NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C10990024
v.	:	Hearing Officer - SW
AVERELL GOLUB (CRD #2083375), Brooklyn, NY	:	**Hearing Panel Decision**
	:	Dated: February 17, 2000
Respondent.	:	

Digest

The Department of Enforcement ("Enforcement") filed a three-count Complaint alleging that Respondent Averell Golub ("Respondent") violated the anti-fraud provisions of the Securities Act of 1933 ("Securities Act"), through Conduct Rule 2110, of the Securities Exchange Act of 1934 ("Exchange Act"), and of Conduct Rule 2120, as well as Conduct Rule 2110, by making material misrepresentations and omitting material information when soliciting Customers MB, CB, and RW to purchase a security. [1]

The Hearing Panel concluded that Respondent made material misrepresentations and omissions to two customers, MB and CB, regarding one security. The Hearing Panel determined that Enforcement failed to prove by a preponderance of the evidence that Respondent solicited Customer RW. Accordingly, the Hearing Panel found that

Respondent violated Section 17(a) of the Securities Act, through Conduct Rule 2110, Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rules 2110 and 2120. The Hearing Panel determined that Respondent, as a registered representative, did not violate Section 15(c) of the Exchange Act and SEC Rule 15c1-2.

The Hearing Panel fined Respondent $50,175 ($50,000 plus $175, the amount of the commissions Respondent earned on the two transactions) and suspended him for one year. The Hearing Panel also directed Respondent to pay $2,255 for the costs of the Hearing. The fine and the costs are due and payable upon Respondent's re-entry into the industry.

Appearances

Jay M. Lippman, Senior Regional Counsel, Elizabeth Candreva, Regional Counsel, Karen Whetzle, Regional Attorney, and David Shellenberger, Chief Counsel New York, New York, for the Department of Enforcement.

Averell Golub pro se.

DECISION

I. Procedural Background

A. The Complaint

The NASD Regulation, Inc. ("NASDR") Department of Enforcement filed its Complaint in this disciplinary proceeding on February 26, 1999, alleging that Respondent, using material misrepresentations and omissions of material information, solicited three customers to purchase a security. Enforcement served the Complaint on

[1] Respondent is alleged to have violated the antifraud provisions of Section 17(a) of the Securities Act, through Conduct Rule 2110, Section 10(b) of the Exchange Act, SEC Rule 10b-5, Section 15(c) of the Exchange Act, and SEC Rule 15c1-2.

Respondent on February 25, 1999 by sending it to Respondent's address of record in the NASD's Central Registration Depository ("CRD address"). Respondent filed an answer to the Complaint on April 12, 1999.

B. The Hearing

The Parties presented evidence to a Hearing Panel in an October 26, 1999 Hearing in New York, New York.[2] Enforcement presented exhibits labeled CX-1-39 and 42-46, and three witnesses: an NASD examiner from the Special Investigations Department; Customer MB and Customer RW.[3] Respondent testified on his own behalf and presented three exhibits.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was registered as a general securities representative with First American Equities, Inc. ("FAE") from February 1996 to June 1996 and with Corporate Securities Group, Inc. ("Corporate Securities") from January 1997 to February 1997.[4] (CX-1, p. 5). On March 4, 1997, the Association received a Form U-5 showing that Respondent's association with Corporate Securities ended on February 3, 1997. (CX-1, p. 6). The Hearing Panel determined that Respondent's registration was terminated on

[2] References to the testimony set forth in the transcript of the October 26, 1999 Hearing will be designated as "Tr." References to exhibits presented by Respondent will be designated as "RX-," and references to exhibits presented by Enforcement will be designated as "CX-."

[3] Enforcement presented evidence that it had made extensive efforts to contact Customer CB prior to the Hearing, but was unable to reach him. (Tr. pp. 167-169). Accordingly, CB did not testify at the Hearing.

[4] Respondent was previously associated with Global Equities Group, Inc. from July 1996 to November 1996, H.D. Vest Investment Securities, Inc. from November 1993 to February 1996, and J. W. Grant & Associates, Inc. from July 1990 to September 1990. (CX-1, p. 5).

March 4, 1997, when the Association received the Form U-5.[5] (CX-1, p. 6). Respondent is not currently associated with a member firm.[6] (CX-1, p. 3).

Under Article V, Section 4(a) of the NASD's By-Laws, the NASD retains jurisdiction over Respondent for two years following the termination of his registration. During this period of retained jurisdiction, the NASD may file a complaint against Respondent based upon conduct that occurred prior to his termination. The Complaint in this proceeding was filed on February 26, 1999, within two years of the termination of Respondent's registration on March 4, 1997, and the alleged violation related to conduct occurring prior to the termination of his registration. Accordingly, the Hearing Panel finds that the NASD has jurisdiction over Respondent.

B. Respondent Made Material Misrepresentations and Omitted Material Information When He Solicited Customers to Purchases Shares of Music and Entertainment Network, Inc.

Respondent, while associated with FAE from February 1996 to June 1996, solicited the purchase of shares of Music and Entertainment Network, Inc. ("MENW"), a company whose shares traded on the NASDAQ OTC Bulletin Board. (CX-25, p. 2). Specifically, Respondent is alleged to have solicited Customers MB, CB, and RW using material misrepresentations and omissions. Customers MB and CB purchased shares of MENW; RW did not. Although Respondent admits he solicited MB and CB, he denies

[5] Because Respondent terminated his association with Corporate Securities on February 3, 1997, he filed a motion to dismiss for lack of jurisdiction with his Answer. The motion was denied based on the Hearing Panel's finding that Respondent's registration terminated on March 4, 1997, when the NASDR received the Form U-5.

[6] While employed at FAE and presently, Respondent's primary source of support has been a job outside of the industry. (Tr. pp. 142, 186).

soliciting RW, and he denies intentionally making material misrepresentations and omissions.

1. MENW

MENW, a Nevada corporation with executive offices in Pompano Beach, Florida, was in the business of producing records, concerts, and entertainment, and selling related products. (CX-2, p. 1). The Nevada Secretary of State received an amendment changing the company's name to Music Entertainment Network, Inc. on January 2, 1996.[7] (CX-10, p. 10).

MENW's unaudited financial statements for the two months ended February 29, 1996 designated MENW as a development stage company, and showed no revenue, a loss for the two-month period of $63,024, and an aggregate loss from inception to February 29, 1996 of $139,857. (CX-10, p. 61). Audited financial statements as of April 30, 1995 showed that the company (1) was seeking the acquisition of any and all types of assets, properties and businesses, (2) was dependent upon financing to continue operations, (3) had recurring operating losses, and (4) had no assets. (CX-10, pp. 22-23). MENW's president provided copies of the audited and unaudited financial statements to FAE in an April 3, 1996 letter. (CX-10, p. 64).

A January 10, 1996 SEC Rule 15c-2-11 report, prepared by MENW, contained the audited financial statements. (CX-10, pp. 5-24). FAE supplied the SEC Rule 15c-2-11 Report and the unaudited financial statements to the NASDR staff in response to a Rule

[7] MENW was originally incorporated on June 10, 1987 as U.S. Retail, Inc. to sell non-food and non-beverage items at the retail level. (CX-10, p. 22). On November 1, 1989, the company changed its name to Sabel Palm Airways, Inc. (CX-10, p. 22). On August 8, 1995, it changed its name to Blue Grizzly Truck, Inc. (CX-10, p. 11).

8210 request for research reports and due diligence information prepared or collected by FAE for MENW. (CX-10, pp. 1-3; Tr. pp. 157-158).

2. Customer MB

In early 1996, Respondent cold-called MB and recommended a purchase of Intel stock.[8] (CX-15, p. 1; Tr. p. 23). MB indicated to Respondent that his experience with New York brokers had not been good, but he would watch Intel to test Respondent's advice. (CX-15, p. 1). Respondent called MB several times thereafter. (CX-15, p. 1). Customer MB completed an FAE account form on April 12, 1996, and he transferred 1,000 shares of Track Data Corp. to his new FAE account on April 30, 1996.[9] (CX-16; CX-20, p. 1; Tr. p. 25).

On May 7, 1996, Respondent told MB that it was too late to capitalize on a purchase of Intel, but recommended MENW, which he indicated was a better investment than Intel. (CX-15, p. 1; Tr. p. 26). Customer MB expressed concern that MENW did not appear to be listed in the Wall Street Journal. (CX-15, p. 2; Tr. p. 27). However, Respondent reassured MB that it would periodically appear in the small cap section of the Wall Street Journal. (Tr. p. 27).

[8] In an August 28, 1996 letter to the NASD, Customer MB described his dealings with Respondent. (CX-11).

[9] The account statement reported that MB had an annual income of $100,000, net worth of $500,000, excluding his personal residence, and 15 years experience in investing in stocks. (CX-16). MB's investment goal was listed as speculative capital appreciation. (Tr. p. 52).

Based on Respondent's recommendation, MB purchased 3,000 shares of MENW on May 7, 1996 for a total cost of $20,935.[10] (CX-19). Respondent earned a commission of $150 on the sale, 50% of the total commission charged by FAE. (CX-19; Tr. p. 95).

In response to MB's repeated requests for information about MENW, Respondent faxed to MB a newspaper article regarding MENW on May 17, 1996, and, on May 20, 1996, he faxed a research report by Tellerstock Incorporated, dated April 1996. (Tr. p. 30; CX-21; CX-44, pp. 2-3). The research report contained a price forecast of $15-17 for MENW and indicated that the NASDAQ trading symbol for the company was "MENW." (CX-21, p. 5).

Respondent left FAE on June 6, 1996; the market value of MB's MENW stock as of June 30, 1996 was $19,500. (CX-20, p. 4). Subsequently, in July 1996, Customer MB closed his FAE account and transferred the MENW stock to an account at Prudential Securities. (Tr. p. 35). MB's Prudential broker advised him that the stock was not worth selling. (Tr. p. 59). Currently, MB's MENW stock is valued at $97.[11] (Tr. p. 37; CX-43, p. 5).

MB specifically stated that Respondent did not disclose to him, prior to his decision to invest in MENW, that the company was a developmental stage company, and that it had no operating history with respect to its then current business plan, had suffered losses since its inception, and had not generated any revenues since its inception. (Tr. p. 47). In addition, Respondent created the false impression that MENW was a NASDAQ

[10] The $20,935 included a $10 SEC and/or handling fee and $300 commission charge. (CX-19). Customer MB authorized the sale of the Track Data stock at $3,065 and wired an additional $18,000 to fund the purchase of MENW. (CX-18, pp. 2-3; CX-20 pp. 2-3).

[11] On July 10, 1998, MENW changed its name to Informatrix Holdings, Inc. (CX-2).

listed security, rather than an NASDAQ OTB Bulletin Board security, by indicating the stock would be listed in the small cap section of the Wall Street Journal and by sending a report that listed "MENW" as the company's NASDAQ trading symbol. (Tr. pp. 47-49). MENW has never traded on the NASDAQ SmallCap Market. (Tr. pp. 47-49).

3. Customer CB

Although Customer CB did not testify at the Hearing, he filed a customer complaint against Respondent on the NASD website on December 13, 1996 describing his interactions with Respondent. (CX-22). CB executed a declaration setting forth similar facts on January 16, 1998 for the NASDR staff.[12] (CX-30, pp. 1-2).

On April 24, 1996, Respondent completed an FAE account form for CB, who purchased 500 shares of LoJack Corp. as the result of a cold-call.[13] (CX-23, p. 1; CX-30, p. 1). At the same time, Respondent attempted to sell MENW, but CB declined, indicating that he only bought stocks that were listed. (CX-22, p. 1; CX-30, p. 1). On May 1, 1996, Respondent told CB that MENW was going to have a public offering, and it would be listed on NASDAQ National Market within three weeks. (CX-22, p. 1). Consequently, CB purchased 1,000 shares of MENW for $6,685. (CX-28, p. 1). Respondent earned a commission of $25 on CB's purchase. (CX-27, p. 1; Tr. p. 95).

CB unsuccessfully attempted to reach Respondent in the following weeks to check on MENW's secondary public offering. (CX-22, p. 2; CX-30 p. 2). Ultimately, he was told that Respondent no longer worked at FAE, that the MENW stock was "off by about $2.00," and that MENW was not going to be listed on the NASDAQ National Market.

[12] CB wrote that he had filed a similar complaint with the SEC in August 1996. (CX-22, p. 2; CX-30, p. 2).

(CX-22, p. 2; CX-30, p. 2). The NASDR staff found no evidence that MENW filed a registration statement with the SEC for a public offering of MENW. (Tr. p. 171; CX-11; CX-13).

Respondent admitted that he placed a cold-call to CB. (Tr. p. 128). He admitted that CB purchased 1,000 shares of MENW as a result of his solicitation. (Tr. p. 130). Respondent admitted that when he "pitched" MENW to CB he was reading from a sales script, and that he told CB that "they felt" the stock would go up. (Tr. p. 135). Respondent admitted that, at the time, he thought that MENW was in the process of registering for a public offering. (Tr. p. 101). MENW did not file a registration statement for a secondary public offering with the SEC. (Tr. p. 159). Respondent admitted that he did not provide CB with any negative information about MENW. (Tr. p. 135). Respondent stated that he knew MENW was a risky investment, but he didn't know about MENW's losses or the lack of earnings. (Tr. p. 148). Respondent admitted that all of the brokers at FAE were pushing MENW during this time period. (Tr. 145). Respondent stated that he relied on FAE's representations regarding MENW's prospects. (Tr. p.148).

4. <u>Anti-fraud Provisions</u>

Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, SEC Rule 10b-5, Section 15(c) of the Exchange Act, SEC Rule 15c1-2 thereunder, and NASD Conduct Rule 2120 are anti-fraud provisions and prohibit any fraudulent scheme or device or the making of material misrepresentations and omissions in connection with the offering, purchasing, or selling of securities. In general, in order to find a violation of these provisions, there must be a showing that (1) misrepresentations and/or omissions

[13] The account statement reflected that CB was born in 1938, was retired, and had no prior investment

were made in connection with the purchase or sale of securities,[14] (2) the misrepresentations and/or omissions were material, and (3) as to Section 17(a)(1) of the Securities Act,[15] Section 10(b) of the Exchange Act[16] and SEC Rule 10b-5 thereunder, and Conduct Rule 2120,[17]the misrepresentations and/or omissions were made with the requisite intent, i.e., scienter.

The Hearing Panel finds that Respondent omitted negative financial information about MENW and misrepresented the status of MENW as a NASDAQ listed security, when soliciting Customers MB and CB. It is well established that "an omission or

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experience. (CX-23, p. 1).

[14] For the federal securities laws, the transactions must also involve interstate commerce or the mails, or a national securities exchange. Respondent used a means and instrumentality of interstate commerce when he communicated with the customers via telephone across state lines and when he used the mails to send confirmations and account statements to the customers. See SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992), 1992 U.S. Dist. LEXIS 1322 at **148-149 (1992).

[15] Sections 17(a)(2) and (3) of the Securities Act are also applicable to the misconduct alleged; however, Sections 17(a)(2) and (3) do not require proof of scienter. See Aaron v. SEC, 446 U.S. 680, 686-87 n. 5 (1980); Ernst and Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

Section 17(a**)** of the Securities Act provides: "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly:

> (1) To employ any device, scheme or artifice to defraud; or
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> (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or
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> (3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[16] Section 10(b) of the Exchange Act provides:
"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors."

misstatement is material if a substantial likelihood exists that a reasonable investor would find the omitted or misstated fact significant in deciding whether to buy or sell a security and on what terms to invest in the securities."[18] Respondent's misstatement that MENW was a NASDAQ listed security and his omissions that MENW had no track record in the entertainment industry, had no revenue, and had accrued losses were material. A reasonable investor would have considered the information significant in deciding whether to purchase shares of MENW. The "in connection with" a sale or purchase requirement has been construed broadly to include any statement that is reasonably calculated to influence the average investor to purchase or sell a security.[19] Respondent's representations and omissions were clearly made in connection with the purchase or sale of a security.

Scienter is established by a showing that the Respondent acted intentionally or recklessly.[20] Recklessness has been defined as highly unreasonable conduct involving not merely simple or excusable negligence, but an extreme departure from the standards of ordinary care, that presents a danger of misleading buyers or sellers, which is either

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[17] In re Prime Investors, Inc., Securities Exchange Act Release No. 38,487, 1997 SEC LEXIS 761, at *24 (April 8, 1997). (making material misstatements of fact in connection with a sale of a security is a violation of Conduct Rule 2120).

[18] Basic, Inc. v. Levinson, 485 U.S. 224, 230-32 (1988) (quoting TSC Industries, Inc. v. Northway, Inc. 426 U.S. 438, 449 (1976)).

[19] SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992), 1992 U.S. Dist. LEXIS 1322 at **150 (1992) (any statement that is reasonably calculated to influence the average investor satisfies the 'in connection with' required of Rule 10b-5). Section 17(a) of the Securities Act covers fraud in the sale of securities, Section 10(b)of the Exchange Act and Rule 10b-5 cover fraud in the purchase or sale of securities, and Section 15(c) of the Exchange Act and Rule 15c1-2 prohibit manipulation or fraud in the purchase or sale of securities traded on the over-the counter market. Conduct Rule 2120 is co-extensive with Section 10(b) of the Exchange Act and Rule 10b-5.

[20] Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994), 1994 U.S. App. LEXIS 3326 at **14 (1994).

known to the defendant or is so obvious that the defendant must have been aware of it.[21] A registered representative, as a securities professional, has an obligation to disclose material facts that he knew or were "reasonably ascertainable."[22] By his recommendation, a broker implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation.[23]

Respondent admits that, in recommending MENW, he relied on information provided by FAE management, that he did no independent investigation of MENW, and that he failed to ask FAE any questions based on the information he did have. (Tr. p. 121). The Hearing Panel finds that Respondent was reckless in making the misrepresentation regarding the listing of MENW on the NASDAQ SmallCap Market and in failing to disclose the negative information, which was available in FAE's files.

Accordingly, the Hearing Panel concludes that Respondent's conduct violated Section 17(a) of the Securities Act, through Conduct Rule 2110, Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder, and Conduct Rule 2120.[24]

By this conduct, Respondent also failed to observe high standards of commercial honor and just and equitable principles of trade. Accordingly, the Hearing Panel finds that the misrepresentations and omissions of material facts violated Conduct Rule 2110.[25]

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[21] Id.
[22] Hanley v. SEC, 415 F.2d 589, 597 (2nd Cir. 1969).

[23] Id.

[24] District Bus. Conduct Comm. for District 9 v. Michael R. Euripides, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *7 (1997).

[25] Micah C. Douglas, Securities Exchange Act Release No. 37865, 1996 SEC LEXIS 3008, at *1 n.1 (1996).

5. Customer RW

Respondent denied that he solicited Customer RW.[26] (Tr. pp. 180-181). He admitted that, in previous on-the-record testimony, he stated that he did not remember soliciting RW, but, based on RW's testimony, he was sure he had not solicited RW.[27] (Tr. pp. 191-192). Respondent also introduced a letter, which provided evidence that, in at least one instance, someone else used Respondent's name to solicit the purchase of MENW during 1996. (Tr. p. 82; RX-3).

RW testified that he received a cold-call on April 15, 1996 from a New York broker, who identified himself as Respondent and described himself as senior portfolio manager.[28] (Tr. p. 79). RW stated that the caller sounded young, and he could not specifically identify the voice of Respondent at the Hearing. (Tr. p. 79). RW testified that the caller said he would "guarantee" a doubling of his money in 30 days. (Tr. p. 80). The caller reiterated the term "guarantee," when RW questioned him. (Tr. p. 80). Despite RW's specific request for a prospectus, the caller refused to send RW a prospectus and launched into a "tirade how he did not have to send prospectuses because of the amount of money he had under management." (Tr. p. 81). The caller did not discuss the market on which MENW was trading. (Tr. pp. 87-88).

RW refused to purchase MENW stock. The same day, RW called to report his conversation to FAE's compliance department. (Tr. p. 82). The call was transferred to

[26] RW is a registered representative with a small Arizona broker-dealer and has served as an NASD arbitrator and expert witness in securities matters. (Tr. pp. 76-77).

[27] Respondent indicated that, at the time of the investigative testimony, he was only prepared to discuss the customer complaint filed by CB. (Tr. p. 146).

[28] In his prior testimony and at the Hearing, Respondent denied ever using the term "senior portfolio manager." (Tr. p. 190).

Vince Cappello, who identified himself as FAE's branch manager. (Tr. p. 83). Mr. Cappello refused to provide Customer RW with FAE's home office address, or the name of its compliance officer, until RW threatened to report the matter to the NASD. (Tr. p. 82).

Enforcement argued that the sales pitches given to MB, CB, and RW were sufficiently similar for the Hearing Panel to decide on the preponderance of evidence that Respondent had solicited RW. The Hearing Panel disagrees. The Hearing Panel decided that RW's sales pitch, with its more detailed price guarantees, use of the title "senior portfolio manager," lack of information regarding the market, and the caller's refusal to provide written information concerning MENW, was significantly different from Respondent's scripted sales pitches to MB and CB.

RW is a credible witness, and the Hearing Panel believes his testimony concerning the content of the sales pitch. The Hearing Panel also believes Respondent when he states that he was careful not to guarantee a specific price increase.

In view of the evidence of the use of Respondent's name by at least one other broker at FAE, the differences in the sales pitches, the recognition that all of the brokers at FAE were pushing MENW during this time period, Respondent's unqualified statement that he did not solicit Customer RW, and the Hearing Panel's belief that Respondent's voice would not be described as "young," the Hearing Panel finds that Enforcement has not shown by a preponderance of the evidence that Respondent solicited RW.

6. Section 15(c) of the Exchange Act

The anti-fraud provision of Section 15(c) of the Exchange Act and SEC Rule 15c1-2 is in some respects a narrower provision than Section 10(b) of the Exchange Act. Unlike Section 10(b) which applies to "any person," Section 15(c)(1) applies only to broker-dealers. Accordingly, Section 15(c) and SEC Rule 15c1-2 thereunder can be violated only by (1) a broker-dealer, (2) someone who is required to register as a broker-dealer, or (3) an individual who aids or abets a broker-dealer's violation.[29] Respondent is not a registered broker-dealer. As a general securities representative registered with FAE and soliciting purchases of an FAE product, Respondent was not required to be registered as a broker-dealer. The Complaint did not allege that Respondent aided or abetted a violation of Section 15(c) of the Exchange Act by FAE. Consequently, the Hearing Panel finds that Section 15(c) of the Exchange Act and SEC Rule 15c1-2 do not apply to Respondent.

III. Sanctions

Enforcement argued that Respondent made material misrepresentations and omissions to three individuals and, accordingly, he should be barred, fined $25,000 to $50,000, ordered to pay restitution to MB and CB, and ordered to disgorge his commissions of $175.

As relevant to this proceeding, the NASD Sanction Guidelines provide for fines ranging from $10,000 to $100,000, suspensions of 15 business days to two years, and, in

[29] Richard H. Morrow, Securities Exchange Act Release No. 40392, 1998 SEC LEXIS 1863, at *2 n.2 (1998).(The finding that Morrow was a primary violator of Section 15(c) and SEC Rule 15c1-2 was set aside because Morrow was not found to be a broker-dealer).

an egregious case, a bar.[30] In determining sanctions, the Hearing Panel considered whether the Respondent engaged in numerous acts and or a pattern of misconduct,[31] whether the misconduct resulted in injury to other parties, the extent of the injury,[32] the number, size, and character of the transactions at issue,[33] the level of Respondent's monetary gain,[34] and the level of sophistication of the injured or affected customers.[35]

The Hearing Panel noted that Respondent was found liable for soliciting two customers to purchase one security, which involved two transactions. The Hearing Panel also noted that, with respect to the misrepresentation concerning the status of the security as well as the omission of negative information, Respondent relied on information provided by his employer, FAE. Although reliance does not excuse the conduct, it does convince the Hearing Panel that Respondent did not willfully lie or withhold information.[36] Nor did Respondent continue to falsely reassure customers MB and CB that MENW was a good investment. As early as July 1996, both MB and CB were aware of problems with the stock and failed to take action.

Consequently, the Hearing Panel believes that fining Respondent $50,175 ($50,000 and the $175 in commissions earned by Respondent) and suspending him for

[30] NASD Sanction Guidelines, p. 80 (1998).

[31] NASD Sanction Guidelines, Principal Consideration No. 8, p. 8 (1998).

[32] NASD Sanction Guidelines, Principal Consideration No. 11, p. 9 (1998).

[33] NASD Sanction Guidelines, Principal Consideration No. 18, p. 9 (1998).

[34] NASD Sanction Guidelines, Principal Consideration No. 17, p. 9 (1998).

[35] NASD Sanction Guidelines, Principal Consideration No. 19, p. 9 (1998).

[36] NASD Sanction Guidelines, Principal Consideration No. 13, p. 9 (1998).

one year from associating with any member firm in any capacity are appropriate remedial sanctions. The fine is due and payable upon Respondent's re-entry into the industry.

IV. Conclusion

Based on the evidence submitted by the Department of Enforcement, the Hearing Panel fines Respondent $50,175 and suspends him for one year for the material misrepresentations and omissions. Respondent also is assessed $2,255, consisting of a $750 administrative fee and a $1,505 transcript fee, as costs of the Hearing. The fine and the costs are due and payable upon Respondent's re-entry into the industry.[37]

These sanctions shall become effective on a date determined by the Association, but not sooner than 30 days from the date this decision becomes the final disciplinary decision of the NASD.[38]

SO ORDERED.

HEARING PANEL

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by: Sharon Witherspoon
Hearing Officer

Dated: February 17, 2000
Washington, DC

Copies to:
Averell Golub, Jr. (via Airborne Express and first class)
Jay M. Lippman, Esq. (via electronically and first class mail)
Rory C. Flynn, Esq. (via electronically and first class mail)

[37] In compliance with NASD Notice to Member 99-86, the Respondent will not be eligible for association with a member firm until the monetary sanction is satisfied.

[38] The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.