prout was uncertain about how Pacific Mutual learned of his misconduct, but speculated that Weirich informed either Pacific Mutual or Titan after Prout disclosed to Weirich that he had misstated the customers’ ages. (Tr. 66-67.) Sometime thereafter, Pacific Mutual contacted the customers and obtained their correct dates of birth. (Tr. 80.)

<sup>10</sup> Pacific Mutual offered two variable annuity products, Pacific One and Pacific Select, and paid different commissions on each product. The company paid one percent up-front plus a one percent trailing commission (payable in quarterly installments) on sales of Pacific One annuities and six percent up-front on sales of Pacific Select annuities. (Tr. 56-57, 82.) Prout sold a Pacific One variable annuity to WV, and LW and MW, and sold a Pacific Select variable annuity to GS and RS. (JX 3-5; see also “Post-Hearing Submission by Respondent re Commission Payments.”)

annuitants' dates of birth to qualify for the maximum commission pay-out on every occasion when he was presented with the situation of receiving a reduced commission.

According to Prout, before submitting the subject applications, he ascertained by questioning personnel at fixed and variable annuity companies, including Pacific Mutual, that there would be no adverse ramifications either to an annuitant or his or her potential beneficiaries if the annuitant's age was misstated on a contract application. (Tr. 47-48, 51, 59-62; JX 6.) Based on his inquiries, Prout understood that Pacific Mutual (and other annuity companies) reduced the commission percentage paid on contracts for annuitants who were over 75 solely for their own economic reasons, i.e., so that they could recoup the commission load by the time of the annuitants' death and the policies were paid to beneficiaries. (Tr. 59-60; JX 6.) At the hearing, Prout thus explained that he had been able to "rationalize" falsifying the customers' dates of birth because Pacific Mutual "would really never miss [the excess commissions] and even upon death there wouldn't be any negative [impact] to the beneficiaries or survivors." (Tr. 51.) Prout, however, never ascertained whether there would be any negative impact if the misstatement of the annuitant's age caused a company to accept a contract application that it otherwise would not have accepted, as was the case of the annuity application Prout submitted for WV. (Tr. 88-89.) Whether as a matter of practice or exception, Pacific Mutual did not cancel any of the subject annuities. (Tr. 95.)

At the hearing, it became clear that, in addition to increasing his commission remuneration, Prout had another motive for falsifying the date of birth on WV's annuity application – which he did not disclose in his letter to Titan and apparently never previously disclosed either to his present employer or to NASD Regulation, Inc. (NASDR) during the underlying investigation. (Tr. 19-20, 54; JX 6.) When

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Prout submitted WV's application (as well as the application for LW and MW),<sup>11</sup> he was seeking to qualify for an all expenses paid trip to Hawaii that Pacific Mutual was offering to its agents in a production-based promotional contest. In order to qualify, a Pacific Mutual agent was required to sell \$1.2 million of the company's products, within a specified period. (Tr. 54, 74, 99.) As Prout admitted at the hearing, because WV was actually over 85 years old, by falsifying his date of birth on an annuity application with a stated initial purchase amount of \$466,000, he induced Pacific Mutual to accept an application that it probably would have rejected (Tr. 75) and thereby substantially enhanced his chances of qualifying for the trip.<sup>12</sup>

At Titan's request, on or about May 7, 1998, Prout issued a check to Titan in the amount of \$230 as repayment of the "commission overage." (Tr. 49, 87; RX 1.) Prout did not understand how the excess commissions were calculated (Tr. 83), but indicated that he had expected to reap a more sizable financial benefit from his misconduct. He testified:

Q. Did the \$230, that seemed to be the amount of the damages that you repaid to Titan and to Pacific Mutual, did that amount surprise you [as a] little? A lot? You didn't know the calculations, but were you surprised at the outcome . . . ?

A. Well, actually when I was originally told . . . [\$]230, I kind of thought, well, I must not have heard . . . right. Maybe it was [\$]2,230.

(Tr. 81.)

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<sup>11</sup> Prout testified that by January 1998, when he allowed Weirich to sign the application for GS and RS, he had already qualified for the trip to Hawaii. (Tr. 77-78.)

<sup>12</sup> Prout understood that, for purposes of qualifying for the trip, he would have received credit for \$466,000 as a result of the sale of the annuity to WV. (Tr. 74-75.) In fact, WV's initial investment or premium payment was substantially less. (HX 1 [M. Prout Decl., Ex. A].) Whether Pacific Mutual in fact credited Prout with the full \$466,000 or some lesser amount from the sale of the annuity is irrelevant. What is relevant is Prout's understanding and motivation at the time he decided to falsify WV's date of birth on the annuity application.



At the hearing, in response to questions and concerns raised by the Hearing Panel, Prout undertook to review his records to ascertain whether he had received more than \$230 in improper, excess commissions and, if so, to make additional restitution to Pacific Mutual. (Tr. 81-83, 87, 95-97.) On or about December 21, 1999, Prout issued a check made payable to Pacific Mutual, in the amount of \$934.97, which represented the balance of all commissions he received from Pacific Mutual on the sales of the annuities to WV,<sup>13</sup> and MW and LW, plus the funds he received from Weirich, which represented the commission payments on the annuity sold to GS and RS. (HX 1.)

Prout admitted, and there is no doubt that as a legal matter, he violated NASD Conduct Rule 2110 by falsifying customers' dates of birth on the three subject variable annuity applications he submitted to Pacific Mutual. (Tr. 6; Answer ¶ 1.) See, e.g., In re Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) (finding that insurance agent's falsification of insurance applications to earn commissions violated former Rule 2110 (Article III, Section 1); In re Donald Clyde Bozzi, Complaint No C10970003, 1999 NASD Discip. LEXIS 5 (NAC Jan. 13, 1999) (finding that respondent violated Rule 2110 by submitting three life insurance applications that included false information about the customers, including misstatements of the customers' dates of birth).

### **III. Sanctions**

The NASD Sanction Guideline for "Forgery And/Or Falsification of Records" – which Enforcement suggested and the Hearing Panel agrees is the appropriate Guideline to apply in this case<sup>14</sup> – recommends, in cases where mitigating factors exist, the imposition of a suspension in any or all

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<sup>13</sup> The commissions on the \$466,000 annuity sold to WV were smaller than Prout anticipated because WV only paid \$68,468.17 in premiums before Titan terminated Prout. (HX 1 [M. Prout Decl., Ex. A].)

<sup>14</sup> Respondent did not suggest that this Guideline was inappropriate or suggest that the Hearing Panel apply some other Guideline in imposing sanctions.

capacities for up to two years, or, in egregious cases, the imposition of a bar.<sup>15</sup> For monetary sanctions, the Guideline suggests the imposition of a fine ranging between \$5,000 and \$100,000. The sanctions recommended in the Guideline indicate that the NASD views the falsification of records as an inherently egregious offense. In addition to the principal considerations that adjudicators always should consider in imposing sanctions,<sup>16</sup> the Guideline recommends that adjudicators consider the “[n]ature of the document(s) forged or falsified” and whether the respondent was acting under a “good-faith, but mistaken, belief of express or implied authority.”<sup>17</sup>

Enforcement has requested that Prout be suspended in all capacities for six months and fined \$10,000.<sup>18</sup> Prout argues that a censure is adequate to remediate his misconduct and that no additional sanctions are warranted. He claims that a suspension is unnecessary because he already has been terminated by Titan and Pacific Mutual, and subject to a three-month suspension by Russian River, for his misconduct. He also claims that no fine should be imposed because he already has forfeited

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<sup>15</sup> NASD Sanction Guidelines, 35 (1998 ed.).

<sup>16</sup> Id., at 8-9. The following principal considerations are relevant in assessing the appropriate remedial sanctions for Prout’s misconduct: (1) relevant disciplinary history, if any; (2) whether he accepted responsibility for and acknowledged the misconduct to his employer prior to detection and intervention by the firm or a regulator; (3) whether he voluntarily and reasonably attempted, prior to detection and intervention to pay restitution or otherwise remedy the misconduct; (4) whether he engaged in numerous acts and or a pattern of misconduct; (5) whether he engaged in the misconduct over an extended period of time; (6) whether he attempted to conceal his misconduct; (7) whether the respondent’s conduct injured the investing public; (8) whether he provided substantial assistance to NASDR in its investigation of the underlying misconduct, or whether he attempted to conceal information from NASDR; and (9) whether respondent’s misconduct was the result of an intentional act, recklessness, or negligence; (10) whether the member firm with which the respondent is and was associated disciplined respondent for the misconduct at issue prior to regulatory detection; and (11) whether the respondent’s misconduct resulted in the potential for his monetary or other gain.

<sup>17</sup> Id., at 35.

<sup>18</sup> See “Memorandum of the Department of Enforcement on Sanctions,” filed November 19, 1999; Tr. 104-05.

approximately \$5,000 in commissions as a result of the suspension imposed by Russian River.<sup>19</sup>

According to Respondent, these “sanctions” are adequate given the isolated nature of his misconduct, his remorse and acceptance of responsibility, and his “good” character.<sup>20</sup> In support of the latter, Respondent offered the testimony of and a letter written by Michael Catania, who hired Prout to work at Russian River, despite the fact that he generally was aware of the nature of Prout’s misconduct at Titan. (Tr. 19-20.) According to Mr. Catania, after “looking into . . . Prout’s background and business reputation,” he was persuaded that Prout’s misconduct “was an isolated incident and would not be repeated.” (RX 2; see also Tr. 19-20.)<sup>21</sup> In Mr. Catania’s opinion, Prout is an asset to Russian River and an “honest and ethical” person (RX 2), and has “very high integrity.” (Tr. 21.)

The Hearing Panel agrees it is important that member firms respond proactively when faced with violations of their internal policies and procedures or NASD rules. This does not mean, however, that in the context of an NASD disciplinary proceeding, a Hearing Panel must defer to a member’s determination as to the appropriate sanction and allow its judgment to substitute for the Hearing Panel’s independent judgment. As a practical matter, Titan’s termination of Respondent served little, if any, remedial or deterrent purpose since Russian River hired him shortly thereafter.<sup>22</sup> Further, the Panel

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<sup>19</sup> Catania testified that Prout ordinarily would be entitled to receive commissions on any investments his customers made in pre-existing mutual fund accounts, but that, during the three-month suspension, he was not credited with any such commissions and, as a consequence, lost approximately \$5,000. (Tr. 24-25, 33-34.)

<sup>20</sup> See “Respondent’s Prehearing Memorandum,” filed November 19, 1999; see generally Tr. 105-14.

<sup>21</sup> Mr. Catania also testified that although he would terminate any broker who engaged in such misconduct, he hired Prout because he “believe[s] in giving people a second chance. . . .” (Tr. 20.)

<sup>22</sup> See supra, pp. 3-4. It is not atypical for member firms to terminate registered representatives upon learning that they have violated either internal policies or procedures, or NASD rules, and the Hearing Panel recognizes that the NASD has imposed suspensions retroactive to the date of termination in some cases where respondents were unemployed in the securities industry for lengthy periods subsequent to termination. See, e.g., District Business Conduct Committee No. 9 v. Hartsock, Complaint No. C9A960029, 1998 NASD Discip. LEXIS 46 (NAC Oct. 22, 1998);

cannot conclude that the three-month suspension imposed by Russian River is sufficiently remedial given the nature of Respondent's misconduct.<sup>23</sup>

Respondent's misconduct was not the result of a temporary lapse in judgment. He knowingly and deliberately falsified annuitants' dates of birth on variable annuity applications, whose accuracy is very important, for his own financial advantage and other benefits. While Prout stresses that he misrepresented customers' ages on only three applications over a brief, four-month period, in fact he decided to falsify the customers' ages on every occasion for which he would have received a reduced commission pay-out. Put differently, the evidence suggests that if Prout had been presented with additional opportunities to engage in this misconduct, he would have taken them. In addition, although the economic advantage Prout actually realized was very modest, it is clear he anticipated that his wrongful activities would be far more profitable. Moreover, while Prout accepted responsibility for and acknowledged his misconduct to Titan, Russian River, and NASDR, and cooperated with NASDR in the underlying investigation, the Hearing Panel finds that the mitigative effect of his admissions and cooperation is diminished somewhat by his failure to disclose, prior to the hearing, one of the two

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District Business Conduct Committee No. 12 v. Gallerani, Complaint No. NY-8055, 1991 NASD Discip. LEXIS 6 (Bd. of Governors Jan. 3, 1991).

<sup>23</sup> Russian River imposed the three-month suspension based on advice it received from Prout's counsel, who also serves as counsel for Russian River, after counsel became aware that Enforcement, in the context of settlement discussions, had proposed a six-month suspension. (Tr. 22-23, 32-33, 36.) It is unclear whether counsel was rendering such advice in his capacity as counsel to Prout, Russian River, or both, or whether the firm, independent of counsel's advice, would have imposed any suspension. In connection with the latter, the Panel notes that, in imposing the three-month suspension, Mr. Catania did not personally review the Guideline for "Forgery And/Or Falsification of Records," or discuss with Enforcement the basis for its proposed six-month suspension. (Tr. 36, 39.) Further, in imposing the three-month suspension, Mr. Catania chiefly considered Respondent's "integrity and [his own] comfort level" that the conduct would not be repeated and did not make an assessment of the appropriate length of suspension based on the principles in the Sanction Guidelines. (Tr. 39.)

motives he had for misrepresenting the annuitants' ages, i.e., to qualify for the Hawaii trip.<sup>24</sup> Indeed, Prout, in his so-called "letter of apology" (Tr. 49) to Titan, affirmatively misled the firm about his motives.

The Hearing Panel also observes that Prout accepted responsibility for his misconduct, and made a partial restitution payment only after Titan and Pacific Mutual had detected the falsifications. In addition, notwithstanding the fact that he was surprised Pacific Mutual requested repayment of only \$230 in commissions, Prout took no independent steps to verify the accuracy of Pacific Mutual's restitution calculation until after the Hearing Panel questioned the amount.

On the other hand, the Hearing Panel recognizes that Prout's misconduct did not result in harm to the investing public and that Prout, prior to falsifying the customers' ages on the annuity applications, did consider whether such actions would adversely affect either the customers or potential beneficiaries.<sup>25</sup> The Hearing Panel also has considered the opinion of Mr. Catania that Prout is an honest and valued employee.<sup>26</sup>

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<sup>24</sup> In fact, Prout testified that he falsified the customers' ages on the annuity applications primarily to qualify for the trip to Hawaii. (Tr. 80-81.)

<sup>25</sup> This is not to say that the Hearing Panel condones Prout's willingness to obtain money, under false pretenses, from an annuity company.

<sup>26</sup> That Prout has no relevant disciplinary history does not mitigate the seriousness of his misconduct:

[r]egistered individuals are required as part of the terms of their admission to the securities industry to comply with the NASD's Rules and observe high standards of conduct. We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person. We therefore do not find that the absence of a disciplinary history should mitigate the seriousness of the misconduct or the severity of the sanctions imposed.

Department of Enforcement v. Balbirer, Complaint No. C07980011, slip op., at 5 (NAC Oct. 18, 1999).

On balance, the Hearing Panel concludes that there are insufficient mitigating factors present to warrant the lenient sanctions requested by Enforcement, but that Prout's conduct is not so egregious as to warrant a bar.<sup>27</sup> According, the Hearing Panel has determined to suspend Prout from association with any NASD member in all capacities for nine months, and fine him \$10,000. In imposing these sanctions, the Hearing Panel has taken into account and has given Prout credit for the three-month suspension "served," and has considered that he forfeited approximately \$5,000 in commissions as a result. Finally, the Panel has considered that penalties in disciplinary proceedings such as this are intended not only to deter the Respondent from future misconduct but also to deter others from engaging in similar misconduct. See In re Daniel Joseph Alderman, 52 S.E.C. 366, 370 (1995) ("for self-regulatory exchanges to maintain their credibility as effective participants in the regulatory process, . . . [they] must also impose sanctions severe enough to deter others from engaging in similar misconduct") (quoting In re Kenneth Sonken, 48 S.E.C. 832, 836 (1987)), aff'd 104 F.3d 285 (9<sup>th</sup> Cir. 1997).

#### IV. Order

Therefore, having considered all of the evidence, Prout is suspended from association with any NASD member in all capacities for nine months, and fined \$10,000. Prout also is ordered to pay costs in the amount of \$1,497.25, which include an administrative fee of \$750 and hearing transcript costs of

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<sup>27</sup> Cf., e.g., In re Donald Clyde Bozzi, 1999 NASD Discip. LEXIS 5 (where respondent was barred for knowingly submitting three insurance applications containing numerous misstatements of fact, including the applicants' social security numbers, dates of birth, addresses, telephone numbers, and employers, and attempted to conceal his misconduct.)

\$747.25. These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date of service of the decision constituting final disciplinary action of the NASD.<sup>28</sup>

Hearing Panel.

By: \_\_\_\_\_

Ellen B. Cohn  
Hearing Officer

Copies to:

David A. Watson, Esq. (via first class mail and electronically)

Rory C. Flynn, Esq. (via first class mail and electronically)

Douglas B. Martin, Jr., Esq. (via overnight courier and first class mail)

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<sup>28</sup> The Hearing Panel has 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.