NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ROBERT TRETIAK (CRD #1416058), Las Vegas, NV Respondent.	Disciplinary Proceeding No. C02990042 Hearing Officer - DMF **HEARING PANEL DECISION** March 6, 2000

Digest

The Department of Enforcement filed a Complaint against Robert Tretiak charging that, while Tretiak was associated with then-NASD member firm RFCA Financial Services, Inc., he was responsible for (1) the dissemination of a false and misleading prospectus in connection with an initial public offering of the stock of RFCA's parent corporation, Retirement Financial Centers of America, Inc., in violation of Securities and Exchange Commission Rule 10b-5 and NASD Rules 2120 and 2110; (2) the failure of RFCA to comply with a contingency deadline, which required return of investor funds if a minimum offering amount was not raised within 90 days after the effective date of registration of the initial public offering, in violation of SEC Rule 10b-9 and NASD Rule 2110; and (3) the failure of RFCA to establish a proper escrow account to hold investor funds until the contingency deadline, in violation of SEC Rule 15c2-4 and NASD Rule 2110. Tretiak filed an Answer denying the charges and requested a hearing.

Following the hearing, the Hearing Panel held that Tretiak violated SEC Rule 10b-5 and NASD Rules 2120 and 2110 by disseminating a false and misleading prospectus, violated SEC Rule 10b-9 and NASD Rule 2110 by failing to ensure return of investor funds when the minimum amount was not raised by the contingency deadline, and violated NASD Rule 2110 by allowing RFCA to enter into an escrow agreement that misstated the contingency deadline. As sanctions, the Hearing Panel ordered that Tretiak be (1) barred from association with any member firm in any principal capacity, suspended from association with any member firm in any other capacity for a period of two years, and fined $10,000 for disseminating the false and misleading prospectus, and (2) suspended from association with any member firm in any capacity for six months and fined $15,000 for failing to require return of investor funds and for causing RFCA to enter into an improper escrow agreement. In addition, the Hearing Panel ordered Tretiak to pay costs in the amount of $4,559.24.

Appearances

Sylvia M. Scott, Esq., Regional Counsel, Los Angeles, CA (Rory C. Flynn, Washington, DC, Of Counsel) for the Department of Enforcement.

Robert Tretiak, *pro se.*

DECISION

Procedural History

The Department of Enforcement filed the Complaint in this matter on July 9, 1999, alleging three “Causes of Complaint” against respondent Robert Tretiak in connection with an initial public offering of common stock by Retirement Financial Centers of America, Inc.

(Retirement) beginning October 21, 1994.[1] The Complaint alleges that Tretiak was president, Chief Executive Officer and majority shareholder, "through a trust controlled by him," of Retirement, as well as president and a General Securities Principal of RFCA Financial Services, Inc. (RFCA), an NASD member firm that was a wholly-owned subsidiary of Retirement.

The First Cause of Complaint alleges that in connection with Retirement's IPO, RFCA, acting through Tretiak, employed a prospectus that was materially false and misleading. Specifically, the First Cause alleges that the prospectus represented that Retirement intended to use a substantial portion of the funds raised to purchase a parcel of land referred to as the Lake Mead Property. In fact, the Complaint alleges, Retirement completed its purchase of the Lake Mead Property during the early stages of the IPO, incurring substantial debt, but the prospectus was not amended to disclose those facts, and RFCA, acting through Tretiak, continued to sell the IPO using the inaccurate prospectus. The First Cause charges that Tretiak thereby violated SEC Rule 10b-5 and NASD Rules 2120 and 2110.

The Second Cause alleges that the Retirement IPO prospectus represented that all investor funds would be returned if the IPO failed to raise a minimum offering amount of $249,997 within 90 days after the effective date of the prospectus. The Second Cause further alleges that the IPO raised only $170,016 by the 90-day deadline, but, instead of returning investor funds, RFCA, acting through Tretiak, continued to sell the IPO. The Second Cause alleges that Tretiak thereby violated SEC Rule 10b-9 and NASD Rule 2110.

The Third Cause alleges that, in connection with the Retirement IPO, RFCA, acting through Tretiak, failed to establish a proper escrow account, pursuant to which the escrow agent

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[1] The record establishes that the investigation that led to the Complaint was based on a referral from the State of

would hold all investor funds, returning them to the investors if the IPO failed to raise the minimum amount by the deadline stated in the prospectus. More specifically, the Third Cause alleges that Tretiak negotiated and signed an escrow agreement that misstated the deadline for raising the minimum amount. As a result, the escrow agent did not return the funds to the investors when the IPO failed to raise the minimum amount by the deadline, and subsequently released the funds to Retirement when the minimum amount was raised after the deadline stated in the prospectus, but prior to the erroneous deadline stated in the escrow agreement. The Third Cause charged that Tretiak thereby violated SEC Rule 15c2-4 and NASD Rule 2110.

Tretiak filed an Answer denying the charges and requested a hearing.[2] A hearing was held in Las Vegas, Nevada, on December 2 and 3, 1999, before a Hearing Panel composed of a Hearing Officer and two current members of the District Committee for District No. 2. The Hearing Panel heard the testimony of four Enforcement witnesses (an NASDR Examiner and three former employees of Retirement or RFCA) and Tretiak, and received Complainant's Exhibits (CX) 1-3, 4 (except pp. 122-129 and 155-160), 5-7, 9, D-E, F (pp. 31-69 only), and G, as well as Respondent's Exhibits (RX) 1-4, A-1, A-2, A, and G-Q.

Nevada, which had conducted its own proceeding against Tretiak. (Tr. 421-23.)

[2] Prior to the hearing Tretiak moved to dismiss the proceeding on the grounds that (1) the proceeding was barred by the Nevada statute of limitations, (2) the same charges were raised and resolved in a proceeding brought by the Nevada Securities Division in 1996, and (3) the proceeding was barred because Retirement filed for Chapter 7 Bankruptcy. Enforcement, on the other hand, moved for summary disposition in its favor prior to the hearing. The Hearing Panel denied both parties' motions in an order issued November 17, 1999. At the hearing, Tretiak raised for the first time the contention that the charge that he violated SEC Rule 10b-5 is time-barred in accordance with the Supreme Court's decision in Lampf, Pleva, Lepkind, Prupis, & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991). The Hearing Panel rejects this argument for the reasons stated in Market Surveillance Committee for District No. 13 v. Theys, Complaint No. MS-1138 (June 16, 1992) (noting that Lampf held that time limitations applied to private civil actions brought under certain provisions of the Exchange Act, and holding that Lampf does not apply to the institution of NASD disciplinary proceedings).

Facts

1. Background

Tretiak first became registered as a General Securities Representative with First Affiliated Securities, Inc. in 1985. He qualified as a General Securities Principal in 1990. From February 1993 to the present, he has been registered with RFCA as a General Securities Representative and a General Securities Principal. (CX 5.)

Retirement was incorporated in Nevada in 1992. As described in the IPO prospectus, its business was to provide

> a unique full-service, one-stop financial center catering to retired clients who need Estate Planning, Financial Planning and Tax Planning. The Company renders these services as a multi-disciplined approach in neighborhood, store-front type locations. The Company also offers, through wholly owned subsidiaries, Insurance and Investment Services, including a Discount Stock Trading Desk. Investment products include IRA's, Mutual Funds, Variable and Fixed Annuities, Stocks, Bonds, Property & Casualty Insurance and Tax Services.

By the Fall of 1994, Retirement was providing these services through four locations in Las Vegas and Boulder City, Nevada. (CX 4, p. 9; CX 1, p. 9.) Tretiak was the founder, Chief Executive Officer and President of Retirement, and the Tretiak 1993 Trust, a Tretiak family trust, owned 88% of Retirement's stock. (CX 1, pp. 7-8; CX 4, pp. 24, 30.)

RFCA was a wholly owned broker-dealer subsidiary of Retirement. Its primary function was to provide investment products to Retirement's clients. Until October 1994, Tretiak was RFCA's president. Tretiak was also a General Securities Principal registered with RFCA at all relevant times. (CX 5.)

On October 19, 1994, RFCA's Board of Directors, of which Tretiak was Chairman, appointed Bradford J. Barker as president of RFCA, to replace Tretiak in that position. (Tr. 259-

60; CX D, p. 2.) On October 21, RFCA's Board determined that Barker "would become active in the operation as president on Monday, October 24." (CX D, p. 3.) On December 7, 1994, however, RFCA's Board accepted Barker's resignation as president, having been advised by NASD Regulation that Barker could not be president of the firm, because he was not qualified as a General Securities Principal. (Id. at p. 4; CX 1, p. 9; Tr. 163, 259-60.) According to the terms of his resignation, Barker was to return as president when he qualified as a General Securities Principal; he did so qualify, and became president of RFCA again in May 1995. (Tr. 264.) In the meantime, Tretiak remained president of RFCA. Even after Barker became president of RFCA again in May 1995, he reported to Tretiak, who was chairman of RFCA, as well as president of RFCA's parent, Retirement. Barker testified: "As president, any decision that I made or any policy or anything that I attempted to input was subject to overturn and – review and overturn by Mr. Tretiak. It was done several times." (Tr. 316; see also Tr. 267-68.)

2. Retirement's IPO

On September 23, 1994, Retirement filed documents with the Nevada Securities Division to conduct an Initial Public Offering under Nevada's Small Corporate Offering Registration (SCOR) program. The SCOR program allows small companies to raise up to $1 million using a simplified registration and offering process. For a SCOR offering, issuers use a "fill in the blanks" Form U-7 Disclosure Document as a prospectus for investors. Tretiak wrote the Form U-7 used by Retirement as the prospectus for its SCOR offering. (CX 1, p. 12; Tr. 173-74, 342-43.)

According to the prospectus, Retirement intended to offer a maximum of 153,846 shares of its Class "A" Common Stock, which would raise a total of $999,999 in proceeds, and a minimum of 38,461 shares, which would raise a total of $249,997 in proceeds. (CX 4.) This type of offering is sometimes referred to as a “part or none” offering, because the issuer is required to return all investor funds if it is not successful in raising the stated minimum amount through sale of that “part” of the offering. The prospectus also advised investors that the proceeds from the IPO would be held in escrow until the minimum amount was raised, and that the escrow agent would return all escrowed funds to investors if the IPO did not raise the minimum within 90 days after the effective date of the offering. (CX 4, pp. 4, 23.) Retirement’s SCOR IPO offering became effective as of October 21, 1994. (CX 4, p. 55.)

The prospectus explained that Retirement intended to use the proceeds of the offering “to franchise several dozen Retirement Financial Centers of America, Inc. in demographically appropriate locations, initially in the southwest, and later nationally.” In addition, the prospectus explained that Retirement “has just committed to acquire a high profile 1-acre building site on Lake Mead Boulevard in Summerlin, Las Vegas, Nevada at a price of $475,000. It is intended that the entire cost of acquisition be financed by the proceeds from this offering.” (CX 4, p. 9.)

More specifically, the prospectus stated that if the IPO raised the maximum proceeds ($999,999), Retirement would use $475,000 to acquire the Lake Mead Property as a future site for its main office; $200,000 to market franchise offices; and $258,999 for working capital and reserves for contingencies. In contrast, the prospectus stated that if the IPO raised only the minimum proceeds ($249,997), Retirement would use $95,000 toward the purchase the Lake Mead Property, leaving $100,000 for marketing franchise offices, and $26,497 for working capital and contingencies. The prospectus explained that if the IPO raised only the minimum, Retirement intended to pay the balance of the purchase price of the Lake Mead Property by securing financing in the amount of $380,000. The prospectus advised, however, that "[t]his financing is contingent, since it is assumed that funds in excess of the minimum will be raised." (CX 4, p. 17.) Tretiak wrote the portion of the prospectus describing Retirement's plans regarding the Lake Mead Property purchase. (CX 1, p. 13.)

3. Retirement's Purchase of the Lake Mead Property

On August 11, 1994, more than two months before the IPO became effective, Retirement entered into an agreement to purchase the Lake Mead Property for $475,000. (CX 4, p. 87.) The agreement included a "time is of the essence" provision that called for the sale to be closed by October 15, 1994. (Id. at p. 89.) On October 26, 1994, Retirement entered into an agreement that extended the time for closing the sale to November 15, 1994, and increased the price of the property to $480,000. (Id. at p. 99.) Tretiak signed both agreements on behalf of Retirement. Retirement actually closed its purchase of the Lake Mead Property on November 22, 1994. (Id. at p. 101.) To obtain "bridge loan" funds to close the purchase, between November 15 and November 18, Retirement issued a series of notes to various individuals totaling $503,153.79. Tretiak signed all the notes on behalf of Retirement. (Id. at pp. 144-148; CX 7, p. 1.)

By November 22, Retirement's IPO had already become effective. As explained above, the prospectus represented that Retirement intended to purchase the Lake Mead Property by paying all or part of the purchase price with the proceeds of the IPO, and would finance a maximum of $380,000 of the purchase price. The instructions for completing the SCOR Form U-7 that Retirement used as a prospectus advised:

> After the registration has been declared effective, and while the offering is still in progress, if any portion of the Form should need to be changed or revised because of a material event concerning the Company or the offering to make it accurate

> and complete, it shall be so changed, revised, or supplemented. If changed, revised, or supplemented … the Form as so changed, revised, or supplemented, clearly marked to show changes from the previously filed version, should be filed and cleared with the administrator of this state before use. If any of the changes or revisions are of such significance that they are material to the making of an investment decision by an investor, and if the minimum proceeds have not been raised, after filing with and clearance by the administrator, the Disclosure Document on this Form as so changed, revised or supplemented should be recirculated to persons in this state that have previously subscribed, and they should be given the opportunity to rescind or reconfirm their investments.

(CX F, p. 34.) In spite of these instructions, Retirement did not revise its prospectus to disclose that it had completed the purchase of the Lake Mead Property and had incurred more than $500,000 in debt to do so. (CX 1, p. 14.) Instead, RFCA and Tretiak continued to sell the IPO stock to investors using the original prospectus.

4. Sale of Retirement's IPO

RFCA was the exclusive selling agent for Retirement's IPO. (CX 1, p. 10, CX 4, p. 22.) As noted above, Retirement's offering became effective on October 21, 1994; the first sale documented in the record was on November 4, 1994. (CX 9, p. 15.) Sales of the IPO stock continued through October 1995, with most sales occurring after Retirement closed the purchase of the Lake Mead Property on November 22, 1994. (CX 9; CX E.)

Before the offering became effective, Tretiak anticipated that all of RFCA's brokers would sell the Retirement IPO. (CX 1, p. 15.) In fact, however, Tretiak admits he made at least 80% of the sales, and the evidence suggests that he made more than 90% of the sales.[3] (Compare CX 1, pp. 15, 19 (admissions) with CX 4, p. 193 (Tretiak accounted for 91% of the commissions generated by RFCA on the sale of the Retirement IPO).) Furthermore, the sales occurred at a substantially slower rate than Tretiak had expected. (Tr. 609; CX 1, p. 15.) As a result, the IPO did not raise the minimum amount ($249,997) by the 90-day deadline established in the prospectus (January 19, 1995). By that date, the IPO had raised only $173,266.15, which was $76,730.85 less than the minimum. (CX E, p. 1.) The minimum was not raised until February 14, 1995, after Retirement and RFCA employees purchased approximately $24,000 of the offering at Tretiak's request in order to allow Retirement to "break escrow." (Id. at p. 2; Tr. 200, 283.)

Sales of the IPO offering continued until October 1995. (CX 1, p. 24.) In the meantime, Retirement refinanced the indebtedness it incurred to purchase the Lake Mead Property, but did not substantially decrease the total amount it owed. (CX 1, p. 31-33; Tr. 207.) Subsequently, Retirement filed for Chapter 7 Bankruptcy, and the Lake Mead Property was sold. Although the sale raised more than Retirement's outstanding indebtedness on the property, in the end investors lost their entire investments. (CX 1, p. 15, 33-34; Tr. 553.)

5. The Escrow Agreement

The prospectus stated that all investor funds would be held in escrow until the minimum amount was raised. Under the terms of the prospectus, when the IPO failed to raise the minimum by January 19, the escrow agent should have returned all funds to the investors. That did not occur because the escrow agreement misstated the deadline.

When he wrote the prospectus, Tretiak thought the local branch of the Bank of America, where Retirement maintained its accounts, would serve as escrow agent. He later learned,

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[3] A variety of reasons were offered for this, including the relatively low commission rates payable for sale of the IPO and the fact that RFCA's representatives were experienced primarily in selling mutual funds and other packaged products, rather than IPO stock. (Tr. 550-51.)

however, that the Bank of America required that such an escrow arrangement be handled from its California offices, at a much higher cost than Tretiak had anticipated. Ultimately, Tretiak arranged for a local bank, First Security Trust Company of Nevada, to be the escrow agent. (CX 1, p. 11.)

In the meantime, Joseph Kyle, an in-house attorney employed by Retirement, drafted an escrow agreement assuming that the Bank of America would be the escrow agent.[4] (Tr. 175-80; CX 4, p. 166.) Kyle's draft misstated critical dates. It stated, first, that "the Offering will terminate no later than <u>November</u> 21, 1995, unless extended by agreement between the Company and the Placement Agent to a date not later than April 21, 1996 and if the Minimum Offering Amount has not been subscribed for <u>by such date</u>, all monies paid for and accepted by the Company will be returned to the subscribers, as provided herein …." (CX 4, p. 166 (emphasis added).) In fact, by its terms the offering would terminate no later than <u>October</u> 21, 1995, and the IPO had to raise the minimum by January 19, 1995.

A subsequent provision of Kyle's draft stated: "In the event that the minimum amount of $249,997 is not achieved by <u>April 21, 1996</u>, the interest accumulated from the investment in the Business Money Market Account [in which the escrowed funds would be held] will be refunded to the investors. … In the event that the stipulated amount is not received from investors <u>within one year from the approval of the SCOR offering by the State of Nevada</u>, then the Agent shall release the funds payable to the subscribers through the Company to be refunded to the ordinal [sic] investors." (<u>Id</u>. at p. 171 (emphasis added).) This provision also misstated the terms of the

[4] During the hearing, Tretiak devoted a great deal of effort to trying to prove that Kyle was also in-house counsel to RFCA. The preponderance of evidence suggested that Kyle was not formally in-house counsel to RFCA, but that is

prospectus, which required return of investor funds if the minimum was not raised by January 19, 1995.

Kyle testified that he obtained the information on which he based the escrow agreement from Tretiak. (Tr. 180, 182, 186-87.) He also testified that he gave the draft to Tretiak before First Security Trust Company replaced Bank of America as the prospective escrow agent, and that he had no part in revising the agreement for First Security Trust Company. (Tr. 191-99.) It is clear that someone revised Kyle's draft, however. In fact, the record contains <u>two</u> signed versions of a final, signed escrow agreement between Retirement, RFCA and First Security Trust Company, both dated November 14, 1994. The only notable difference between the two signed agreements is that one agreement was signed by Tretiak as both president of Retirement and president of RFCA, while the other version was signed by Tretiak as president of Retirement, but by Barker as president of RFCA. (CX 4, pp. 106-112; CX 6, pp 2-8; CX 1, pp. 16-17.)

Both of the signed agreements are identical with regard to their key provisions. Both signed agreements include the first erroneous provision found in Kyle's draft, with one notable correction: Kyle's draft stated that "the Offering will terminate no later than <u>November</u> 21, 1995 …," but in the signed agreements, this provision is corrected to state that "the Offering will terminate no later than <u>October</u> 21, 1995 …." Both signed agreements, however, incorporate the erroneous statement in Kyle's draft that the escrowed funds would be returned only if the minimum amount were not raised "by such date" – <u>i.e.</u>, by October 21, 1995 – instead of January 19, 1995, as required by the prospectus. In addition, both signed agreements include the second erroneous provision found in Kyle's draft, again with a notable change. Kyle's draft stated that

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not material to the issues presented. For reasons stated herein, the Hearing Panel found that Tretiak bore the escrow agent should return the escrowed funds if the minimum amount was not received "within one year from the approval of the SCOR offering by the State of Nevada," but in the signed agreements, that provision is changed to state that the escrow agent should return the escrowed funds if the minimum amount is not received "by October 21, 1995." Once again, this change misstates the January 19, 1995 deadline in the prospectus.

Kyle gave his draft to Tretiak, and Tretiak was the only person at either Retirement or RFCA who had substantial personal involvement in the Retirement IPO. Based on this evidence, the Hearing Panel found that Tretiak was responsible for the changes in Kyle's draft, which corrected some of Kyle's errors, but failed to correct the most important error, Kyle's misstatement of the deadline by which the minimum amount of proceeds had to be raised. Because the final version of the escrow agreement misstated the deadline, First Security Trust Company, the escrow agent, did not return investor funds when the minimum proceeds were not raised by January 19, 1995, the deadline according to the prospectus. Instead, the IPO sales went forward, and First Security later released the escrowed funds to Retirement when the minimum IPO proceeds were raised after the deadline stated in the prospectus, but before the deadline stated in the erroneous escrow agreement. (CX 4, p. 114; CX E, p.2.)

Tretiak signed both versions of the escrow agreement with First Security Trust Company, one as president of both RFCA and Retirement and the other only as president of Retirement. He had written the relevant provisions of the prospectus and had arranged for the escrow agent, and, as explained above, the Hearing Panel found he was responsible for the revisions to Kyle's draft escrow agreement. Tretiak also admitted he reviewed the final escrow agreement, but said

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responsibility for the errors in the escrow agreement.

"frankly the only thing I looked at was the price [the escrow agent would charge.]" He explained: "Yeah, I'm the money man. I owned 80 percent of the company. I was concerned about not wasting any money. I had a fiduciary responsibility to shareholders." (Tr. 515-16.) On the other hand, Tretiak said he "gave no thought" to whether RFCA had an obligation to review the agreement to ensure that it stated the deadline for raising the minimum proceeds correctly, and he "never gave … any thought" to whether it was RFCA's responsibility to monitor the proceeds to ensure that investor funds were returned if the IPO failed to raise the minimum before the deadline. (CX 1, pp. 21-23.) He said he just "plucked [the 90-day deadline] out of the air and didn't attach any significance to it. … I never really gave it another thought." (Tr. 513-14.)

Discussion

1. Misrepresentations and Omissions Regarding the Lake Mead Property

The First Cause of Complaint charges that Tretiak violated SEC Rule 10b-5 and NASD Rules 2120 and 2110 by disseminating the prospectus for the Retirement IPO with material misrepresentations and omissions regarding Retirement's purchase of the Lake Mead Property. As explained by the National Business Conduct Committee:

> To find a violation of Conduct Rule 2120 and Rule 10b-5, 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. … [On the other hand, a] misrepresentation may violate Conduct Rule 2110 even where there is no finding of intent to mislead. Kauffman v. SEC, No. 94-3011 (3d Cir. Oct. 20, 1994). "[C]oncepts such as fraud and scienter are irrelevant," and there is no need for a finding of materiality or harm to investors, Id. (citing Eichler v. SEC, 757 F.2d 1066, 1070 (9th Cir. 1985)). "Proceedings instituted by the NASD . . . are instituted to protect the public interest, not to redress private wrongs. Thus it [is] unnecessary for the NASD to show that customers [are] in

> fact misled." In re Wall Street West, Inc., 47 S.E.C. 677, 679 (1981), aff'd, Wall Street West, Inc. v. SEC, 718 F.2d 973 (10th Cir. 1983).

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).

It is clear that, after Retirement closed the purchase on November 22, 1994, the prospectus misrepresented the status of the Lake Mead Property and failed to disclose that, in order to complete the purchase, Retirement had incurred substantial debt. It is also clear that these misrepresentations and omissions were in connection with the purchase of Retirement's IPO.[5]

In his defense, Tretiak argues that he was not responsible for the misrepresentations and omissions; that they were not material; and that he did not act with "scienter." The Hearing Panel rejects all of these arguments.

As a general matter, "the president of a brokerage firm is responsible for the firm's compliance with applicable requirements unless and until he or she reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties." In re Everest Securities, Inc., Exchange Act Release No. 37600, 62 SEC Docket 1752 (Aug. 26, 1996). Tretiak was president of RFCA during a large portion of the relevant period. Although Barker was appointed president for a brief period from late October to early December 1994, that appointment did not excuse Tretiak from responsibility for the misrepresentations and omissions in the sale of the Retirement offering.

[5] The record establishes that most of the IPO sales were made after November 22, 1994. (CX 9; CX E.)

First, Tretiak recruited Barker, and was responsible for his appointment as president of RFCA to succeed Tretiak. But as of October 1994, Barker was not qualified to serve in that capacity, because he was not a General Securities Principal, and therefore was not qualified to assume responsibility for RFCA's compliance with the securities laws and NASD Rules. Although he did become president of RFCA legitimately in May 1995, after he had qualified as a General Securities Principal, by then the Retirement IPO had continued for months based on misrepresentations and omissions concerning the Lake Mead Property.

Furthermore, Tretiak's responsibility does not rest on his title as president of RFCA. The record establishes that Tretiak maintained firm personal control of Retirement and RFCA at all relevant times. Even after Barker became president of RFCA, he reported to Tretiak. Moreover, Barker had no responsibility for the Retirement IPO. In contrast, Tretiak drafted the prospectus, so he knew what it said; he signed all of the relevant documents concerning Retirement's purchase, so he knew that after November 22 the prospectus misrepresented the status of the Lake Mead Property and failed to disclose the debt that Retirement had incurred; and he made at least 80% of the sales of the IPO, so he bore direct responsibility for communicating accurate information to purchasers. Under these circumstances, Tretiak's responsibility for the misrepresentations and omissions is clear.[6]

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[6] There is no merit to Tretiak's argument that he cannot be disciplined for misconduct that he committed in his capacity as president of Retirement. (Tr. 74.) In analogous circumstances, the SEC stated. "Applicants suggest that their conduct lies outside the NASD's jurisdiction, arguing that the NASD has no authority to oversee their activities as entrepreneurs, which they view as separate from their actions as broker-dealer professionals. This argument is without merit. We have repeatedly held that a self-regulatory organization's disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security. Moreover, [Applicants'] roles at the broker-dealer and the issuers were inextricably intertwined. Here, [one Applicant], with [the other Applicant's] assistance, controlled the issuers whose funds were being dissipated, as well as the broker-dealer that offered and sold these securities." In re DWS

Tretiak also argues that the misrepresentations and omissions were not material. First, he contends that the investors were concerned with Retirement's plan to expand its business through franchising, not with the status of the Lake Mead Property. Second, he points out that the prospectus disclosed that Retirement had committed to purchase the Lake Mead Property, and that Retirement intended to borrow funds to complete the purchase, if it received only the minimum proceeds from the IPO. Tretiak argues that Retirement merely accelerated this disclosed intent, which would not have been material to investors. Finally, Tretiak argues that the indebtedness was not material because completing the purchase was a benefit to purchasers, since Retirement acquired an asset (the Lake Mead Property) that was worth significantly more than the debt it incurred to complete the purchase. (Tr. 598, 609-10, 624.)

The standard for materiality is objective. Material facts include those which affect the probable future of a company and which might affect the desires of investors to buy, sell or hold the company's shares. SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992). They are facts that "in reasonable and objective contemplation might affect the value of the corporation's stock or securities …." Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963). An omitted fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered 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).

The Hearing Panel finds that the misrepresentations and omissions regarding the Lake Mead Property were material under these standards. By purchasing the Lake Mead Property,

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Securities Corp., Exch. Act Rel. No. 33193, 55 S.E.C. Docket 1242 (Nov. 12, 1993). See also District Business

Retirement substantially altered its financial condition. The prospectus represented that Retirement expected to pay for the land entirely from the proceeds of the IPO, if it obtained the maximum proceeds from the offering. It also represented that even if Retirement obtained only the minimum proceeds from the offering, it would obtain no more than $380,000 in financing to close the purchase, but that Retirement expected the debt would be less than that amount, "since it is assumed that funds in excess of the minimum will be raised." (CX 4, p. 17.)

After Retirement closed the purchase, however, the truth was quite different. Regardless of the eventual outcome of the IPO, Retirement had already incurred more than $500,000 in debt, far more than the maximum forecast in the prospectus, and interest was already accruing on this debt before Retirement received any IPO proceeds. In short, Retirement had dug itself a deep financial hole. Furthermore, the undisclosed financial commitments for the Lake Mead Property would inevitably reduce the amount of funds available to develop Retirement's planned franchising operations, because Retirement had assumed, and would be required to service, far more debt than it planned for in the prospectus. It is precisely for these reasons that courts have held that "the materiality of information relating to financial condition … is not subject to serious challenge." SEC v. Murphy, 626 F.2d 633, 652 (9th Cir. 1980).[7]

The Hearing Panel also finds that Tretiak had the required "scienter" necessary to establish a violation of SEC Rule 10b-5 and NASD 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

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Conduct Committee for District No. 2 v. Roach, Complaint No. LA-4332 (NBCC Nov. 27, 1991).

[7] There is no evidence that at the time of the purchase the value of the Lake Mead Property exceeded the amount of the debt Retirement incurred to complete the purchase. In any event, investors were entitled to know about the purchase and the debt, so they could evaluate those facts for themselves in deciding whether to invest.

> 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.

Tretiak was at least reckless in failing to ensure that the prospectus was amended to disclose the purchase of the Lake Mead Property and the debt incurred by Retirement. Tretiak wrote the prospectus and signed all of the documents on behalf of Retirement concerning the purchase. As a result, he knew or was reckless in not knowing that the prospectus misrepresented the status of the Lake Mead Property, and failed to disclose the purchase and Retirement's indebtedness. Tretiak controlled both Retirement and RFCA, and he personally sold the vast majority of the stock during the IPO offering, so he was in position to halt the use of the misleading prospectus, require the amendment of the prospectus to include the necessary disclosures, and ensure that correct and complete information was given to all prospective investors, but he did not do so. The Hearing Panel finds that Tretiak's failure in this regard represented an extreme departure from the standard of care applicable to registered representatives. Compare District Business Conduct Committee for District No. 2 v. Roach, Complaint No. LA-4332 (NBCC Nov. 27, 1991) (holding that respondent, who "was acting as both the selling agent for the issuer and as a principal of the issuer, and thus was familiar with both sides of the offering," and who "acknowledged that he continued soliciting customers to purchase the … units after he … knew that he had already committed some of the proceeds to purposes not contemplated in the offering memorandum," violated the predecessor provisions to

NASD Rules 2120 and 2110 "as a result of his failure to disclose these material facts to prospective purchasers").

Finally, Tretiak argues that, because the instructions for the SCOR offering program advised that it was intended for small "Companies, the attorneys and accountants for which are not necessarily specialists in securities regulation," a different, more forgiving standard should be applied to "technical" violations. (CX F, p. 31; Tr. 67-68.) Tretiak's argument might have merit if the violations here turned on technical application of the securities laws, but they do not. Instead, this is a garden-variety misrepresentation case. Tretiak sold the Retirement offering using a prospectus that he knew contained out of date, erroneous information, and he failed to disclose significant changes in Retirement's financial circumstances. Investors in a SCOR offering are no less entitled to truthful and complete disclosures than investors in any other type of offering.

Therefore, the Hearing Panel concludes that Tretiak violated SEC Rule 10b-5 and NASD Rule 2120 as alleged in Cause One of the Complaint. The Hearing Panel also finds that Tretiak violated NASD Rule 2110, which does not require proof of materiality or scienter.

2. <u>Failure to Return Investor Funds and the Defective Escrow Agreement</u>

The Second Cause of Complaint charges that Tretiak violated SEC Rule 10b-9 and NASD Rule 2110 by failing to cause RFCA to return investor funds when it did not raise the minimum proceeds from the offering by the deadline stated in the prospectus. The Third Cause charges that Tretiak violated SEC Rule 15c2-4 and Rule 2110 by allowing RFCA to enter into a escrow agreement that misstated the deadline.

These two charges are closely related. "Rule 10b-9 requires that a ["part or none"] offering must provide that investor funds will be returned if the required minimum proceeds are not raised by the stated offering deadline." In re Richard H. Morrow, Exchange Act. Rel. No. 40392, 1998 SEC LEXIS 1863, *9-10 (Sept. 2, 1998).[8] Rule 15c2-4 is designed to effectuate the obligation imposed by Rule 10b-9 by "impos[ing] an obligation on broker/dealers to safeguard investor funds and ensure that they are not disbursed to the issuer before the contingency is met." District Business Conduct Committee for District No. 9 v. Covato/Lipsitz, Inc., Complaint No. C9A920043 (NBCC Mar. 15, 1994).[9]

Retirement's SCOR IPO was the type of offering covered by Rule 10b-9. The prospectus required return of investor funds if the minimum proceeds were not raised within 90 days after the effective date of the offering, i.e., by January 19, 1995. To ensure this occurred, the escrow agreement should have instructed the escrow agent to return investor funds if the minimum was not raised by that date. In fact, however, the offering did not raise the minimum by the deadline, but the escrow agent did not return the investor funds because the escrow agreement contained the wrong deadline. Instead, the IPO continued and the escrow agent later transmitted the escrow

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[8] Rule 10b-9 provides, in relevant part: "It shall constitute a 'manipulative or deceptive device or contrivance" … for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation: … (2) To the effect that the security is being offered or sold on any … basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering … being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless: (A) a specified number of units of the security are sold at a specified price within a specified time …."

[9] Rule 15c2-4 provides, in relevant part: "It shall constitute a 'fraudulent, deceptive or manipulative act or practice," … for any broker … participating in any distribution of securities … to accept any part of the sale price of any security being distributed unless: … (b) If the distribution is being made on … any … basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs: … (2) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the persons entitled thereto when the appropriate event or contingency has occurred."

funds to Retirement in accordance with the erroneous agreement. Ultimately, Retirement failed and the investors lost all their money.

With regard to the Rule 10b-9 charge, Tretiak argues in his defense that the 90-day deadline was arbitrarily selected by him when he wrote the prospectus, based on what proved to be his unrealistic assumptions about the rate at which the IPO would be sold. He says that, under the rules applicable to SCOR offerings, he could have inserted any deadline up to a year after the offering became effective, instead of 90 days. Tretiak says that he never gave another thought to the deadline. He contends that if he had, he could have obtained the consent of the investors to an extension. (Tr. 510, 512-13.) Based on all this, Tretiak argues that the failure to abide by the terms of the prospectus was at most a technical violation of Rule 10b-9.

The Hearing Panel disagrees. "Courts and [the SEC] repeatedly have stressed the importance of [Rule 10b-9], which gives investors assurance that the offering will go forward only if enough investors demonstrate by their purchases that the risk associated with the offering is worth taking and the price being paid for the securities is fair. As one court has observed, 'Each investor is comforted by the knowledge that unless his judgment to take the risk is shared by enough others to sell out the issue, his money will be returned.'" In re Richard H. Morrow, 1998 SEC LEXIS 1863, *9-10 (quoting SEC v. Blinder, Robinson & Co., 542 F. Supp. 468, 476 (D. Colo. 1982)).[10]

While Tretiak might have been able to select another deadline when he wrote the prospectus, investors were entitled to rely on the one he chose. Furthermore, Tretiak's statement

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[10] See also District Business Conduct Committee for District No. 1 v. Progressive Asset Management, Inc., Complaint No. C01930037 (NBCC Dec. 7, 1995) ("SEC Rule 10b-9 serves to ensure that investors are given

that the Retirement IPO did not generate the minimum proceeds by the 90-day deadline because the stock sold more slowly than he anticipated suggests, in the words of Morrow, that the market was not as confident as Tretiak that "the risk associated with the offering [was] worth taking and the price being paid for the securities [was] fair." These are precisely the circumstances in which Rule 10b-9 is designed to protect investors. Although Tretiak contends that investors would have agreed to extend the deadline if he had sought an extension, that is pure speculation. Tretiak never sought such an extension, and investors who never had the opportunity to consider such a request ultimately lost their entire investments.

Tretiak also argues that he did not act with scienter because he simply forgot about the deadline. Tretiak wrote the prospectus, including the provisions requiring that investor funds be returned if the minimum amount was not raised by a specific date. At all relevant times, Tretiak was in complete charge of both Retirement and RFCA, and was therefore in a position to fulfill this commitment. In addition, Tretiak sold nearly all of the IPO himself, so he should have been aware that the minimum funds were not received by the deadline. Indeed, Barker testified that "Mr. Tretiak knew exactly where every dollar was at all points in time," (Tr. 284), and Tretiak described himself as "the money man." (Tr. 516.) Tretiak admits he simply gave no thought to the deadline. No one else at RFCA had any substantial involvement in the Retirement offering, so no one else was in a position to protect investors. Under these circumstances, Tretiak was at least reckless in failing to ensure that RFCA honored the deadline. Therefore, the Hearing Panel concludes that Tretiak violated SEC Rule 10b-9 and NASD Rule 2110.

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protection in the form of potential return of their funds if the market determines that an offering is too risky or is overvalued").

With regard to the Rule 15c2-4 charge, Tretiak argues that he cannot be blamed for the defect in the escrow agreement because Kyle prepared the draft agreement.[11] As explained above, although Kyle drafted the original escrow agreement, anticipating the Bank of America would be the escrow agent, he testified that he based the agreement on information given him by Tretiak. The Hearing Panel found this testimony credible because Tretiak wrote the prospectus and Kyle was clearly a minor functionary who did what Tretiak told him to do. In addition, the Hearing Panel concluded that Tretiak revised Kyle's draft when First Security Trust Company replaced Bank of America as the escrow agent, but failed to correct the deadline for raising the minimum offering amount. Even if he did not make the revisions in Kyle's draft, however, Tretiak signed the final agreement without bothering to verify that it was correct.[12]

Tretiak also argues that cannot be held responsible because he signed the operative agreement only on behalf of Retirement, while Barker signed as president of RFCA. (Tr. 516.) As explained above, there are two fully executed escrow agreements in the record, one signed by Tretiak as president of RFCA and the other signed by Barker as president of RFCA. The version of the agreement signed by Barker as president of RFCA came directly from the files of the escrow agent, while the provenance of the other signed version of the agreement is unclear.

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[11] Tretiak also argues that the Rule does not apply because there is no evidence that RFCA "accept[ed] any part of the sale price," which he contends is required under the terms of Rule 15c2-4 to establish a violation. In fact, however, the evidence includes a letter dated August 5, 1996 from Tretiak, as president of Retirement, to the Nevada Securities Division in which, under the heading "IPO Commissions paid," he lists $48,841.62 in commissions generated by RFCA registered representatives in the sale of the Retirement offering, of which $44,441.50 (91%) was generated by Tretiak himself. (CX 4, p. 163.)

[12] In District Committee for District No. 8 v. Merz, Complaint No. C8A960094 (NAC Nov. 20, 1998), the National Adjudicatory Council observed in somewhat analogous circumstances: "In SEC v. Jakubowski, [130 F.3d 675 (7th Cir. 1998)], the Seventh Circuit stated that 'for a lawyer to fail to read a document central to a business transaction is reckless indeed.' … We believe the same is true of a person in Merz' position, who arranged the sale of the Cooperative Notes."

Moreover, both signed versions of the agreement are dated November 14, 1994, which was during the brief period after Barker had been appointed president of RFCA but before he was forced to resign because he was not qualified. Based on the evidence in the record, it appears most likely to the Hearing Panel that Tretiak initially signed one version of the agreement as president of RFCA, and then, perhaps on the same day, the agreement was re-executed with Barker signing as president of RFCA, and Tretiak signing only as president of Retirement. It was this latter agreement, signed by Barker as president of RFCA, that became the operative escrow agreement.

The Hearing Panel does not agree with Tretiak, however, that this frees him from responsibility for the Rule 15c2-4 violation. Tretiak signed one version of the agreement on behalf of RFCA and both versions on behalf of Retirement, so he knew or was reckless in not knowing that the agreement did not accurately reflect the deadline set forth in the prospectus. On the other hand, Barker may have been nominally the president of RFCA, but he was not qualified to serve in that position or to assume responsibility for RFCA's compliance with the securities laws and NASD Rules at that time, because he was not qualified as a General Securities Principal. Tretiak had been president of RFCA. He recruited and selected Barker, and effectively controlled Barker's appointment as president of RFCA, but he never bothered to ensure that Barker was qualified for that position. Furthermore, the Hearing Panel credited Barker's testimony that he reported to Tretiak at all times while he was president of RFCA, and that he had no significant involvement in any aspect of the Retirement offering. Instead, the Panel found that Tretiak exercised complete control of all aspects of the offering, from drafting the prospectus through making the sales, on behalf of both Retirement and RFCA. Under these circumstances, the Hearing Panel concludes that Tretiak bears responsibility for RFCA violating SEC Rule 15c2-4 by entering into the defective escrow agreement.

In spite of this, the Hearing Panel does not find that Tretiak violated SEC Rule 15c2-4 as charged in the Complaint. Section 15(c) of the Exchange Act and the rules promulgated by the SEC under that Section, including Rule 15c2-4, "can be violated only by a broker-dealer or by any person who aids and abets a broker-dealer's violation." In re Richard H. Morrow, 1998 SEC LEXIS at *3, n. 2. The Complaint did not specifically charge that Tretiak aided and abetted RFCA's violation of Rule 15c2-4, and Enforcement did not attempt to establish the elements of an aiding and abetting violation.

The Complaint also charges, however, that by causing RFCA to violate SEC Rule 15c2-4, Tretiak violated NASD Rule 2110. That Rule is broader and more flexible than SEC Rule 15c2-4, and applies to registered persons such as Tretiak, not just broker-dealers. The Hearing Panel concludes that, just as Rule 2110 may be applied to conduct that does not violate the strict terms of SEC Rule 10b-5, it may be applied to conduct that does not violate the strict terms of SEC Rule 15c2-4. The Hearing Panel finds that this is an appropriate case for application of Rule 2110, because Tretiak was responsible for RFCA entering into the defective escrow agreement. Therefore, the Hearing Panel concludes that Tretiak violated Rule 2110 by causing RFCA to enter into an escrow agreement that violated SEC Rule 15c2-4.

Sanctions

1. Misrepresentations and Omissions

For misrepresentations or material omissions of fact, the NASD Sanction Guidelines recommend, in the case of intentional or reckless misconduct, that the Hearing Panel fine the respondent $10,000 to $100,000 and suspend the respondent in any or all capacities for 10 days to two years. In egregious cases, the Guidelines recommend that the Hearing Panel consider a bar. NASD Sanction Guidelines, p. 80 (1998 ed.). In this case, Enforcement requests that Tretiak be fined $10,000 to $20,000 and suspended in all capacities for two years.

The Sanction Guidelines set out a number of "Principal Considerations in Determining Sanctions." NASD Sanction Guidelines, pp. 8-9. For purposes of this case, the Hearing Panel finds that the most relevant Considerations are:

(1) Tretiak did not accept responsibility for or acknowledge his misconduct. At the hearing, Tretiak began by acknowledging, "I know the buck stops with the chairman of the board or the CEO of a company, and I understand that"(Tr. 61-62), but he spent the rest of his opening statement, his testimony, and his closing argument blaming the State of Nevada, the SCOR forms, Retirement's outside attorneys and accountants, the escrow agent, and his subordinates at Retirement and RFCA – everyone but himself – for his violations of SEC and NASD Rules. In addition, he insisted that the misrepresentations and omissions concerning Retirement's financial obligations, the failure to honor the deadline for raising the minimum offering amount, and the defective escrow agreement were essentially technical violations, of no significance to the investors who eventually lost their entire investments.

(2) Tretiak did not demonstrate reasonable reliance on competent legal or accounting advice. Tretiak argued that he should not be held responsible for the misrepresentations and omissions in the prospectus because the attorneys and accountants to whom he circulated it before the offering failed to identify problems. But there were no problems when he sought their review. The prospectus became misleading when Retirement closed the purchase of the Lake

Mead Property after the offering began. Tretiak knew that the purchase had closed, that Retirement had incurred substantial debt to complete the purchase, and that neither the purchase nor the debt was disclosed in the prospectus. He also tried to blame the defect in the escrow agreement on Kyle and the escrow agent, but Kyle relied on information that Tretiak gave him, and Tretiak signed the agreement without ever bothering to check whether its key provision was correct, while the escrow agent was entitled to rely on RFCA and Retirement to put the correct deadline in the agreement.

(3) Tretiak engaged in the misconduct over an extended period of time. The prospectus became inaccurate and misleading in November 1994, but Tretiak continued to employ it to sell the Retirement IPO until the IPO ended in October 1995.

(4) Tretiak's misconduct caused substantial injury to the investing public. Investors who did not obtain the benefit of the protections that should have been afforded by the "part or none" provision of the prospectus and the escrow arrangement lost all of their investments when Retirement eventually went bankrupt.

(5) Tretiak's misconduct was the result of at least recklessness. Tretiak demonstrated that he cared primarily about raising funds, and gave little attention to his obligations to ensure that the prospectus was accurate, and that RFCA complied with its terms.

(6) Tretiak's misconduct resulted in the potential for his monetary gain. Tretiak explained that the purpose of the IPO was "to bring value to the shares of myself and the other dozen or so shareholders in [Retirement]…." (Tr. 60.)

(7) The misconduct affected a large number of substantial transactions -- all of those in the IPO.

All of these factors establish that this is an egregious case and that substantial sanctions are required to accomplish the Association's remedial purposes. The Hearing Panel concludes that, under these circumstances, the sanctions requested by Enforcement are not sufficient. Instead, these factors lead the Hearing Panel to the firm conviction that Tretiak would pose a danger to the investing public if he were allowed to continue to associate with a member firm in a principal capacity. Therefore, Tretiak will be barred from association with any member firm in any principal capacity, suspended from association with any member firm in any other capacity for two years, and fined $10,000 for his violations of SEC Rule 10b-5 and NASD Rules 2120 and 2110.

2. <u>Failure to Return Investor Funds and Defective Escrow Agreement</u>

For violations of SEC Rule 10b-9, the Sanction Guidelines recommend that the Hearing Panel fine the respondent $5,000 to $50,000 and in egregious cases suspend the respondent in any or all capacities for up to two years. <u>NASD Sanction Guidelines</u>, p. 21. For Tretiak's violation of Rule 2110 by allowing RFCA to enter into the defective escrow agreement, the Hearing Panel finds that it is appropriate to look to the Guidelines for violations of SEC Rule 15c2-4. Those Guidelines recommend that the Hearing Panel fine the respondent $1,000 to $10,000 and in egregious cases consider suspending the respondent in any or all capacities for up to 30 business days. <u>Id</u>. Because violations of Rules 10b-9 and 15c2-4 (or in this case Rule 2110) are so closely related, however, it is appropriate to impose a single sanction for both violations. <u>District Business Conduct Committee for District No. 6 v. Hartman Securities, Inc.</u>, Complaint No. C06950018 (NBCC Mar. 12, 1997) at n. 12. Enforcement requests that Tretiak be fined a total of $15,000 and suspended for six months in all capacities.

In addition to the Considerations discussed above, the Sanction Guidelines list certain Considerations that bear specifically on violations of Rules 10b-9 and 15c2-4. NASD Sanction Guidelines, p. 21. In this case, the most relevant additional Considerations are: (1) Tretiak was affiliated with the issuer to which customer funds were released; (2) the funds were released before the contingency occurred; (3) the funds were exposed to substantial risk of loss – in fact, the investors ultimately lost all their money; and (4) at the deadline, the offering was well short of the minimum stated in the prospectus – in fact, the IPO had raised only 69% of the minimum by the deadline. These Considerations, together with those discussed above, establish that this is an egregious case and weigh in favor of substantial sanctions. The Hearing Panel finds that Enforcement's recommended sanctions for these violations are appropriate. Therefore, Tretiak will be fined $15,000 and suspended in all capacities for six months.

3. Rescission and Restitution

Enforcement also suggests that Tretiak be ordered to offer rescission to investors. The Sanction Guidelines state: "Where appropriate, Adjudicators may order that a respondent offer rescission to an injured person." NASD Sanction Guidelines, p. 6. In this case, however, there are serious impediments to rescission. As a general matter, rescission contemplates the unwinding of a contractual arrangement, returning the parties to the positions they would have occupied if the contract had never come into existence. Rescission of a contract to purchase stock would ordinarily involve the buyer returning the stock and the seller returning the purchase price. Tretiak, however, although he was responsible for the violations, was neither the issuer of the Retirement stock, nor the selling firm. Those entities – Retirement and RFCA – are not parties to this proceeding.

There are also more practical impediments. Rescission is a form of restitution. The Sanction Guidelines encourage restitution "when an identifiable person … has suffered quantifiable loss as a result of a respondent's misconduct …." NASD Sanction Guidelines, p. 6. In this case, however, the record contains very limited identifying information about the investors in the Retirement offering. Enforcement failed to offer any complete list identifying all investors and setting forth the amount of each investor's losses, or any evidence from which such a list could be derived. The record does contain copies of a number of subscription agreements for the purchase of Retirement stock in the offering (CX 9), as well as bank records showing the deposit of investor funds in the escrow account (CX 6), but those records relate only to subscriptions during the escrow. There is no similar information for investors who subscribed to the offering after the escrow ended.

In response to questions during the hearing, Enforcement suggested that Tretiak might be ordered to offer rescission to only those investors he solicited personally. Enforcement admitted, however, that the record did not identify those investors. (Tr. 585.) In any event, the misrepresentations and omissions in the prospectus, and the failure to return funds when the offering failed to raise the minimum by the deadline, did not affect only the investors who were solicited by Tretiak, or only those who invested before the deadline. Later investors also received the misleading prospectus, and if investor funds had been returned when the offering failed to raise the minimum by the deadline, the offering would have ended, and there would have been no subsequent purchasers.

Enforcement suggested that "we could leave it to Mr. Tretiak" to identify the investors to whom rescission should be offered, but the record does not establish that he has access to information that would allow him to do so. In any event, it would be impossible to evaluate his compliance with such a vague requirement.

Finally, the Hearing Panel notes that the record does not establish that Tretiak enjoyed substantial personal gain as a result of his violations. It appears that the proceeds of the offering went to Retirement. At most, Tretiak may have received a portion of the commissions that his sales generated, but the record does not establish the precise amount, if any, that he received. Under all these circumstances, the Hearing Panel will not order rescission or restitution in this case.

Conclusion

The Hearing Panel finds that Tretiak violated SEC Rule 10b-5 and NASD Rules 2120 and 2110 by disseminating the Retirement prospectus with material misrepresentations and omissions; violated SEC Rule 10b-9 and NASD Rule 2110 by failing to ensure that investor funds were refunded in accordance with the contingency in the prospectus; and violated NASD Rule 2110 by allowing RFCA to enter into an escrow agreement that misstated the contingency deadline. For the violation of SEC Rule 10b-5 and NASD Rules 2120 and 2110, Tretiak is barred from association with any member firm in any principal capacity, suspended from association with any member firm in any other capacity for two years, and fined $10,000. For the violations of SEC Rules 10b-9 and NASD Rule 2110, Tretiak is suspended from association with any member firm in any capacity for six months and fined $15,000.

In addition, the Hearing Panel orders Tretiak to pay costs in the amount of $4,559.24, including an administrative fee of $750 and hearing transcript costs of $3809.24. These sanctions shall become effective on a date chosen by the NASD, but not sooner than 30 days after this Decision becomes the final disciplinary action of the NASD.[13]

HEARING PANEL

By: David M. FitzGerald
Deputy Chief Hearing Officer

Copies:

Robert Tretiak (via overnight courier or mail and first class mail)
Sylvia M. Scott, Esq. (via first class mail and electronically)
Rory C. Flynn, Esq. (via first class mail and electronically)

13 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.