NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ANTHONY CIPRIANO (CRD No. 2998665), Respondent.	Disciplinary Proceeding No. C07050029 Hearing Officer—Andrew H. Perkins **HEARING PANEL DECISION** August 10, 2006

The Respondent failed to disclose material financial information concerning a speculative stock he recommended to four customers, and made unreasonable price predictions for the stock, all in violation of Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. For these violations, the Respondent is suspended in all capacities for two years and fined $40,000. In addition, the Respondent is required to re-qualify and is ordered to pay costs.

Appearances

Joel R. Beck, Regional Counsel, Atlanta, GA, and Sean W. Firley, Senior Regional Attorney, Boca Raton, FL (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel) for the Department of Enforcement.

Timothy Feil, Esq., Bayshore, NY, for Anthony Cipriano.

DECISION

This case arose from an investigation into alleged fraud in connection with the sale of Sequiam Corporation stock by brokers at Clark Street Capital, Inc. ("Clark Street"). The Complaint charged that Anthony Cipriano made material misrepresentations and failed to provide material information to four customers when he recommended that they purchase Sequiam Corporation stock and that he thereby violated Section 10(b) of the Securities Exchange

Act of 1934, Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110. The Department of Enforcement ("Enforcement") filed the Complaint on April 18, 2005.[1]

On May 12, 2005, Cipriano filed an Answer to the Complaint and requested a hearing. The hearing was held in New York, NY, on March 14 and 15, 2006, before a Hearing Panel that included the Hearing Officer and two current members of the District 10 Committee.

For the reasons discussed below, the Panel finds that Cipriano violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110.

I. FINDINGS OF FACT

A. Anthony Cipriano

Cipriano entered the securities industry in January 1998. In June 2001, he joined Clark Street where he was registered as a General Securities Representative until he left in June 2003. Thereafter, Cipriano was registered with Continental Broker-Dealer Corp. from June 2003 until January 2004, with LH Ross & Company, Inc. from February 2004 until October 2004, with Wang Investment Associates, Inc. from October 2004 until August 2005, and with Andrew Garrett, Inc. from August 2005 until January 2006. On January 12, 2006, Cipriano joined World Equity Group, Inc. At the time of the hearing, Cipriano was employed by World Equity Group and registered as a General Securities Representative.[2] Cipriano has no disciplinary record.[3]

B. Sequiam Corporation

Sequiam Corporation was formed through a reverse merger effective April 1, 2002 between Wedge Net Experts, Inc. ("Wedge Net") and Sequiam, Inc., two developmental stage

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[1] The Complaint also named Anthony Whitter as a respondent. However, Whitter failed to file an Answer or appear at the Initial Pre-Hearing Conference on June 23, 2005. Accordingly, the Hearing Officer found Whitter in default. The Hearing Officer will issue a separate Default Decision against Whitter.

[2] C 27; Tr. 229. In this decision, exhibit numbers preceded by "C" refer to Enforcement's exhibits, and exhibits preceded by "R" refer to Cipriano's exhibits. "Tr." refers to the hearing transcript.

[3] C 27; Tr. 270.

companies.[4] Three months later, Sequiam Corporation acquired Brekel Group, Inc., which was controlled by Nicholas Van den Brekel and Mark L. Mroczkowski, the founders of Sequiam, Inc.

1. Sequiam, Inc.

Sequiam, Inc. was a privately held Delaware corporation based in Orlando, Florida that had been founded by Nicholas Van den Brekel and Mark L. Mroczkowski in January 2001.[5] Van den Brekel and Mroczkowski founded the company to research, develop, produce, and market a document management software product.[6] Since its inception, Sequiam, Inc.'s "primary activities had consisted of research and development, and software production activities."[7] Sequiam, Inc. had not generated any significant revenues through June 30, 2002.[8]

2. Wedge Net

Wedge Net had been organized under the laws of the State of California in September 1999.[9] Wedge Net's public SEC filings describe its proposed business as the provision of computer and Internet consulting and technical support services and access to an on-line database of computer and software information through a web site on the Internet.[10] At the time of the merger with Sequiam, Inc., Wedge Net had not completed the development of its proposed Internet site, and it operated rent free out of the home of one of its founders.[11] Wedge Net's

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[4] A development stage enterprise is defined by Statement of Financial Accounting Standards No. 7 as "a company that: [d]evotes substantially all of its efforts to establishing a new business and has not yet begun planned principal operations; or [h]as begun operations, but has not generated significant revenue." ACCOUNTING AND REPORTING BY DEVELOPMENT STAGE ENTERPRISES, Statement of Financial Accounting Standards No. 7 (Financial Accounting Standards Bd. 1975), *available at* http://www.fasb.org/pdf/fn%207.pdf.

[5] C 18 at 3; C 19 at 9; C 21 at 5; Tr. 197.

[6] C 21 at 5.

[7] *Id.*

[8] *Id.*

[9] C 18 at 2.

[10] *Id.* at 3.

[11] *Id.* at 11.

public filings further show that it had generated only minimal service revenue from its inception through December 31, 2001—$90 in 2000 and $1,657 in 2001.[12] Over the same period, Wedge Net posted a net loss of $94,420.[13]

Wedge Net elected to pursue the merger with Sequiam, Inc. because, during the first quarter of 2002, Wedge Net did not have sufficient capital to continue operations.[14] Wedge Net did not have "any available credit, bank financing or other external sources of liquidity."[15]

Upon completion of the merger, Wedge Net changed its name to Sequiam Corporation.[16] Van den Brekel became the President and Chief Executive Officer, and Mroczkowski became the Chief Financial Officer of the new entity.[17] In addition, Van den Brekel assumed the position of chairman of Sequiam's board of directors.[18]

3. Brekel Group

On July 19, 2002, Sequiam Corporation acquired Brekel Group, Inc., a Delaware corporation controlled by Van den Brekel and Mroczkowski.[19] Sequiam Corporation's public filings disclosed that it pursued this acquisition because it "continued to need additional capital and sources of liquidity."[20] Sequiam Corporation's management expected the acquisition of

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[12] *Id.* at 12, 17.

[13] *Id.* at 12.

[14] C 20 at 7.

[15] *Id.*

[16] C 19 at 9.

[17] C 21 at 7.

[18] *Id.*

[19] Sequiam Corporation acquired Brekel Group through a tax-free reorganization. Sequiam Corporation issued additional common stock in exchange for an equal number of issued and outstanding shares of Brekel Group. R 2 at 6.

[20] C 21 at 8.

Brekel Group would give Sequiam Corporation greater ability to attract new financing though traditional means.[21]

Brekel Group was organized in February 2000 and was based in Orlando, Florida. Its primary business was digital on-demand publishing services.[22] Brekel Group, through its BGI Sports division, also had a contract with the World Olympian Association ("WOA")[23] to develop, create, host, and maintain its Internet site. Brekel Group was obligated to develop the Internet site at Brekel Group's expense. In return, Brekel Group would receive 35% of sponsorship revenues and 35% of the net proceeds from the sale of merchandise through WOA's Internet site.[24] In the public filings Sequiam Corporation made with the SEC in June 2002, Sequiam Corporation disclosed that it did not expect to begin receiving any revenue under the WOA contract until sometime in 2003.[25]

In connection with the Brekel Group merger, Sequiam Corporation booked over $10 million in goodwill.[26] Thus, the Brekel Group merger increased Sequiam Corporation's total assets from $355,093 as of June 30, 2002, to $12.058 million as of September 30, 2002.[27] Sequiam Corporation reported the goodwill on its Form 10-QSB dated September 30, 2002. However, in February 2003, the SEC required Sequiam Corporation to delete the goodwill from its balance sheet because the merger with Brekel Group was a related-party transaction.[28] With

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[21] *Id.* at 9.

[22] C 20 at 8.

[23] The WOA is an organization comprised of former Olympian athletes.

[24] C 21 at 9.

[25] *Id.*

[26] Tr. 201-02. The value attributed to goodwill represented the excess of the purchase price ($10,946,150) over the estimated fair value of the net assets Sequiam Corporation acquired ($841,966). C 22 at 6.

[27] C 21 at 3; C 22 at 3.

[28] Tr. 202.

the required amendment, Sequiam Corporation's total assets decreased to approximately $1.953 million.[29]

C. Cipriano's Sales of Sequiam Corporation's Stock

Sequiam Corporation was listed on the NASDAQ OTC Bulletin Board. Between June and September 2002, the approximate price range for Sequiam Corporation stock was $0.75 to $2.00 per share.[30] Sequiam Corporation posted total sales of just $1,825 for the first three months of 2002,[31] and $213,315 for the first six months of 2002, most of which was generated from consulting services.[32] Sequiam Corporation reported a net loss of $719,815 for the first nine months of 2002.[33] The company was not profitable at any point relevant to this proceeding.

Cipriano began recommending and selling Sequiam Corporation stock to his customers in or about September 2002 and continued to recommend it thereafter notwithstanding the company's poor performance and financial condition. Cipriano testified that he recommended the stock to 200 of his customers, or approximately half of the customers Clark Street had assigned to him following its acquisition of Royal Hutton.[34] Twenty-eight of Cipriano's customers ultimately purchased shares of Sequiam Corporation stock.[35] The Complaint charged that Cipriano made material misrepresentations and omitted to disclose material information in connection with sales to four of those customers: H.C., D.A., J.G., and B.H.

[29] Tr. 203.

[30] C 23.

[31] Tr. 130.

[32] Tr. 130; C 21.

[33] C 22 at 5.

[34] When Clark Street acquired Royal Hutton, some of the brokers did not join Clark Street. As a result, a number of customers were left without a broker covering their account. Clark Street assigned approximately 400 of those accounts to Cipriano. Tr. 315-16.

[35] Tr. 239-40.

Cipriano testified that he began recommending Sequiam Corporation stock shortly after the Brekel Group acquisition and that he based his decision to do so on three assumptions he drew from information supplied by Sequiam Corporation and the principals at Clark Street.[36] First, Cipriano concluded that Sequiam Corporation had a solid business plan and that the company was "moving forward" because its net assets jumped significantly with the Brekel Group transaction.[37] The increase was attributable almost entirely to the amount of goodwill the company booked because of the transaction. Second, Cipriano concluded that Sequiam Corporation would likely generate substantial revenue from the WOA contract.[38] And third, Cipriano concluded that Clark Street was "behind Sequiam" and that the principals at Clark Street "liked the company's business plan."[39] Cipriano drew this assumption from the fact that Clark Street had entered into a consulting contract with Sequiam Corporation.

Cipriano did little if anything however to verify his assumptions about the company and its prospects. For example, Cipriano did not review Sequiam Corporation's audited financial statements or look at any of the publicly available information filed with the SEC.[40] And he never reviewed the WOA contract or made any inquiry regarding its terms. Indeed, he admitted that he was not familiar with the terms of the contract. Similarly, Cipriano did not review the terms of the consulting agreement between Clark Street and Sequiam Corporation dated June 2002 (the "Consulting Agreement").[41] Significantly, he claimed not to know that the Consulting Agreement provided that Clark Street was to receive warrants to purchase Sequiam Corporation

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[36] Tr. 232.

[37] Tr. 275.

[38] Tr. 236.

[39] Tr. 236.

[40] Tr. 232-33, 287, 304. Cipriano did testify that he saw a private placement memorandum in the office for Sequiam Corporation that had such financial information attached. Tr. 232-33. But he could not recall reviewing it. Indeed, Cipriano did not appear to understand corporate financial statements.

[41] C 17; Tr. 131, 133.

stock as payment for Clark Street's services.[42] According to Cipriano, his understanding of the Consulting Agreement was limited to the information he received from his managers, which did not include any specifics of the relationship between Clark Street and Sequiam Corporation.

Cipriano further testified that he concluded that it was prudent to begin recommending Sequiam Corporation stock to his customers because the stock was no longer classified as a penny stock under the applicable SEC rules and regulations due to its increase in net assets following the Brekel Group transaction.[43] Cipriano testified that he had a policy against recommending penny stocks and that he told his managers he therefore would not recommend the stock despite Clark Street's efforts to encourage him to do so. However, when the principals at Clark Street told Cipriano that the stock no longer fell under the penny stock rules and regulations, he concluded that he would recommend the stock.[44] In reaching this conclusion, Cipriano relied on his managers' statements and an attorney's opinion letter written for Sequiam Corporation dated September 9, 2002 ("Penny Stock Opinion Letter").[45]

The Penny Stock Opinion Letter stated that Sequiam Corporation's securities were excluded from regulation under the Penny Stock Reform Act of 1990 and related SEC rules and

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[42] Under the terms of the Consulting Agreement, Clark Street was required to: (1) review, analyze, and assess the company's financial requirements; (2) assist the company with financing arrangements; (3) introduce the company to professional analysts and money managers; (4) assist the company in developing corporate partnership relationships; and (5) assist the company in becoming listed on the American Stock Exchange, LLC. In return, Clark Street was to receive warrants to purchase Sequiam Corporation stock at specific prices over the course of one year beginning with the date of the Consulting Agreement. C 17 at 6, 12.

[43] In 1990, Congress passed the Securities Enforcement Remedies and Penny Stock Reform Act "Penny Stock Reform Act," which granted the SEC new authority and tools to protect investors and deter fraud and abuse in the market for low-priced, publicly traded securities. "Penny Stock" commonly refers to securities selling for less than $5 per share. In 1990, a definition of the term "penny stock" was added to Section 3 of the Exchange Act, 15 U.S.C. 78c(a)(51). Pub. L. No. 101-429 § 503, 104 Stat. 931, 952. See generally William H. Lash, III, *Loose Change: The Campaign for Penny Stock Reform*, 60 UMKC L. Rev. 1, 1-2 (1991), and the House Committee Report on the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, H.R. Rep. No. 101-617, at 9 (1990), reprinted in 1990 U.S.C.C.A.N. 1408, 1411.

[44] Tr. 271, 288. In fact, customer records reflect that he recommended and sold Sequiam Corporation stock as early as August 27, 2002, which was before the date of the Penny Stock Opinion Letter. Tr. 306-08.

[45] R 6.

regulations because the company's tangible net assets exceeded $2 million as of December 31, 2001, six months before the Brekel Group transaction.[46] But Cipriano knew the letter was inaccurate. Although the letter referenced public information reflecting tangible net assets in excess of $2 million, Sequiam Corporation's publicly filed financial statements showed total assets of just $150,030.[47] Indeed, Cipriano acknowledged that the documents he saw showed that Sequiam Corporation's total assets were no greater than approximately $300,000 before the Brekel Group transaction.[48] In addition, Cipriano acknowledged that the company's financial statements were unaudited for 2001, not audited as stated in the Penny Stock Opinion Letter.

Despite Cipriano's knowledge of the obvious discrepancies and errors in the Penny Stock Opinion Letter, he accepted its conclusion. Cipriano did not calculate whether Sequiam Corporation had *net* tangible assets greater than the required minimum to qualify for the exception to the penny stock rules even though he knew that goodwill was not a tangible asset.[49] In fact, Cipriano made no evaluation of whether he needed to comply with the penny stock rules before he began recommending and selling Sequiam Corporation stock. In his view, he was not responsible to make that determination, his firm was.[50] Thus, he blindly accepted the inconsistent representations made by his managers and Sequiam Corporation.[51] Cipriano could not explain why he relied on the Penny Stock Opinion Letter when he knew it contained inaccuracies.[52]

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[46] Exchange Act Rule 15c2-6 imposed sales-practice requirements on broker-dealers that recommend transactions in certain low-priced securities. At the time relevant to this proceeding, the Rule excluded from its coverage securities issued by a company with $2 million or more in net tangible assets.

[47] R 7 at 21.

[48] Tr. 255.

[49] Tr. 357.

[50] Tr. 272.

[51] Cipriano testified that he attended a presentation given by Sequiam Corporation on Long Island with approximately 40 other brokers where Sequiam Corporation distributed a broker fact sheet and the Penny Stock Opinion Letter. Tr. 273-74.

[52] Tr. 324-25.

Notwithstanding the fact that Cipriano failed to investigate whether Sequiam Corporation's and Clark Street's representations concerning the company had a reasonable basis, Cipriano used the information they supplied him when he recommended the stock to H.C., D.A., J.G., and B.H. Cipriano told his customers that Clark Street was behind the company and stressed Clark Street's positive assessment of Sequiam Corporation. In addition, he pointed to Sequiam Corporation's jump in assets from $300,000 to $12 million, and the monetary potential the company would derive from the WOA contract, to support what he termed an "optimistic" assessment of the company.[53] Furthermore, Cipriano told his customers that Sequiam Corporation's jump in assets demonstrated that the company had a good business plan.[54] Based on this optimistic assessment, Cipriano recommended his customers purchase the stock and "hold [it] for a couple of months, see what it does."[55]

H.C. and J.G. testified that Cipriano went beyond simply voicing an optimistic view of Sequiam Corporation's prospects. They testified that Cipriano predicted substantial short-term increases in the stock's price per share without disclosing the attendant risks or the fact that Clark Street had entered into a consulting agreement with the company.[56] For example, H.C., a 61-year-old retired chemical engineer with little investment experience, testified that Cipriano told him that Sequiam Corporation's revenues were increasing and that its stock was moving up quickly.[57] H.C. further testified that Cipriano did not discuss the company's finances in any detail or mention any particular risk outside of that which one would typically associate with the purchase of stock.[58] Cipriano implied that it was a "normal stock with a strong potential upside";

[53] Tr. 255, 382.

[54] Tr. 254-55.

[55] Tr. 239.

[56] D.A.'s recall of what Cipriano said in September 2003 was not very good. Accordingly, the Panel did not rely on his testimony in reaching its decision.

[57] Tr. 23.

[58] Tr. 23-24.

"it had great potential and it would double or triple."[59] H.C. testified that he would not have bought the stock if Cipriano had told him about Sequiam Corporation's relationship with Clark Street.[60] Cipriano also did not tell him that it was a penny stock.

H.C. purchased 1500 shares of Sequiam Corporation stock on September 19, 2002, in reliance on Cipriano's recommendation. Two weeks later, Clark Street sold 700 of those shares to meet a margin call in his account. H.C. still owns the remaining 800 shares of Sequiam Corporation stock.

J.G., a 71-year-old retired engineer, had some experience with speculative investments before Cipriano called to recommend that he purchase shares of Sequiam Corporation stock.[61] J.G.'s testimony was quite similar to H.C.'s. J.G. stated that Cipriano called and recommended that he purchase Sequiam Corporation stock because it was going to appreciate significantly within a short time.[62] Cipriano did not tell J.G. about the company's finances or its relationship with Clark Street, nor did Cipriano tell J.G. that the stock was a penny stock.[63] J.G. also relied on Cipriano's recommendation and purchased 2500 shares of Sequiam Corporation stock on September 11, 2002, which he still owns.[64]

Enforcement also introduced the Declaration of B.H. dated October 30, 2003. According to the Declaration, Cipriano called B.H. in September 2002 and recommended that B.H. purchase Sequiam Corporation stock. Cipriano told B.H. that Sequiam Corporation had an affiliation with the Olympics and that the company was in the process of getting other large

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[59] Tr. 38, 40. In his Declaration dated January 25, 2003, H.C. stated that Cipriano told him that he expected the stock to double in a year. C 9.

[60] Tr. 42.

[61] Tr. 103-06.

[62] Tr. 106, 113, 115; C 13.

[63] Tr. 118-21.

[64] C 13.

contracts. Cipriano further told B.H. that Sequiam Corporation "was poised to make a big move soon and would be over $6 per share within 60 to 90 days."[65] Cipriano did not mention any risks associated with the recommended investment or that Sequiam Corporation was a penny stock.[66]

On September 6, 2002, based on Cipriano's recommendation, B.H. purchased 2400 shares of Sequiam Corporation stock.[67] Several weeks later, on Cipriano's recommendation, he sold those shares for a small profit. Then, on October 10, 2002, Cipriano again called B.H. and recommended that he buy back some of the shares because the price of the stock had fallen. Cipriano said that he continued to expect the stock price to increase a substantially. In reliance on Cipriano's recommendation and statements, B.H. purchased 1750 shares of Sequiam Corporation stock, which he still owns.[68]

II. CONCLUSIONS OF LAW

The Complaint charged that Cipriano made baseless price predictions for Sequiam Corporation; failed to disclose Sequiam Corporation's financial condition and the risks associated with investing in Sequiam Corporation stock; failed to disclose the relationship between Sequiam Corporation and Clark Street, including the existence of the consulting agreement; and failed to disclose that Clark Street was selling Sequiam Corporation stock from its own account at the same time that Cipriano recommended that his customers purchase the stock. The Complaint charged that Cipriano violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Conduct Rule 2120, which prohibit fraudulent and deceptive practices in connection with the offer, purchase, or sale of a security.[69]

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[65] C 1.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Alvin W. Gebhart*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at *59 (Jan. 18, 2006). *See also Basic v. Levinson*, 485 U.S. 224, 239 n.17 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

"The [SEC's] and NASD's anti-fraud rules are designed to ensure that members of the securities industry fulfill their obligation to the public to be complete and accurate when making statements about securities."[70] A finding of a violation requires a showing that persons acting with scienter misrepresented or omitted material facts in connection with securities transactions.[71] A fact is material if there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision, and disclosure of the omitted fact would have significantly altered the total mix of information available.[72] Scienter is the "intent to deceive, manipulate or defraud."[73] Scienter may be established by a showing of recklessness that involves an '"extreme departure from the standards of ordinary care,… which presents a danger of misleading buyers and sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.'"[74] The Complaint further charged that Cipriano violated Conduct Rule 2110, which requires, more generally, that members and associated persons "observe high standards of commercial honor and just and equitable principles of trade." Proof of scienter is not required to establish that a misrepresentation or omission violates Conduct Rule 2110.

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[70] *Department of Enforcement v. Donner Corp. Int'l*, No. CAF020048, 2006 NASD Discip. LEXIS 4, at *50 (N.A.C. Mar. 9, 2006) (quoting *District Bus. Conduct Comm. V. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *16-17 (N.B.C.C. July 28, 1997)).

[71] *Department of Enforcement v. Donner Corp. Int'l*, 2006 NASD Discip. LEXIS 4, at *50. In addition, violations of Section 10(b) and Exchange Act Rule 10b-5 must involve the use of any means or instrumentalities of transportation or communication in interstate commerce, or the mails, or any facility of any national securities exchange. *See, e.g., SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992). In this case, the requirement of interstate commerce is satisfied, *inter alia*, because Cipriano sold Sequiam Corporation through interstate telephone calls.

[72] *Basic*, 485 U.S. at 231-32.

[73] *Ernst & Ernst v. Hochfelder*, 425 U.S. at 193.

[74] *The Rockies Fund, Inc. v. SEC*, No. 04-1255 (D.C. Cir. Nov. 15, 2005), 2005 U.S. App. LEXIS 24521, at *12 (citing *Steadman v. SEC*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977))).

A. Price Predictions

To establish that Cipriano made baseless price predictions, Enforcement was required to prove that Cipriano made price predictions, and that the price predictions were misleading and material. In addition, to establish that the price predictions violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rule 2120, Enforcement had to prove that Cipriano acted with scienter.[75]

Here, although the customers could not recall the precise words Cipriano used when he recommended that they buy Sequiam Corporation stock, H.C. and J.G. each stood firm on his testimony that Cipriano predicted the share price soon would rise significantly. Moreover, all of the customers' recollections generally were consistent with Cipriano's account of what he told them. Cipriano acknowledged that he painted an optimistic picture of Sequiam Corporation stock and suggested that they would see results within a couple of months. Accordingly, the Panel accepts the customers' testimony.[76]

Cipriano countered that his positive assessments were nothing more than "puffery," not misrepresentations.[77] This argument merits little discussion. It is firmly established that when a registered representative makes a price prediction, even if offered as an opinion, the representative implicitly represents that he or she has a reasonable basis for the prediction. If the representative does not have a reasonable basis for the prediction, the implied representation is false and misleading.[78] Further, the representative cannot rely on the representations of the

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[75] Scienter however is not an element of a Rule 2110 violation.

[76] *Gebhart*, 2006 SEC LEXIS 93, at *19 n.18 ("[W]here … there are similarities among the investors' testimony regarding the salespersons' behavior, the reliability of that testimony is strengthened.").

[77] *See* Respondent Cipriano's Pre-Hearing Br. at 7.

[78] *See Hanley v. SEC*, 415 F.2d 589 (2d Cir. 1969) ("A securities dealer occupies a special relationship to a buyer of securities in that by his position he implicitly represents that he has an adequate basis for the opinions he renders"); *SEC v. Hasho*, 784 F. Supp. at 1109 ("Guarantees and predictions of substantial price rises with respect to securities are actionable absent a reasonable basis for the prediction. … The fraud is not ameliorated where the positive prediction about the future performance of securities is cast as an opinion or possibility rather than as a guarantee.").

issuer's management or of his firm's principals. The representative has a duty to make an adequate investigation to ensure that his representations had an adequate basis.[79] Cipriano lacked such a basis. He had no knowledge of the terms of the WOA contract, and he claimed to be ignorant of the terms of the relationship between Clark Street and Sequiam Corporation. Nonetheless, he used both of these factors to support his price predictions. In addition, Cipriano knew that Sequiam Corporation's increase in reported assets in June 2002 had not come from operations. Accordingly, he lacked a reasonable basis to tell his customers that it evidenced that Sequiam Corporation had a good business plan. None of the information known to Cipriano in September 2002 supported his conclusion that the customers would be able to obtain strong positive results within a couple of months. Nor did Cipriano have a reasonable basis to conclude that Sequiam Corporation was no longer a penny stock. Cipriano claimed he relied on Sequiam Corporation's unaudited financial statements and management's representations about its net tangible assets. However, "Rule 15c2-6 expressly and unambiguously requires *audited* financial statements as a basis for determining whether an issuer meets the $2 million asset test."[80]

Moreover, in the case of a speculative security, it is unlikely that there can be a reasonable basis for such a prediction.[81] Sequiam Corporation was a speculative stock, which Cipriano did not dispute. The company, which was less than three years old, was little more than a shell corporation. It had a history of operating losses and no cash reserves. It had not generated

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[79] *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23, at *42 (Jan. 6, 2006); *James E. Cavallo*, 49 S.E.C. 1099, 1102 (1989), *aff'd*, 993 F.2d 913 (D.C. Cir. 1993) (unpublished opinion); *Gilbert F. Tuffli*, Exchange Act Release No. 12534, 1976 SEC LEXIS 1467, at *10 (June 10, 1976). *See also Nassar & Co., Inc*., 1978 SEC LEXIS 2551, at *5 (Nov. 22, 1978) (the respondent's "reliance on [the issuer's] self-serving statements was patently unwarranted. It fell far short of the stringent standards to which a professional in the securities business must adhere when he under-takes to recommend securities, particularly the unknown securities of an obscure issuer. In that situation, he is under a duty to make an adequate independent investigation to ensure that his representations have a reasonable basis.").

[80] *See Kochcapital, Inc.*, Exchange Act Release No. 31652, 1992 SEC LEXIS 3335, at *14 (Dec. 23, 1992) (emphasis added).

[81] *See Department of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *26-27 (N.A.C. June 22, 2001), and cases cited therein.

significant revenue since its inception, it had repeatedly advised that it needed capital infusions to survive, and its auditors had expressed concerns about its ability to continue as a going concern. Sequiam Corporation's acquisition of Brekel Group did not ameliorate Sequiam Corporation's precarious financial condition. Brekel Group also had a history of operating losses since its inception and limited assets, and it auditors likewise had expressed concerns about its ability to continue as a going concern. These uncertainties unquestionably made Sequiam Corporation a highly speculative investment, and as a result, Cipriano could not reasonably have predicted that the price of the stock would appreciate.

The Panel rejected Cipriano's contention that he acted reasonably by relying on the predictions of Sequiam Corporation's management. Cipriano claims that he looked at the company's Internet site and spoke to executives at Sequiam Corporation on more than one occasion. But he was not certain what he learned from those inquiries. Indeed, Cipriano could not recall why he called Sequiam Corporation although he admitted that it was an unusual occurrence. Moreover, he failed to explain how the information he gathered from Sequiam Corporation, including the information he obtained at its road show, reasonably supported his prediction that the price of Sequiam Corporation stock would double, particularly given that he knew that the company had never been profitable, that it had working capital difficulties, that it had not yet completed development of the Internet sites that were essential to its products, and that it needed financing to continue in business. However, as discussed above, even if Sequiam Corporation's management had assured him that Sequiam Corporation stock was about to turn the corner, it is well established that the self-serving forecast of the issuer's management that it expects to turn around a failing company is insufficient to establish a reasonable basis for predicting that the price of the company's stock will increase substantially.[82]

[82] *See, e.g., Nassar*, 1978 SEC LEXIS 2551, at *5-6.

Accordingly, the Panel concluded that Cipriano violated Section 10(b), Exchange Act Rule 10b-5, and Conduct Rules 2120 and 2110 by making unreasonable price predictions for Sequiam Corporation. Cipriano acted at least recklessly by not fulfilling "his duty as a salesman to make an adequate investigation of [Sequiam Corporation] to ensure that [his] representations to customers had a reasonable basis."[83]

B. Failure to Disclose Material Information

The Panel found Cipriano's contention that he discussed Sequiam Corporation's adverse financial condition, the particular and substantial risks associated with the company, or the nature of its contractual relationship with Clark Street with each of the customers at issue to be disingenuous.[84] Indeed, the Panel found that his testimony generally lacked credibility. Cipriano testified that he recommended Sequiam Corporation stock based on its potential and that he explained the risks to each customer. However, when Cipriano was asked how he assessed the risk associated with Sequiam Corporation, he testified that he "always protect[ed his] clients' downside" by selling a stock when he "saw [the] stock starting to fall part or things were not going in the right direction."[85] Cipriano did not provide an explanation of how that strategy of selling when a stock's price collapsed allowed him to evaluate a company's potential and risk. Further, Cipriano could not recall providing his customers with specific information about Sequiam Corporation. Cipriano could not recall whether he provided the customers with any written information about the company, whether he told them the number of persons Sequiam Corporation employed, or whether he disclosed that the company did not have a complete complement of officers and marketing personnel referenced in its business plan.[86]

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[83] *Hanly v. SEC*, 415 F.2d 589, 596.

[84] On the other hand, the Panel found that there was insufficient evidence to conclude that Cipriano knew that Clark Street was selling Sequiam Corporation stock from its proprietary account at the same time he was recommending the stock to his customers.

[85] Tr. 382.

[86] Tr. 383-84.

Cipriano's general contention that he provided his customers with an adequate disclosure of Sequiam Corporation's financial condition is undercut by his own admissions that he knew very little about the company at the time he made the recommendations. As discussed above, almost all of the information he passed on in connection with his recommendations was favorable information about the company's prospects based on its contracts with Clark Street and the WOA. However, Cipriano readily admitted that he did not understand these contracts. He had not even seen the consulting agreement until after Enforcement filed this disciplinary proceeding against him. Moreover, although he highlighted the Brekel Group acquisition in his recommendations, Cipriano testified that he had done "minimal" research to support his representations.[87] Nonetheless, he placed great emphasis on the WOA contract. But as to the specifics of the contract, he told his customers nothing more than Brekel Group "had some sort of a contract or agreement with the [WOA]."[88]

The Panel further noted that the circumstances surrounding Cipriano's efforts to sell Sequiam Corporation stock belie his contentions that he carefully considered the appropriateness of the stock for his customers and that he disclosed Sequiam Corporation's adverse financial condition in the course of his recommendations. Cipriano had no reason to recommend Sequiam Corporation to 200 of his customers in September 2002 other than Clark Street's pressure to sell the stock. Cipriano did not have an ongoing relationship with any of these customers when he first called them and recommended they purchase Sequiam Corporation stock. Each of the customers that provided evidence in this case indicated that the first they heard of Cipriano was when he called with the recommendation. In fact, apart from looking at the account documents he inherited from Royal Hutton, Cipriano had no knowledge about their investment objectives.

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[87] Tr. 376.

[88] Tr. 376.

In summary, the Panel concluded that Cipriano misled H.C., J.G., and B.H. by failing to disclose Sequiam Corporation's negative financial condition and performance, which information was material to the customers' investment decisions.[89] The fact that H.C., J.G., and B.H. could not say that they would have made a different investment decision if Cipriano had provided more information is irrelevant. Proof of investor reliance is not necessary to establish a violation of the antifraud rules involving a material misrepresentation.[90]

The Panel further found that Cipriano acted with scienter. Cipriano acted recklessly in withholding information concerning Sequiam Corporation's precarious financial condition. The significance of this information was obvious, and Cipriano knew or should have known that his failure to disclose it presented a danger of misleading his customers.[91] Cipriano's conduct amounted to a total abdication of the basic responsibilities imposed on professionals in the securities business.[92]

Accordingly, the Panel concluded that Cipriano violated Section 10(b), Exchange Act Rule 10b-5, and Conduct Rules 2120 and 2110 by failing to disclose material information concerning Sequiam Corporation.

III. SANCTIONS

For misrepresentations or material omissions of fact, the NASD Sanction Guidelines recommend a fine of $2,500 to $50,000 and a suspension of up to 30 business days for negligent

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[89] *See SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) (finding information relating to financial condition, solvency, and profitability material); *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at *24-25 (Mar. 19, 2003) (finding misrepresentations and omissions related to undisclosed financial commitments material); *Hasho*, 784 F. Supp. 1059, 1106, 1109 (finding that failure to disclose negative financial and performance information violated the antifraud provisions).

[90] *See, e.g.*, *Lester Kuznetz*, Exchange Act Release No. 23525, 1986 SEC LEXIS 1001 (August 12, 1986).

[91] *See Rockies Fund v. SEC*, 2005 U.S. App. LEXIS 24521, at *12.

[92] *See Dan King Brainard*, Exchange Act Release No. 20408, 1983 SEC LEXIS 293, at *13 (Nov. 22, 1983) (footnotes omitted).

misconduct. For intentional or reckless misconduct, they recommend a fine of $10,000 to $100,000 and a suspension of 10 business days to two years, or in egregious cases a bar. The fine amount may be increased to take into consideration the respondent's financial benefit from the misconduct.[93] The Guidelines do not include specific principal considerations for those violations; rather, they direct attention to the general Principal Considerations for Determining Sanctions.[94] Enforcement requested that the Panel impose a two-year suspension, a $40,000 fine, and an order requiring Cipriano to pay restitution to those customers who suffered a loss on the purchase of Sequiam Corporation stock.

The Panel determined that the appropriate sanctions in this case are those for intentional or reckless misconduct. As discussed above, Cipriano acted in total disregard of his obligations to investigate Sequiam Corporation to ensure that his representations had a reasonable basis. He did not have, and could not have had, a reasonable basis for the price predictions he made. Indeed, Cipriano made those predictions knowing that some of the factors he relied upon in formulating his recommendations were inaccurate. For example, Cipriano knew or should have known that Sequiam Corporation was a penny stock and that its increase in reported assets did not result from a successful business plan. On the other hand, the Panel found that many of the aggravating factors enumerated in the Principal Considerations for Determining Sanctions were not present in this case.[95] Cipriano's misconduct did not extend over a lengthy period, and there were only a few small transactions.

The Panel found that under all the circumstances a lengthy suspension, together with a substantial fine, would accomplish NASD's remedial goals. Accordingly, the Panel determined that a two-year suspension and a $40,000 fine are appropriate under the facts and circumstances

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[93] NASD SANCTION GUIDELINES at 95 (2006 ed.).

[94] *Id.*

[95] *See Id.* 6-7.

of this case. In addition, the Panel determined that Cipriano should be ordered to re-qualify in all capacities.[96]

IV. ORDER

For the reasons set forth above, Anthony Cipriano is suspended in all capacities for two years, fined $40,000, and ordered to re-qualify in all capacities.[97] In addition, he is ordered to pay costs in the amount of $3,961.10.[98]

These sanctions shall become effective on a date set by NASD, except that if this decision becomes NASD's final disciplinary action in this matter, the suspension shall begin at the opening of business on October 2, 2006, and end on October 1, 2008.

____
Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Anthony Cipriano (overnight delivery and first-class mail)
Timothy Feil, Esq. (facsimile and first-class mail)
Joel R. Beck, Esq. (electronic and first-class mail)
Mark P. Dauer, Esq. (electronic and first-class mail)
Rory C. Flynn, Esq. (electronic and first-class mail)

[96] Enforcement did not present sufficient evidence to establish that identifiable customers suffered quantifiable injury because of Cipriano's misconduct. Accordingly, the Panel did not order restitution.

[97] The Hearing Panel has considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views expressed herein.

[98] The costs are composed of an administrative fee of $750 and transcript costs of $3,211.10.