NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LH ROSS & COMPANY, INC.
(CRD No. 37920)
2255 Glades Road, Suite 425W
Boca Raton, FL 33431,

and

FRANKLYN MICHELIN
(CRD No. 2459180)
851 Aurelia Street
Boca Raton, FL 33486,

Respondents.

Disciplinary Proceeding
No. CAF040042

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

December 15, 2004

The Respondents violated NASD Conduct Rule 2110 by (1) failing to pay an arbitration award on time and (2) filing a meritless pleading with the Office of Hearing Officers. The Respondents are fined, jointly and severally, $50,000. Michelin is suspended for 5 business days for the first violation and 6 months for the second violation. In addition, the Respondents are ordered to pay restitution to the arbitration claimant in the amount of $69,915.97.

Appearances

Roger D. Hogoboom, Assistant Chief Litigation Counsel, Denver, CO, and Philip J. Berkowitz, Assistant Chief Litigation Counsel, Washington, DC (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel) for the Department of Enforcement.

Gary Langan Goodenow, Esq., Boca Raton, FL, for the Respondents.

DECISION

I. INTRODUCTION

On May 28, 2004, the Department of Enforcement (the "Department") filed a two-cause Complaint against the Respondents LH Ross & Company, Inc. ("LH Ross" or the "Firm") and Franklyn Michelin ("Michelin"). In the first cause of action, the Department alleges that LH Ross, acting through Michelin, failed to pay timely an arbitration award (the "Award")[1] entered on September 19, 2002, in the matter of *CN and BN v. LH Ross & Company, Inc., Guido A. Torres, Franklyn Ross Michelin, and Ricardo Miguel Torres, Jr.*, Dispute Resolution Number 00-05306,[2] in violation of NASD Conduct Rule 2110. In the second cause of action, the Department alleges that LH Ross, acting through Michelin, asserted a meritless defense when LH Ross requested a hearing in response to a suspension notice NASD Dispute Resolution issued on February 17, 2004, in violation of NASD Conduct Rule 2110. In the hearing request, LH Ross stated "it is unable to pay [the Award] in a manner required by the NASD Code of Arbitration Procedure and in a manner that does not endanger the operations and existence of [the Firm]."[3]

On June 24, 2004, the Respondents filed their Answer and requested a hearing.[4] On November 5, 2004, Respondents' current counsel filed a motion to amend the pleadings and papers because he believed that ethically he could not adopt the Answer and Pre-Hearing Submission filed by the Respondents' former attorney. Specifically, he requested leave to amend

[1] Ex. 14.

[2] The claims against Franklyn Ross Michelin and Ricardo Miguel Torres, Jr. were dismissed. (Ex. 14, at 5.)

[3] Ex. 19, at 2.

[4] The Answer was filed by Alan P. Fraade, the Respondents' former counsel.

the Answer and Pre-Hearing Submission to admit that LH Ross had the ability to pay the Award with the qualification that Michelin believed that payment would endanger his Firm's operations and existence.[5] The Hearing Officer granted the Motion and ordered that the Respondents' Answer be deemed amended as stated in the Motion.[6] In addition, on November 5, 2004, the Parties filed Stipulations, which resolved most of the previously contested facts.

The hearing was held in Boca Raton, Florida, on November 9, 2004, before a hearing panel composed of the undersigned Hearing Officer, a current member of NASD's District 7 Committee, and a former member of the District 7 Committee. The Department presented four witnesses and introduced 31 exhibits into evidence. Michelin testified on behalf of the Respondents. The Respondents presented no documentary evidence.

II. FINDINGS OF FACT

A. The Respondents

LH Ross, a retail brokerage firm with executive offices in Boca Raton, Florida, has been a member of NASD since 1995, and its registration remains in effect.[7] Michelin is the Firm's Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, President, and Chief Compliance Officer. Michelin also owns LH Ross Holdings Corp. ("Holdings"),[8] which owns all of LH Ross's issued and outstanding shares of common stock.[9] Michelin has been registered as a

[5] *See* Respondents' Counsel's Mot. to Amend Pleadings & Papers or for Leave of the Panel to Withdraw as Counsel for Respondents.

[6] Order Granting Respondents' Mot. to Amend Pleadings (Nov. 5, 2004).

[7] Ex. 1, at 5.

[8] Stip. ¶ 45.

[9] *Id.* ¶ 44.

General Securities Representative and General Securities Principal since 1995.[10] In addition, he is registered currently as an Options Principal, a Financial and Operations Principal, and an Equity Trader.[11]

B. The Arbitration Proceedings

On September 19, 2002, the Award was issued against LH Ross in favor of CN and BN (the "Claimants"). The Award required LH Ross to pay the Claimants $209,915.97.[12]

LH Ross did not pay the Award. Instead, on October 22, 2002, LH Ross filed a Motion to Vacate the Award in the United States District Court for the Eastern District of Missouri.[13] The Parties consented to having the case heard by a United States Magistrate Judge, who denied the Motion to Vacate on December 3, 2003, and entered judgment in favor of CN and BN and against LH Ross, Michelin, Guido Torres, and Ricardo Miguel Torres.[14]

LH Ross did not pay the Award promptly. Instead, LH Ross filed an appeal with the United States Court of Appeals for the Eighth Circuit. LH Ross did not post a supersedeas bond.[15]

C. The Non-Summary Suspension Proceeding

On January 9, 2004,[16] counsel for CN and BN sent a letter to NASD Dispute Resolution requesting that it institute Non-Summary Suspension Proceedings against the arbitration

[10] Ex. 2, at 6.

[11] *Id.* at 5–6.

[12] Stip. ¶ 47. The amount of the Award is comprised of $69,166.01 in compensatory damages, $6,016.23 in interest, $100,000 in punitive damages, and $34,733.73 in attorney fees.

[13] Stip. ¶ 48.

[14] Ex. 16; Stip. ¶ 49. The Parties could not explain why Michelin and Ricardo Miguel Torres were joined as plaintiffs in the Motion to Vacate despite the fact that the Arbitration Panel had dismissed the claims against them.

[15] Stip. ¶¶ 50, 51.

respondents because they had not paid the Award.[17] The Claimants' attorney sent copies of the letter to both of LH Ross's attorneys.

On February 17, 2004, NASD Dispute Resolution sent a Fifteen-Day Suspension Notice to LH Ross and Michelin, pursuant to Procedural Rule 9510.[18] The Suspension Notice stated that LH Ross's NASD membership would be suspended effective March 4, 2004, unless prior to that date the Firm provided evidence that one or more of the following events had occurred:

1. LH Ross had paid the Award in full;
2. The arbitration claimants had agreed to accept installment payments or to settle the action;
3. The Award had been modified or vacated by a court;
4. A motion to vacate was pending in a court, or, if on appeal, a supersedeas bond had been posted; or
5. LH Ross had a bankruptcy petition pending in U.S. Bankruptcy Court or the Award had been discharged by a U.S. Bankruptcy Court.[19]

The Suspension Notice further advised LH Ross that "a bona fide inability to pay an arbitration award may be a factor in determining whether any sanction for failure to pay an arbitration award is excessive or oppressive."[20]

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[16] The letter is incorrectly dated January 9, 2002.

[17] Ex. 17, at 1.

[18] Stip. ¶ 58.

[19] Ex. 18.

[20] *Id.* at 1, n.2.

On February 24, 2004, in response to the Suspension Notice, LH Ross filed a Request for Hearing Pursuant to NASD Rule 9514(a)(1).[21] Among its defenses for failing to pay the Award, LH Ross claimed that it had a bona fide inability to pay the Award. LH Ross also stated that it had a settlement conference scheduled for March 3, 2004, at the United States Court of Appeals for the Eighth Circuit, at which time LH Ross anticipated that parties would make a good faith effort to reach a settlement.

In fact the settlement conference was successful; on March 17, 2004, LH Ross and CN[22] entered into a Settlement Agreement that provided that LH Ross would pay CN[23] $185,000 in three payments as follows: $100,000 by April 2, 2004, $40,000 by August 30, 2004, and $45,000 by February 26, 2005. LH Ross made the first payment under the Settlement Agreement on April 3, 2004.[24] Accordingly, the Department moved to dismiss the Non-Summary Suspension Proceeding without prejudice. The Office of Hearing Officers granted the Department's motion on April 13, 2004.

After the Non-Summary Suspension Proceeding was terminated, the Department filed the instant disciplinary proceeding. The Department contends that LH Ross violated NASD Conduct Rule 2110 by failing to pay the Award immediately after the court denied the Motion to Vacate. The Department further contends that LH Ross had the ability to pay the Award, but it chose instead to stall the claimants as long as possible. In addition, the Department contends that LH Ross's claim of inability to pay was groundless and made in bad faith.

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[21] Ex. 19.

[22] BN passed away before the federal court denied the Motion to Vacate on December 3, 2003.

[23] Ex. 20, at 6.

[24] Stip. ¶ 64; Ex. 21.

D. LH Ross's Ability to Pay the Award

LH Ross admitted in its Amended Answer and at the hearing that it had the ability to pay the Award at all times after December 3, 2003.[25] The evidence confirms LH Ross's admissions. From November 2003 through February 2004, LH Ross had ample capital and sufficient cash to pay the Award in full. And no one knew this fact better than Michelin. For example, according to the Financial and Operational Combined Uniform Single Reports ("FOCUS reports") Michelin filed with NASD, LH Ross had the following *excess* net capital:[26]

November 2003	$2,365,080
December 2003	$2,385,655
January 2004	$1,719,920
February 2004	$1,175,115

Moreover, the evidence shows that payment of the Award would not have impaired the Firm's operations, as Michelin claimed in his Amended Answer. From January 5, 2004, to March 2, 2004, LH Ross, through Michelin, paid out approximately $1,644,212 in loans to 32 registered representatives as an incentive for them to join LH Ross.[27] In other words, Michelin elected to pursue expansion of the Firm rather than pay the debt due CN and BN. The Hearing Panel further notes that LH Ross continued to make these loans even after it received the Suspension Notice. LH Ross made loans in excess of $300,000 between February 24, 2004, and March 2, 2004.[28]

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[25] Tr. at 161–62.

[26] According to Michelin, he booked the Award when it was issued. Accordingly, LH Ross' excess net capital figure reflected the Award liability of $209,915.47.

[27] Ex. 30 (Schedule of Loans).

[28] Ex. 29, at 8.

III. CONCLUSIONS OF LAW

A. Failure to Pay the Award Timely

NASD Code of Arbitration Rule 10330(h) requires that "all monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction." If a motion to vacate has been filed and subsequently denied by a court, the thirty-day "grace period" to pay the award no longer applies; specifically, "[a]n award must be paid immediately … absent a court order staying compliance with the award."[29] Without question, LH Ross failed to pay the Award within the time required by NASD Code of Arbitration Rule 10330(h) although it had the ability to do so as evidenced by the Firm's FOCUS reports, which show that LH Ross had not less than $1.7 million in excess capital during the relevant period.[30] Accordingly, the Hearing Panel concludes that LH Ross, acting through Michelin, violated NASD Conduct Rule 2110.[31]

Despite Michelin's admission that LH Ross had the funds needed to pay the Award, LH Ross attempted to avoid liability by asserting two alternative defenses. First, LH Ross asserts that it relied on its counsel's advice that it was not yet obligated to pay the Award. Second, LH Ross argued that it was not obligated to pay the Award until NASD requested payment, which it did not do until it sent the Suspension Notice. LH Ross contends that once it received the

[29] NASD Notice to Members 00-55, 2000 NASD LEXIS 63, Endnote 5 (Aug. 2000).

[30] The purpose of NASD's net capital rule is to ensure the firm's ability to pay its liabilities promptly, particularly to customers. It requires a member to be liquid at all times. (NASD Notice to Members 82-6, 1982 NASD LEXIS 366, at *39 (Feb. 8, 1982).

[31] *Robert Tretiak*, Exchange Act Release No. 47,534, 2003 SEC LEXIS 653, at *17 (Mar. 19, 2003) (citations omitted). *See also* NASD Interpretive Release IM-10100 (Failure to Act Under Provisions of the Code of Arbitration Procedure).

Suspension Notice it promptly negotiated a settlement with the arbitration claimant. The Hearing Panel rejects both defenses.

1. Reliance on Advice of Counsel

LH Ross's advice of counsel defense is rejected. The defense is inapplicable when scienter is not an element of the violation, and scienter is not required for a violation of NASD Conduct Rule 2110.[32]

2. Notice to Pay the Award

LH Ross's second defense is frivolous. As discussed above, the applicable rules state clearly that arbitration awards must be paid promptly. Further, NASD issued a Notice to Members in August 2000 specifically reminding members that, once a motion to vacate is denied, the subject arbitration award must be paid immediately.[33] There is no further grace period absent a court order staying compliance with the award. Moreover, a member's duty to pay an arbitration award is not contingent on receipt of notice from NASD.

The Respondents' lack-of-notice defense likewise is unsupported by the indisputable facts. The evidence shows that LH Ross received notice when the Award was entered and when the court denied its Motion to Vacate. Moreover, the Respondents admit that they received the Suspension Notice indicating that the Firm's membership would be suspended because it had not paid the Award. Nevertheless, the Respondents continued to withhold payment as part of its unjust strategy to force CN to accept less than the full amount he was due.

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[32] *Department of Enforcement v. Fergus*, No. C8A990025, 2001 NASD Discip. LEXIS 3, at *44 n.30 (May 17, 2001).

[33] *See* NASD Notice to Members 00-55, 2000 NASD LEXIS 63.

Finally, the Hearing Panel notes that the Respondents failed to point to any authority in support of this defense. Accordingly, based on all the evidence, the Hearing Panel concludes that the Respondents lacked a good-faith basis for asserting this defense.[34]

B. False Claim of Inability to Pay

LH Ross's inability to pay defense was meritless. The Hearing Panel finds that the Respondents inserted this defense to delay paying the Award, in violation of NASD Conduct Rule 2110. The Respondents knew that LH Ross possessed sufficient resources to pay the Award,[35] but they nevertheless included the defense in the Firm's Hearing Request filed with the Office of Hearing Officers in response to the Suspension Notice.

NASD Conduct Rule 2110 provides that "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Conduct, including litigation, relating to the payment of securities arbitration claims relates to the conduct of a member's business.[36] Furthermore, "if a respondent engages in unethical and dishonorable business-related conduct in litigation, disciplinary sanctions may be imposed" pursuant to NASD Conduct Rule 2110.[37] The "pursuit of legal rights" cannot "somehow confer immunity from discipline under Conduct Rule 2110."[38]

[34] The Hearing Panel also notes that the Respondents were quite familiar with the arbitration process. Over the last ten years, they have been involved in 15 to 20 arbitrations.

[35] Tr. at 161–62.

[36] *Department of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, *1819 (N.A.C. June 2, 2000).

[37] *Id* at *34.

[38] *Id.*

IV. SANCTIONS

A. Failure to Pay the Award Timely

The NASD Sanction Guidelines ("Guidelines") recommend a fine of at least $2,500 and a suspension of up to five business days for failure to pay an arbitration award on time.[39] The Guidelines also recommend adding an escalator to the fine for each day of delay in egregious cases involving failure to honor an award.[40] Enforcement argues that this is an egregious case and, therefore, the Respondents should be fined $25,000—$2,500, plus $250 per day from December 4, 2003 until the parties reached a tentative settlement on March 3, 2004.

The Hearing Panel agrees with the Department's assessment that the Respondents' conduct was egregious. The Hearing Panel finds that the Respondents have evidenced a continuing disdain for the rules governing their conduct in the securities industry. Once the federal court denied their motion to vacate the Award, the Respondents elected to engage in dilatory tactics in an effort to force CN to accept less than he was due. Michelin knew that the Firm unconditionally owed the money and that the Firm had the funds on hand to make immediate payment. Nevertheless, Michelin refused to pay the Award. Instead, he stalled CN until NASD initiated a non-summary suspension proceeding against LH Ross. At this point, Michelin authorized his attorney to file a false pleading with NASD to buy further time. The Respondents then used the mediation process administered by the Eighth Circuit Court of Appeals to pry a compromise and settlement out of CN, rather than pay him in full. At the

[39] NASD Sanction Guidelines 22 (2004 ed.).

[40] The Hearing Panel notes, however, that the recommendation to add a daily escalator does not apply to untimely payment of an award. Accordingly, the Hearing Panel will not impose an escalator to the fine in this case.

conclusion of the mediation, CN accepted a deferred payment plan that pays him $24,915.47 less than he was due.

In determining the appropriate remedial sanctions for this case, the Hearing Panel considered the General Principles Applicable to All Sanction Determinations[41] and the applicable Principal Considerations in Determining Sanctions.[42] The Hearing Panel first notes that a basic tenet governing sanctions in NASD disciplinary proceedings is that sanctions should be set at a level to remediate misconduct, improve overall standards in the industry, and protect the investing public.[43] The Guidelines advise, therefore, that sanctions should be set high enough to deter and prevent future misconduct by imposing more severe sanctions on respondents with disciplinary histories involving similar past misconduct or misconduct that evidences disregard for regulatory requirements.[44]

Here, the Respondents' significant disciplinary history evidences a disregard for regulatory requirements.

> On October 29, 1999, the Illinois Securities Department issued a consent order against LH Ross that included a fine of $2,500, an additional payment of $1,500 for costs of the investigation, and an order to make restitution to an investor in the amount of $33,360 plus 10% interest. The case concerned the offer and sale of unregistered securities by an unregistered salesperson. On January 3, 2000, the Illinois Securities Department issued an Order temporarily suspending LH Ross's registration for failure to pay the fine and costs.
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> On April 4, 2001, the Florida Division of Securities issued an Order fining LH Ross $25,000 and Michelin $5,000. The action concerned allegations of unregistered activities and failure to supervise.

[41] Guidelines 4–7.

[42] *Id.* at 8–9.

[43] General Principle No. 1, Guidelines 4.

[44] General Principle No. 2, Guidelines 4.

On January 3, 2002, NASD's National Adjudicatory Council issued a Decision that found that LH Ross had violated NASD Rules 2110 and 3010. The NAC concluded that the Firm had failed to comply with the taping rule, and failed to establish, maintain, or enforce any special written supervisory procedures for supervising the telemarketing activities of its registered persons. LH Ross was censured and fined $10,000. (*DOE v. LH Ross & Company, Inc.*, No. C07000033, 2002 NASD Discip. LEXIS 1 (N.A.C. 2002)).

On May 13, 2002, LH Ross entered into a consent order with the North Dakota Securities Commissioner, wherein LH Ross agreed to withdraw its application in North Dakota as a result of the Firm's failure to provide documents to the State of Utah.

On June 7, 2002, the State of Connecticut and LH Ross entered into a Consent Order to settle allegations that LH Ross: (1) concealed material information from, and made false or misleading statements to, agency staff during an investigation and examination; (2) engaged in dishonest or unethical practices by employing two cold callers who were not registered; (3) sold unregistered securities; and (4) failed to enforce and maintain adequate written supervisory procedures. LH Ross was fined $12,500, ordered to file reports with the State for two years, and required to reimburse the State for costs associated with a future examination. On May 25, 2004, State of Connecticut issued a cease and desist order against LH Ross and filed a notice of intent to revoke its registrations and to fine LH Ross for alleged violation of the Consent Order.

On January 6, 2004, the Department of Commerce for the State of Utah issued an Order that placed LH Ross on six-months probation and required the Firm to consent to a surprise audit at the firm's expense not to exceed $5,000. The case concerned LH Ross's alleged refusal to allow investigators from the State of Utah access to books and records and physically stopped Utah's auditors from entering the sales floor where the auditors observed books and records of the firm being discarded and hidden.

On March 15, 2004, the North Dakota Securities Department issued a Cease and Desist Order against LH Ross alleging that the Firm and at least three of its representatives had offered and sold unregistered securities.

On April 27, 2004, NASD accepted an AWC (C07040046) that LH Ross submitted to settle allegations that the firm failed to file Rule 3070 reports in a timely manner and failed to promptly amend Forms U-4 and U-5. LH Ross was censured and fined $10,000.

On September 20, 2004, the North Dakota Securities Commissioner and LH Ross entered into a Consent Order to settle allegations that LH Ross, among other

> things, falsified documents and sold unregistered securities. LH Ross was assessed a penalty of $43,000 and ordered to make restitution to a customer in the amount of $71,085.35.

The Hearing Panel considered the Respondents' refusal to accept responsibility for their misconduct.[45] In a scathing broadside—without any supporting evidence—the Respondents argued that all of their regulatory troubles resulted from their attorney's incompetence. The Hearing Panel finds no support in the record for the Respondents' allegations.

The Hearing Panel rejected the Respondents' alternative assertion that their reliance on counsel's advice regarding payment of the Award was mitigating. Under the Guidelines, the test for analyzing whether reliance on counsel may mitigate sanctions is whether the respondent demonstrated reasonable reliance on competent legal advice.[46] The Respondents failed to meet that standard.

The evidence fails to establish that Michelin sought and received legal advice that LH Ross was free to avoid paying the Award after a court of competent jurisdiction had confirmed it until NASD made a specific demand for payment. Indeed, the Hearing Panel finds that Michelin fabricated this claim once he learned from his present attorney that the Respondents' inability to pay defense was meritless. The Respondents did not assert reliance on counsel as an affirmative defense in their Answer or other pleadings although the attorney Michelin now claims gave him this advice filed those pleadings on the Respondents' behalf. The Respondents also submitted no evidence from their former attorney corroborating Michelin's claim. Moreover, at the hearing, Michelin testified that he did not get the legal opinion in writing, and there was no other

[45] Principal Consideration No. 2, Guidelines 8.

[46] *Department of Enforcement v. Fergus*, 2001 NASD Discip. LEXIS at *47.

evidence supporting his claim. The Hearing Panel further notes that Michelin's testimony did not establish clearly the nature of the advice he sought. Michelin repeatedly testified that he based his decision to withhold payment on his understanding that payment was not due until NASD sent him notice to that effect.[47] In summary, based on the record as a whole, the Hearing Panel finds that the Respondents interposed this claim in bad faith. The Respondents falsely concocted the claim at the last minute as part of their continuing effort to improperly shift responsibility for their wrongdoing to others.

Moreover, even if the Respondents had been given such advice, it would not have been reasonable for them to have relied on it. First, Michelin testified that he knew that members have an absolute duty to pay arbitration awards.[48] At no point did he testify that he had any uncertainty regarding this obligation. Second, the obligation to pay an arbitration award promptly is not subject to interpretation. No one in the Respondents' position would have needed an attorney to tell him that he would be violating NASD's rules if he refused to pay an arbitration award after it had been confirmed by court order.[49] Thus, reliance on contrary advice would not be reasonable.

In consideration of all of the evidence and the foregoing aggravating factors, the Hearing Panel concludes that the appropriate sanction is a fine of $10,000, which shall be the Respondents' joint and several obligation. In addition, the Hearing Panel concludes that it will suspend Michelin in all capacities for five business days.

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[47] Tr. at 170–71.

[48] Tr. at 123. Michelin further testified that he understood that the Respondents could be sanctioned for failing to abide by NASD's conduct rules.

[49] *Cf. Sundra Escott-Russell*, Exchange Act Release No. 43,363, 2000 SEC LEXIS 2053, at *11 (Sept. 27, 2000) (finding that respondent was not relieved of her obligation to respond to a request for information issued pursuant to Rule 8210 by her attorney's advice); *Coastline Fin., Inc.*, Exchange Act Release No. 41,989, 1999 SEC LEXIS

B. Filing a Meritless Claim in an NASD Proceeding

There are no specific provisions in the Guidelines covering the second cause of action. The most analogous Guideline is that for Failure to Respond Truthfully, which recommends a fine of $25,000 to $50,000 and a suspension of up to two years. In egregious cases, the Guideline recommends a bar.[50]

The Hearing Panel finds that the Respondents' misconduct was serious. As discussed above, the Respondents filed the false pleading with the Office of Hearing Officers to further delay paying the Award. And CN was harmed because he did not receive the full amount he was due. There are no mitigating factors for the Hearing Panel to consider. Accordingly, the Hearing Panel will fine the Respondents, jointly and severally, $40,000. In addition, the Hearing Panel will suspend Michelin for six months in all capacities.

The Hearing Panel also will order the Respondents to pay restitution to CN in the sum $69,915.97,[51] the unpaid balance due on the Award, plus interest thereon from March 3, 2004. Although LH Ross could have posted a supersedeas bond when it filed its federal court appeal, LH Ross instead elected to abuse NASD's process to gain settlement leverage. Thus, it is appropriate to order that the Respondents pay CN the full amount he was due under the Award. Payment of restitution will assure that the Respondents do not benefit from their misconduct.

2124, at *13 (Oct. 7, 1999) ("[Respondent] did not need a lawyer to tell him that it was false to describe the notes as 'secured' when they were not.").

[50] Guidelines 37.

[51] The amount of restitution is comprised of the remaining $45,000 due under the Parties' settlement agreement plus $24,915.47, which is the difference between the total settlement amount and the Award.

V. ORDER

Franklyn Michelin is suspended for five business days from associating with any member firm in any capacity, and LH Ross & Company, Inc. and Michelin are fined $10,000, for failing to pay the Award within the time required by the NASD Arbitration Code, in violation of NASD Conduct Rule 2110.

LH Ross and Michelin are fined $40,000, and Michelin is suspended for six months from associating with any member firm, for filing a meritless pleading with the Office of Hearing Officers, in violation of NASD Conduct Rule 2110. The suspension imposed under each cause of action against Michelin shall run concurrently. In addition, LH Ross and Michelin are ordered to pay restitution to CN in the sum $69,915.97, plus interest thereon from March 3, 2004, calculated pursuant to 26 U.S.C. § 6621(2)(2).[52]

The Respondents also shall pay costs in the amount of $2,049.40, including an administrative fee of $750 and hearing transcript costs of $1299.40.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD, except that, if this Decision becomes the final disciplinary action of NASD, Michelin's suspension shall commence at the opening of business on February 7, 2005, and end on August 7, 2005.

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Andrew H. Perkins
Hearing Officer
For the Hearing Panel

[52] The interest rate used by the Internal Revenue Service to determine interest due on underpaid taxes. This rate, which is adjusted each quarter, reflects market conditions, and thus approximates the time value of money for each quarter in which CN was deprived payment of the Award.

Copies to:

Gary Langan Goodenow, Esq. (facsimile and first-class mail)
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