

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL FANTETTI  
(CRD No. 1474403),

Respondent.

Disciplinary Proceeding  
No. C3A040030

Hearing Officer—Andrew H. Perkins

**HEARING PANEL DECISION**

July 18, 2005

**Respondent violated NASD Conduct Rules 2310 and 2110 by recommending unsuitable transactions in two accounts. For these violations, Respondent is suspended for one year from association with any member firm in any capacity and fined \$25,000.**

*Appearances*

For the Department of Enforcement: Jacqueline D. Whelan, Regional Counsel, Denver, CO (Rory C. Flynn, Of Counsel).

For the Respondent: Michael Fantetti appeared *pro se*.

**DECISION**

**I. Procedural History**

The Department of Enforcement (“Enforcement”) filed a two-count Complaint on June 1, 2004, charging that Michael Fantetti (“Fantetti” or the “Respondent”) recommended qualitatively unsuitable transactions in two customer accounts at PaineWebber Incorporated, currently UBS Financial Services, Inc. (“UBS”).<sup>1</sup> The first cause of the Complaint alleges that, in July 2000, the Respondent recommended that WM

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<sup>1</sup> PaineWebber Incorporated later changed its name to UBS PaineWebber Inc. and then to UBS Financial Services, Inc. The Complaint incorrectly alleges that he was associated with Solomon Smith Barney between September 1999 and October 2002.

and EM liquidate their bond mutual funds and purchase Class B shares of four equity growth funds offered by IDEX. The second cause of the Complaint alleges that, in November 2000, the Respondent recommended that ST liquidate her bond mutual funds and purchase Class B shares of various IDEX growth funds. In both cases, the Complaint alleges that the Respondent's recommendations were unsuitable in light of the customers' financial needs and circumstances, and violated NASD Conduct Rules 2310 and 2110.

The Respondent filed an Answer on July 16, 2004, asserting that his customers demanded that the Respondent purchase growth oriented investments and that he fully explained the risks and costs associated with the recommended funds. The Respondent further asserted that the new investments were suitable. The Respondent waived his right to a hearing and offered to provide sworn testimony and documentation if requested.<sup>2</sup>

On August 2, 2004, the Hearing Officer previously assigned to this proceeding held an Initial Pre-Hearing Conference, at which the Respondent waived his right to a hearing and requested that the matter be decided on written submissions. Thereafter, the Hearing Officer entered an order directing the Respondent to file an Amended Answer and setting deadlines for the parties to file written submissions.<sup>3</sup> On November 4, 2004, Enforcement filed a written submission, which included 26 exhibits. The Respondent filed nothing further.

The Hearing Panel reviewed Enforcement's filing and determined that it did not adequately cover the facts and circumstances surrounding the recommendations Fantetti made to WM and EM in July 2000. Accordingly, the Hearing Panel requested Enforcement to present additional evidence.

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<sup>2</sup> Ans. at 17.

<sup>3</sup> The Order also directed Enforcement to provide the Respondent with an index of all documents in its investigative file and established a procedure for the Respondent to review and copy any of the documents in the investigative file.

On June 8, 2005, the Hearing Panel heard testimony from EM.<sup>4</sup> The hearing was conducted by conference call. Fantetti cross-examined the witness and testified on his own behalf.<sup>5</sup>

Following the hearing, Fantetti moved to reopen the record so that he could challenge EM's credibility. Fantetti contended that she had misrepresented her husband's medical condition in stating that he was not able to participate in the hearing. Fantetti submitted a newspaper article dated May 29, 2005, which reported that WM was expected to participate in an upcoming foot race in Boulder, CO, on Memorial Day, despite his nearly fatal automobile accident last December. The article further stated that WM had been released from the hospital on March 30, 2005, after recovering from 17 broken ribs, a broken pelvic bone, broken collar bones, a fractured skull, and a lacerated liver, kidneys and spleen.

The Hearing Officer denied the Respondent's motion for two reasons. First, the Respondent failed to show that EM mischaracterized her husband's disability. According to EM, her husband's disability arose from his impaired memory caused by the automobile accident, not his physical condition. Second, NASD lacks jurisdiction to compel WM's testimony. At the Hearing Panel's request, Enforcement asked WM to testify, and he declined. Instead, EM, who also had direct, relevant knowledge of the facts and circumstances surrounding the recommendations at issue in this proceeding, volunteered to testify. In conclusion, the Hearing Officer found that Fantetti had not shown a valid reason for re-opening the record and denied the motion.

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<sup>4</sup> References to the hearing transcript are cited as "Tr." followed by the page number.

<sup>5</sup> Although Fantetti had waived his right to a hearing, the Hearing Officer granted him leave to participate at the hearing. On June 28, 2005, Fantetti filed an affidavit that his testimony was truthful.

## **II. Findings of Fact and Conclusions of Law**

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

Between November 1999 and July 2004, Fantetti was registered with UBS as a general securities representative.<sup>6</sup> Fantetti is not currently registered. The record shows that he is on a medical leave of absence from UBS.<sup>7</sup> Prior to joining UBS, Fantetti was associated with several other member firms, including U.S. Bancorp Piper Jaffray, Inc., Smith Barney, Inc., Lehman Brothers, Inc., Prudential Securities Incorporated, Prudential-Bache Securities, Inc., and Dean Witter Reynolds, Inc.<sup>8</sup> Fantetti began his career in the securities industry in 1986.

### **B. Customers WM and EM's Accounts and Finances**

#### **1. Background**

Fantetti became WM and EM's broker in approximately 1988 or 1989, shortly after WM retired.<sup>9</sup> Both were in their early 70s, living in Sun City West, Arizona.<sup>10</sup>

WM and EM wanted to invest their life savings in low-risk investments to supplement their social security income. EM testified that they told Fantetti at the outset that they wanted the least risk that would yield sufficient income for their retirement years.<sup>11</sup> EM also testified that she and her husband were not sophisticated investors, so they put their faith in Fantetti to make the appropriate recommendations.<sup>12</sup> To her knowledge, Fantetti made low-risk investments on their behalf over the first ten years.

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<sup>6</sup> Fantetti is subject to NASD jurisdiction, because he was registered with a member firm at the time of the alleged violations and when Enforcement filed the Complaint.

<sup>7</sup> Fantetti states in his Answer that he is currently on long-term disability with UBS. (Ans. ¶ 2.)

<sup>8</sup> Ex. 1.

<sup>9</sup> Tr. at 8–9.

<sup>10</sup> Ex. 3, at 1–2.

<sup>11</sup> Tr. at 10–11.

<sup>12</sup> Tr. at 12, 15–16. For example, EM testified that she did not understand what a mutual fund was. (Tr. at 17–18.)

Fantetti painted a different picture of his long-term relationship with WM and EM. Fantetti testified that when he first met with WM and EM they presented him with a specific income goal,<sup>13</sup> and he explained that they could not reach that goal without incurring additional risk.<sup>14</sup> Nonetheless, according to Fantetti, WM and EM were adamant in their desire to maximize their income so that they could maintain what he characterized to be a “very up-scale lifestyle.”<sup>15</sup> Thus, Fantetti recommended that they liquidate their investment grade corporate and government bonds and purchase high-yield bond funds.<sup>16</sup>

Between 1989 and 1999, WM and EM periodically met with Fantetti to review their investments. Over this period, EM constantly voiced her concern that their investment income was dropping. In response, Fantetti recommended riskier investments.<sup>17</sup> Fantetti stressed at the hearing, however, that with each recommendation he explained the attendant risk factors to WM and EM.<sup>18</sup> In his opinion, WM and EM were willing to accept the increased risk rather than be seen by their friends as needing to cut back their high standard of living or give up their “lavish vacations.”<sup>19</sup> EM disputes Fantetti’s contention. She testified that Fantetti never mentioned that his recommendations involved any significant risk. If he had, EM claims they would not have followed his recommendations.

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<sup>13</sup> Tr. at 36–37, 62.

<sup>14</sup> *Id.* at 62.

<sup>15</sup> *Id.* at 75. Fantetti did not square his characterization that they enjoyed an “up-scale lifestyle” with the fact that he knew their income did not exceed \$50,000 per year. Indeed, there is no evidence supporting Fantetti’s characterization.

<sup>16</sup> Tr. at 65–66. A substantial portion of the assets WM and EM initially transferred to Fantetti was cash. Although these early recommendations may not have been suitable, Enforcement did not charge the Respondent with making unsuitable recommendations before July 2000 when he recommended that they liquidate their high-yield bond funds.

<sup>17</sup> Tr. at 62–63.

<sup>18</sup> Tr. at 63, 68.

<sup>19</sup> Tr. at 73, 75.

The Hearing Panel finds that Fantetti's testimony regarding WM and EM lacked credibility. Fantetti testified that WM and EM made unreasonable demands for increased income to support their lavish lifestyle, which demands he tried to meet. According to his version of events, no matter how much he cautioned them, they demanded that he recommend more aggressive options so that they could keep up appearances with their friends. In his Answer, Fantetti justified his actions by stating that WM and EM demanded more income from their investments and, therefore, his "recommendation of growth funds was entirely appropriate."<sup>20</sup> In sum, Fantetti portrayed WM and EM as knowledgeable investors who were making informed, independent investment decisions. The evidence, however, does not support Fantetti's testimony.

Fantetti possessed complete information about WM and EM's financial situation. Not only had he been their broker for ten years, but also he had met with them on a regular basis over that period of time. Fantetti knew that WM and EM had modest income, that they could not afford a "lavish" lifestyle, and that they were not sophisticated investors. As he admitted in his Answer, "I knew their level of income, [and] I knew their net worth."<sup>21</sup>

In addition, Fantetti's reference to their second home in Colorado is misleading. Fantetti bolstered his testimony that WM and EM insisted on investing in riskier investments to support their upscale lifestyle by pointing to the fact that they owned a second home in Colorado ski country. However, Fantetti knew this was a mischaracterization because he knew that they had purchased their interest in the condominium by withdrawing funds from their variable annuity, which was valued at approximately \$50,000.<sup>22</sup> Accordingly, Fantetti knew that their equity in the

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<sup>20</sup> Ans. ¶ 5.

<sup>21</sup> Ans. ¶ 5. At his on-the-record interview, Fantetti testified that their primary source of income was social security, which he estimated totaled \$20,000 to \$25,000 per year. (Ex. 2, at 83.)

<sup>22</sup> Ex. 2, at 81 (Fantetti on-the-record interview).

condominium was quite small, certainly not enough to suggest that they could afford to concentrate their retirement funds in the manner Fantetti recommended.

For the foregoing reasons, the Hearing Panel rejects Fantetti's testimony regarding WM and EM and credits EM's testimony. The Hearing Panel finds that WM and EM were unsophisticated investors who relied upon Fantetti to recommend appropriate, low-risk investments that would meet their retirement needs.<sup>23</sup> WM and EM routinely followed Fantetti's recommendations.

The Hearing Panel further finds that WM and EM's income was limited and their expenses exceeded their income. They received \$1,300 per month from Social Security and approximately \$250 per month in earned income. They relied on their investments for the balance of their income. WM and EM's tax returns show that they received dividend income of \$27,956 in 1999 and \$13,071 in 2000.<sup>24</sup> Their expenses, on the other hand, totaled approximately \$3,800 per month.<sup>25</sup>

## **2. The UBS Accounts**

When Fantetti joined UBS in November 1999, WM and EM transferred their investment accounts with him. They opened three accounts: a joint trust account and an individual retirement account for each of them.<sup>26</sup> The joint account was valued at approximately \$294,500, which was invested primarily in high-yield bond funds.<sup>27</sup> The

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<sup>23</sup> The Hearing Panel further notes that Fantetti took the same approach in defending his recommendation to ST in December 2000. Fantetti portrayed ST as a constant complainer who could not be satisfied by any broker. (Ans. ¶ 10.) According to Fantetti, like WM and EM, ST demanded more income from her accounts, and he tried to meet those demands by recommending the IDEX growth equity funds after fully apprising her of the market risks associated with the funds. In light of Fantetti's mischaracterization of WM and EM's finances and situation, the Hearing Panel gives little weight to Fantetti's similar claims concerning ST.

<sup>24</sup> Ex. 7, at 12, 13.

<sup>25</sup> *Id.* at 6, 13.

<sup>26</sup> Ex. 3, at 1; Ex. 4, at 1; Ex. 5, at 1.

<sup>27</sup> Ex. 3, at 27; Tr. at 15–16. The bond funds in the joint account were the following high-yield (or junk bond) funds: Eaton Vance High Income Fund Class B; Federated International High Income Fund Class B; and Federated High Income Bond Fund Class B.

balance of the holdings in the joint account was comprised of notes valued at \$1,680 and a corporate bond with no assigned market value. The combined value of the IRA accounts, which were invested in the AIM Global Aggressive Growth fund, was approximately \$77,000.<sup>28</sup> In addition, they owned an annuity valued at approximately \$25,000 that they held outside their securities account.<sup>29</sup>

According to the UBS account applications, WM and EM's total net worth, exclusive of their residence,<sup>30</sup> was \$500,000; their liquid net worth was approximately \$200,000; and their combined annual income was \$48,000.<sup>31</sup> The account documentation further reflects that their investment objective was "current income and capital appreciation" and that their risk profile was "moderate."<sup>32</sup>

### **3. Fantetti's Recommendations to WM and EM in July 2000**

In July 2000, Fantetti met with WM and EM and recommended that they sell their high-yield bond funds and purchase IDEX growth funds. EM testified that he explained that he was moving several of his clients to IDEX, and he showed them a hypothetical illustration of the returns they could expect if they invested in four funds through IDEX.<sup>33</sup> Fantetti obtained the hypothetical from IDEX.<sup>34</sup> In summary, the hypothetical showed that an initial investment of \$40,000 on October 2, 1995, divided equally among the four recommended funds, would have earned a return of 31.12% by March 31, 2000, while allowing annual income withdrawals of 10% per year.<sup>35</sup> According to EM, Fantetti

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<sup>28</sup> Ex. 4, at 15; Ex. 5, at 9.

<sup>29</sup> The annuity appears intermittently on their account statements.

<sup>30</sup> The Respondent knew that WM and EM owned their residence and an interest in a condominium in Colorado. (Ex. 2, at 77.) At the hearing, EM testified that their interest in the condominium, which they owned with their daughter and her husband, was insignificant. (Tr. at 26.)

<sup>31</sup> Ex. 3, at 1; Ex. 4, at 1; Ex. 5, at 1.

<sup>32</sup> *Id.*

<sup>33</sup> Tr. at 19, 21; Ex. 7, at 14–18.

<sup>34</sup> Ex. 2, at 84 (Fantetti on-the-record interview).

<sup>35</sup> Ex. 7, at 15.

explained that the IDEX program would allow them to meet their income needs and obtain principal appreciation of 10% to 12% per year.<sup>36</sup>

At his on-the-record interview, Fantetti testified that he recommended the IDEX funds to WM and EM because he believed that the market had “corrected,” resulting in a “buying opportunity.”<sup>37</sup> At least one of their bond funds had dropped substantially over the previous 18 months, and Fantetti believed that the IDEX funds would provide WM and EM with a consistent income stream.<sup>38</sup> Based on his predicted 10% to 12% rate of return, Fantetti advised WM and EM that they would be in a better position in 10 years if they purchased the recommended IDEX growth funds.<sup>39</sup> Fantetti claimed in his on-the-record interview that he explained the market risks associated with purchasing equity funds although he did not quantify the potential loss they could sustain in a down market.<sup>40</sup>

WM and EM followed Fantetti’s recommendations, and on July 18, 2000, they sold their bond funds and purchased four IDEX growth funds for a total of \$285,964.<sup>41</sup> At that point, 98.9% of WM and EM’s account was invested in growth-oriented mutual funds, 0.6% in corporate notes, and 0.4% in a money market account. Viewed alternatively, with the purchase of the IDEX funds, 92.5% of their liquid net worth was invested in growth funds.

WM and EM also followed Fantetti’s recommendation to withdraw \$2,500 per month from their IDEX funds.<sup>42</sup> As a result, when the market declined, WM and EM had to make principal redemptions from the funds to meet their living expenses.

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<sup>36</sup> Tr. at 19; Ex. 2, at 85 (Fantetti on-the-record interview).

<sup>37</sup> Ex. 2, at 80.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 85.

<sup>40</sup> *Id.* at 84.

<sup>41</sup> Ex. 3, at 31–36.

<sup>42</sup> Ex. 3, at 40, 91.

#### 4. The IDEX Funds WM and EM Purchased

According to the March 2000 IDEX prospectus, the funds Fantetti recommended had the following characteristics:

The JCC Growth Fund's stated objective was "growth of capital." It was described as appropriate for investors "who want capital growth in a broadly diversified stock portfolio, and who can tolerate significant fluctuations in the value of their investment." "Realization of income" was characterized as "not a significant investment consideration" and "incidental to [the fund's] objectives."<sup>43</sup>

The prospectus described the Janus Global Fund as appropriate for investors "who want capital growth without being limited to investments in US securities, and who can stand the risks associated with foreign investing." The fund's stated objective was "long term growth of capital in a manner consistent with preservation of capital."<sup>44</sup>

The JCC Capital Appreciation Fund's objective was stated as "long-term growth of capital." Like the global fund, the prospectus stated that this fund was appropriate for "investors who want capital growth and can stand the risks associated with common stock investments." The prospectus also identified the fund's principal focus on medium-sized companies as a risk, noting that such companies "present additional risks because their earnings are less predictable, their share prices more volatile, and their securities less liquid than larger, more established companies." In addition, the prospectus advised that the fund was "non-diversified."<sup>45</sup>

Finally, the prospectus described the Alger Aggressive Growth Funds as "appropriate for investors who seek capital growth aggressively, and who can tolerate wide swings in the value of their investment." The prospectus identified three specific risks investors should consider before investing: the risk of "investing aggressively"; the

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<sup>43</sup> Ex. 12, at 5–9.

<sup>44</sup> *Id.* at 10–14.

<sup>45</sup> *Id.* at 19–23.

risk of leveraging, which could make the fund more volatile; and the risks associated with the purchase of convertible securities.<sup>46</sup>

### **C. Customer ST**

Fantetti also had been ST's broker for several years before he joined UBS. Fantetti acquired ST as a client while he was associated with Piper Jaffray. At the time she opened her first account at UBS, ST was 75 years old and retired.<sup>47</sup> She lived in Sun City West, Arizona.

#### **1. ST's Accounts and Finances**

In December 1999, ST opened an individual retirement account at UBS, and three months later, she opened an individual account. The account statements show that the retirement account was worth approximately \$13,000 and invested in the Alliance North American Government Income Trust Class A fund, and the individual account was worth approximately \$110,000 invested primarily in high-yield bond funds.<sup>48</sup>

The new account documentation stated that, exclusive of her residence, ST's net worth was between \$300,000 and \$350,000 and that her annual income was between \$30,000 and \$40,000.<sup>49</sup> The new account forms further reflected that her investment objective was capital and current income appreciation and that she had a moderate risk tolerance.<sup>50</sup> Fantetti testified at his on-the-record-interview that his knowledge of ST's financial situation was limited to the information on the new account

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<sup>46</sup> *Id.* at 28–32.

<sup>47</sup> Ex. 13, at 1; Ex. 14, at 1; Ex. 2, at 14.

<sup>48</sup> Ex. 13, at 2; Ex. 14, at 7.

<sup>49</sup> Ex. 13; Ex. 14.

<sup>50</sup> *Id.* The Respondent testified during the investigation that his sales assistant prepared all new account documentation. (Ex. 2, at 21–23 (Fantetti on-the-record interview).)

documentation and that he did not question her about her financial situation before he recommended that she liquidate her holdings and purchase IDEX funds.<sup>51</sup>

ST's income in 2000 and 2001 was modest. Her tax returns reflect that on average her monthly income was approximately \$2,200 per month. She received \$16,123 from Social Security in 2000 and \$17,136 in 2001. In addition, she received \$10,476 in dividends and other income in 2000 and \$991 in 2001.<sup>52</sup> ST could not provide NASD staff with reliable information about her monthly expenses.

After Fantetti implemented his recommendations in December 2000, ST's entire net liquid worth was invested in equity-based securities, including four growth sub-accounts reflected on her annuity statement.<sup>53</sup>

## **2. Fantetti's Recommendations to ST**

ST met with Fantetti in December 2000 to review her portfolio. According to Fantetti she wanted to increase her income.<sup>54</sup> Fantetti recommended that she sell the bond funds in her account and purchase four IDEX funds. At the meeting, Fantetti gave ST an illustration prepared by his sales assistant of the five-year hypothetical return that would have been earned if, in October 1995, someone had invested \$95,740 in the four IDEX funds Fantetti recommended.<sup>55</sup> The illustration showed average rates of return of 31.5%, but Fantetti cautioned ST that she should not expect that kind of return; rather, he told her that she could realize a 10% to 12% return. Several days later, ST agreed to purchase the recommended IDEX funds.<sup>56</sup>

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<sup>51</sup> Ex. 2, at 22, 24.

<sup>52</sup> Ex. 16, at 4, 28.

<sup>53</sup> Ex. 20. Approximately 40% of the variable annuity was invested in the Janus Growth Fund.

<sup>54</sup> Ex. 2, at 23–24 (Fantetti on-the-record interview).

<sup>55</sup> *Id.* at 26, 29–30; Ex. 17.

<sup>56</sup> Ex. 2, at 26, 28 (Fantetti on-the-record interview).

### 3. The IDEX Funds ST Purchased

The IDEX funds Fantetti recommended to ST had the following characteristics:

The IDEX Pilgrim Baxter Technology Fund is listed in the index of the December 2000 prospectus as an aggressive growth fund.<sup>57</sup> The prospectus stated that it was appropriate for investors “who [were] willing to accept the higher risk of loss inherent in a fund that invests in technology company securities which may be strongly affected by worldwide scientific and technological developments and governmental policies, in exchange for the potential of greater capital appreciation.” According to the prospectus, the fund’s objective was capital appreciation. Specific risks identified included the risk of non-diversification and the volatility of small-company and technology stocks.<sup>58</sup>

The prospectus for the IDEX Gabelli Global Growth Fund stated that it “may be appropriate for investors who are long-term investors and who seek growth of capital in a diversified portfolio of stocks of companies located inside and outside the United States.” Among the specific risks identified in the prospectus were the exposure to political, social, and economic developments abroad, and risks associated with investments in communications and entertainment stocks.<sup>59</sup>

The prospectus for the IDEX GE US Equity Fund described it as “appropriate for investors who seek long-term growth from a diversified fund that combines ‘value’ and ‘growth’ investment management styles.” The prospectus cautioned that the investor “should be comfortable with the price fluctuations of a stock fund and be willing to accept higher short-term risk for potential long-term returns.”<sup>60</sup>

Finally, ST invested in the IDEX JCC Growth Fund, which is described above in the discussion of the funds WM and EM purchased from Fantetti.

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<sup>57</sup> Ex. 19, at 4.

<sup>58</sup> *Id.* at 34–36.

<sup>59</sup> *Id.* at 39–41.

<sup>60</sup> *Id.* at 44–45.

When ST purchased the foregoing IDEX funds, she set up a systematic withdrawal of \$800 per month for the individual account.<sup>61</sup> Her account statements reflect that this amount was withdrawn from the account on a monthly basis through May 2002.

#### **D. Suitability**

NASD Conduct Rule 2310 requires that a registered representative have reasonable grounds for believing, on the basis of information furnished by the customer, and after reasonable inquiry concerning the customer's investment objectives, financial situation, and needs, that the recommended transaction is not unsuitable for the customer.<sup>62</sup> A broker's recommendations "must be consistent with his customer's best interests, and he or she must abstain from making recommendations that are inconsistent with the customer's financial situation. A recommendation is not suitable merely because the customer acquiesces in the recommendation."<sup>63</sup> In addition, a recommendation that results in concentration in an investment that is more aggressive than a customer's circumstances dictate is unsuitable.<sup>64</sup>

Here, the Complaint alleges that Fantetti improperly recommended that his clients invest virtually all of their liquid assets in growth-oriented mutual funds, which resulted in an over concentration in growth-oriented equity investments, and an unreasonable exposure to risk of loss.<sup>65</sup>

Apart from insisting that he merely acceded to his customers' demands for increased income, Fantetti presented a two-prong defense of his recommendations. First,

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<sup>61</sup> Ex. 2, at 43 (Fantetti on-the-record interview).

<sup>62</sup> *Dane S. Faber*, Exchange Act Release No. 49,216, 2004 SEC LEXIS 277, at \*23-24 (Feb. 10, 2004).

<sup>63</sup> *Id.*

<sup>64</sup> *See Clinton Hugh Holland, Jr.*, 52 S.E.C. 562, 566 (1995), *aff'd sub nom, Holland v. SEC*, 105 F.3d 665 (9th Cir. 1997) (table format); *see also Jack H. Stein*, Exchange Act Release No. 47,335, 2003 S.E.C. LEXIS 238 (Feb. 10, 2003) and *James B. Chase*, Exchange Act Release No 47,476, 2003 SEC LEXIS 566 (Mar. 10, 2003).

<sup>65</sup> Cause One of the Complaint also alleges that Fantetti's recommendations to WM and EM that they purchase Class B mutual funds shares instead of Class A were unsuitable. However, the Hearing Panel finds that there is insufficient evidence in the record to support this claim.

in his Answer, Fantetti cited the following five factors, which he said he considered in making the recommendations:<sup>66</sup>

- Bond fund performance was disappointing in 1998 and 1999;
- Investors were “abandoning bond funds in droves;”
- The money leaving bond funds was moving into stocks;
- The recent drop in stock prices represented a “short-term decline” and that the market would rebound shortly; and
- The theory of “buying on [market] dips” was a recognized investment strategy.

Fantetti further stated in his Answer that numerous commentators supported the theory of “buying on [market] dips” and that the funds he recommended received glowing reviews.<sup>67</sup> But Fantetti cannot justify his recommendations to these specific customers by pointing to such generalities. He was required to take into account his customers’ investment objectives, financial situations, and needs. This he did not do. None of the foregoing factors relate to a customer’s specific financial situation. Thus, even if he were correct in his assessment of the bond market, he failed to take his customers’ best interests into consideration when he recommended that they invest all of their liquid assets in equity growth funds.

Second, Fantetti blamed the losses suffered by his customers on the World Trade Center attack and the corporate scandals of 2002, such as Enron and Worldcom. However, the drop in their accounts occurred before these developments. When WM and EM sold their IDEX funds in April 2001, the prices were down 40% to 60% and their losses, net of withdrawals, were nearly half of what they had invested.<sup>68</sup> ST’s accounts

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<sup>66</sup> Ans. ¶ 5, at 4.

<sup>67</sup> *Id.* ¶ 5, at 4–5. Fantetti stated that “many of the funds [he] recommended had achieved dizzying results in 1999.” (Ans. ¶ 5, at 6.)

<sup>68</sup> *See* Ex. 3, the account statements, which show the purchases, withdrawals and eventual liquidations, and the staff’s loss schedule, taken from the statements, which is Ex. 11.

likewise experienced significant declines before these events. As of August 30, 2001, the prices of her IDEX funds had dropped between 15.5% and 59%, averaging a decline of approximately 33%.<sup>69</sup>

In conclusion, the Hearing Panel finds that the recommendations Fantetti made to WM and EM in July 2000, and those he made to ST in December 2000, were unsuitable. Fantetti should not have placed all of his customers' investments in growth-oriented funds, as he did. The risks associated with the investments Fantetti recommended were unreasonable, and the concentration of their investments in growth funds was unsuitable. Accordingly, the Hearing Panel finds that Fantetti violated NASD Conduct Rules 2310 and 2110.

### **III. Sanctions**

The NASD Sanction Guidelines ("Guidelines") for Unsuitable Recommendations suggest a fine of \$2,500 to \$75,000.<sup>70</sup> In addition, the Guidelines recommend a suspension in any or all capacities for 10 business days to one year, and in egregious cases a longer suspension of up to two years or a bar. In setting specific sanctions, the Guidelines further direct adjudicators to look at the factors enumerated in the "Principal Considerations in Determining Sanctions."<sup>71</sup> Reviewing those factors, the Hearing Panel concludes that Fantetti's misconduct was serious.

Fantetti caused significant harm to clients with whom he had established relationships and exposed them to considerable risk. His unsuitable recommendations resulted in substantial losses to elderly and vulnerable customers.<sup>72</sup> In addition, Fantetti

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<sup>69</sup> See Ex. 13 and Ex. 14, the account statements, which reflect the share prices for the funds, and the staff's schedule of losses as of May 2002, which is Ex. 21.

<sup>70</sup> NASD Sanction Guidelines 99 (2005 ed.).

<sup>71</sup> See *Id.* at 6-7.

<sup>72</sup> WM and EM ultimately lost \$139,327.23 on the sale of their IDEX funds (Ex. 11). The record is not clear as to why they sold the shares when they did or what their losses would have been had Fantetti recommended a more conservative plan. ST was paid \$32,000 in a settlement with UBS to cover her losses. (Ex. 21.)

has not accepted responsibility for his misconduct. Not only has he continued to insist that he acted reasonably, he has attempted to blame his customers for their losses. He characterizes ST as a constant complainer, incapable of being satisfied by any broker, and WM and EM as extravagant spenders with an insatiable desire for income, which left him no choice but to gamble with their money in an effort to meet their demands. These arguments evidence a misunderstanding of his suitability obligations.

Based on these considerations, the Hearing Panel will suspend Fantetti for one year from association with any member firm in any capacity and fine him \$25,000.<sup>73</sup>

#### **IV. Conclusion**

Respondent Michael Fantetti violated NASD Conduct Rules 2310 and 2110 by making unsuitable recommendations to WM and EM and ST. For these violations, Fantetti is suspended for one year from association with any member firm in any capacity and fined \$25,000.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of NASD, except that if this Decision becomes the final disciplinary action of NASD, the suspension shall become effective on Monday, September 5, 2005.

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Andrew H. Perkins  
Hearing Officer  
For the Hearing Panel

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<sup>73</sup> Enforcement recommended a six-month suspension and a \$17,500 fine, including disgorgement of the excess commissions he earned from the sale of Class B shares as opposed to Class A shares. The Hearing Panel determined that a longer suspension and a higher fine were warranted due to the seriousness of his misconduct. The Hearing Panel did not order disgorgement, however, because there was insufficient evidence to support Enforcement's contention that he should have recommended Class A shares. In addition, because the evidence does not adequately quantify the losses WM and EM suffered as a direct result of the Respondent's recommendations, the Hearing Panel is unable to order restitution. Finally, ST recovered her losses, therefore no restitution is ordered as to her.

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