NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. KEVIN M. GLODEK (CRD No. 2419411), Respondent.	Disciplinary Proceeding No. E9B2002010501 Hearing Officer – DMF **AMENDED HEARING PANEL DECISION** April 24, 2007

Summary

Respondent made misrepresentations in violation of Section 10(b) of the Securities Exchange Act, SEC Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110. For these violations, he is suspended from association with any NASD member in any capacity for 60 days and fined $25,000.[1]

Appearances

Paul D. Taberner, Esq., and Paul M. Tyrrell, Esq. (Rory C. Flynn, Esq., and Mark P. Dauer, Esq., Of Counsel) for Complainant.

Ruthann G. Niosi, Esq., for Respondent.

DECISION

I. Procedural History

The Department of Enforcement filed its Complaint against Kevin M. Glodek and others on August 1, 2005.[2] As to Glodek, the Complaint alleged that he made material misrepresentations to certain customers regarding Metropolitan Health Networks, Inc. (MDPA) stock, in violation of Section 10(b) of the Securities Exchange Act, SEC Rule

[1] This decision is amended to delete an erroneous reference in the Summary to a re-qualification requirement.

[2] The other Respondents subsequently settled the charges against them.

10b-5, and NASD Rules 2120 and 2110 and IM-2310-2, including the following: (1) predictions of substantial and specific increases in the price of MDPA; (2) statements regarding the purported imminent listing of MDPA on the American Stock Exchange (AMEX); (3) statements that MDPA was a debt-free company; (4) statements that MDPA was the fastest growing company in the healthcare industry and that the healthcare industry was recession-proof; and (5) projections regarding MDPA's quarterly earnings. The Complaint alleges that Glodek made these misrepresentations in connection with the sale of MDPA stock to the customers and/or to convince them not to sell MDPA stock they already owned.

Glodek filed an Answer contesting the charges and requested a hearing, which was held in New York, NY on October 24, 25 and 26, 2006, before a Hearing Panel.

II. Facts

A. Respondent

Glodek has worked in the securities industry since he graduated from high school "and went right into the family business." At the relevant time, he was a general securities representative associated with William Scott & Co. (WSC). He is now registered in the same capacity through another NASD member. He has no prior disciplinary history. (Tr. 160-62, 461-62.)[3]

B. MDPA

MDPA was incorporated in 1996 to develop an integrated healthcare delivery network. It pursued this business plan until 2000, through the acquisition, expansion and

[3] In this decision, "CX" refers to Complainant's exhibits; "RX" to Respondent's exhibits; "Tr." to the transcript of the hearing; and "Tr. 10/26/06" to the transcript of the parties' closing arguments. CX 2-20, and 23-33, and 37-47 and RX 1-2, 4-5, 7, 11, 14-15, 20, 24-26, 31, 34, 36, 38, 40, 42, 46, 53, 64, 69 and 73-75 were offered and admitted; the remaining exhibits identified by the parties in their pre-hearing submissions were not offered. (Tr. 283-85, 541-47.)

integration of physician health care practices and diagnostic and rehabilitation centers in Florida, but its business model proved unsuccessful and the company incurred substantial losses through 1999. In 2000, however, the company hired new senior management and implemented a new business plan as a Provider Service Network, specializing in managed care risk contracting. (CX 9.)

In January 2000, Glodek entered into an advisory agreement with MDPA under which he helped the company negotiate an agreement with the owner of certain convertible stock under which the convertible stock was converted to common stock. For his efforts, Glodek received a warrant to purchase 225,000 shares of MDPA common stock at $0.17 per share. He exercised the warrant in October 2000 and received 225,000 restricted shares of MDPA. (CX 20.)

In early 2001, MDPA and Glodek amended the advisory agreement to extend its term and broaden Glodek's responsibilities. Specifically, he was to: "Bring to the Company a strategic market maker which would serve as 'eyes and ears' in the trading box"; "Maintain a working relationship with [NG] (former CEO [of MDPA])"; "Maintain a line of communication with the Company on a daily basis and periodically raise capital for the Company's daily operations"; "Market the Company to accredited investors to increase activity on the open market"; and "Introduce the Company to mid-tier hedge funds to develop an awareness to the market." The Amended Agreement provided that Glodek would receive an additional 300,000 restricted shares of MDPA for performing these services.[4] (CX 20.)

[4] In September 2001, MDPA issued the 300,000 restricted shares, but Glodek received only 150,000, with the remaining 150,000 shares going to the representative who was his partner at WSC. (CX 20.)

On April 2, 2001, MDPA publicly reported its financial results for 2000, disclosing that for the year MDPA had revenues of approximately $120 million, with a profit of $5.1 million, which included one-time gains of $4 million. The company also reported that it had a positive net worth of $1.2 million at the end of 2000, and although its auditors had issued going concern qualifications on earlier financial statements, MDPA's 2000 year-end statement did not include any such qualification.[5] (CX 9.) On May 15, 2001, MDPA reported its results for the first quarter of 2001, disclosing that for the period January 1 through March 31, it had revenues of approximately $29.5 million and net income of approximately $1.2 million, compared with revenues of approximately $29.9 million and net income of approximately $154,000 for the same period in 2000. (CX 10.)

Although MDPA stock had at one time been listed on the NASDAQ Small Cap market, by early 2001, the period at issue in this case, it was traded on the OTC Bulletin Board (OTCBB). At the end of 2000, the price of the stock was hovering around $1 per share, but it began to rise during January 2001, and by early April moved past $2. In early May, MDPA passed $3, but peaked at $3.40 on May 8, after which the price began to decline, and MDPA did not exceed $3 for the rest of 2001. By the end of the year, MDPA had fallen back to around $1.25. (CX 37A.) MDPA continued in business, however, and eventually became listed on the AMEX in 2004, where it is still traded. (CX 18.)

[5] In September 2001, after the period at issue in this case, MDPA filed an amended Form 10-K for the year 2000 disclosing that MDPA had revised its 2000 financial statements by increasing its payroll taxes payable, which had the effect of reducing the company's reported profit by $400,000. (CX 9A.)

C. The Conversations

Enforcement's allegations rest on statements made by Glodek regarding MDPA during recorded telephone conversations with WSC customers that took place from late March through April 2001. In 2002, during a routine examination of WSC, NASD staff noted that Glodek had received restricted MDPA stock, pursuant to his advisory agreement with the firm, that he had sent information regarding MDPA to customers, and that there had been a substantial increase in the price of MDPA during early 2001. Accordingly, the staff decided to review Glodek's communications with his customers during that period. (Tr. 42-46, 59-60.)

The staff requested, and WSC provided, recordings of 800 to 900 telephone calls on Glodek's extension during the period March 19 through April 30, 2001. The staff listened to some 600 of the calls, eventually focusing on a small sub-set of calls. (Tr. 59-68, 75-78, 184; CX 2, 2A.)

The Complaint alleged that Glodek made specified misrepresentations to specifically identified customers, as well as "three individuals who cannot be identified." At the hearing, to prove these allegations Enforcement introduced a total of 35 telephone recordings, some of which included more than one telephone call.[6] The recorded calls included conversations between Glodek and the WSC customers specifically identified in the Complaint, as well as conversations with other individuals, some of whom were

[6] Enforcement's exhibits included a CD containing the 35 recordings (CX 3), transcripts of those recordings prepared by a court reporter (CX 5, 5A) and CDs purportedly containing all of the recorded calls that William Scott provided to the staff during the investigation (CX 2A). Although the Panel found the transcripts of the calls were reasonably accurate, the Panel found that CX 3 provided the most reliable evidence and the quotations in this decision are based upon CX 3. With the exception of one call that Glodek relied upon (Tr. 368-69), the Panel had no occasion to consider the additional calls included in CX 2A.

clearly customers and others of whom apparently were not.[7] Enforcement also offered a staff-prepared list of the 35 recordings (CX 4) that provided, for each recording, its date, time, and length; the identities of the persons involved; certain explanatory staff notations; and, most significantly, the types of misrepresentations, if any, that Enforcement alleged Glodek made. (Tr. 77-79.) In determining whether Enforcement had met its burden of proof, the Panel considered only whether, during the calls cited in the staff-prepared list, Glodek made the misrepresentations alleged in the Complaint to the persons identified in the Complaint.[8]

The Complaint alleged that Glodek "made predictions of substantial and specific increases in the price of MDPA on at least eight occasions to WSC customers PK, LW, MO, AA and KC." In that regard, the recordings showed:

- On March 22, 2001, after customer KC expressed concern about the value of his MDPA stock, Glodek said, "I think my stock will go to $5 and I'll be blowing out of it between five and ten," and after KC asked what time frame Glodek foresaw, Glodek responded, "I'm looking at, hopefully, within two weeks you'll see it's over $2." (Call 2)[9]

[7] The participants were fully identified by name in most of the calls, and Enforcement was able to tie those names to the customers' account records. In a few calls, however, Glodek spoke with individuals who were identified in the calls by only their first names, but, who, based on the content of the calls, were clearly customers. Enforcement was not, however, able to fully identify those individuals or their account records. Finally, some of the calls, which Enforcement characterized as "context calls," were between Glodek and persons who were not customers, such as the president of MDPA.

[8] In its pre-hearing brief, its exhibits including CX 4 and its closing argument, Enforcement sought to expand the allegations in the Complaint, citing alleged misrepresentations to customers and one prospective customer not identified in the corresponding allegations of the Complaint. As indicated in the text, the Hearing Panel did not consider any alleged misrepresentations or customers not identified in the Complaint, except insofar as the Complaint specifically alleged that Glodek made certain misrepresentations to "customers that cannot be fully identified." For those allegations only, the Panel considered whether the evidence showed that Glodek had made the specified misrepresentations to individuals who were clearly customers, but could be identified by only their first names.

[9] The call numbers cited in this decision are those set forth in CX 4.

- On March 27, 2001, Glodek told customer AA, "my price target, [AA], is like $5 on [MDPA] stock." (Call 5)
- On March 29, 2001, after customer LW expressed concerns about losses in his account, Glodek said, "but I think that MDPA goes back to $5. I really feel that comfortable about it." In a subsequent call with LW on April 4, 2001, Glodek told LW, "I hope that, you know, over the next two to three months we'll be selling the stock, half our position, out at $5." (Calls 7, 12.)
- On April 4, 2001, in response to customer PK's question, "When do you think we hit the three buck range [for MDPA]?" Glodek responded, "Within the next two weeks." (Call 10)
- On April 10, 2001, after PK asked whether MDPA was "going to do anything in the near term" that should lead him to continue to hold his MDPA stock, rather than liquidating it in order to pursue another investment opportunity, Glodek replied, "[MDPA]'s going to be $5 hopefully within the next two to three months." (Call 17)
- On April 25, 2001, in an effort to persuade customer MO to purchase additional shares of MDPA, Glodek told him, "My price target is $4, between three and a half and $4 sometime in May." (Call 31)

The Complaint also alleged that "[o]n at least ten occasions … Glodek made statements to WSC customers KC, AA, PK, MO, PN and two customers that cannot be fully identified, that were misleading in that they suggested MDPA was pursuing the listing of its common stock on AMEX and/or that MDPA would qualify for listing on

AMEX as soon as the stock hit a certain price on the OTCBB." In that regard, the recordings showed:

- On March 22, 2001, after predicting to customer KC that the price of MDPA would exceed $2 per share within two weeks, Glodek said, "then they'll go for the AMEX listing." After KC asked, "How long is it going to take them to get the listing once the earnings come out?", Glodek responded, "Not too long because they have the market capitalization and everything. It's not going to take too long. It's either going to the American or they're going to the NASDAQ." (Call 2)
- On March 27, 2001, after predicting to customer AA that the price of MDPA would "probably drift over $2," Glodek continued, "and then you'll see it approved for … the AMEX and then the stock will be off from there." (Call 5)
- On April 25, 2001, Glodek told customer MO that after MDPA reported its first quarter earnings, "the stock will easily be over $3, and if that's the case, the company qualifies for the AMEX. … Then if it's on the AMEX, you're going to get another run out of it." (Call 31)
- On April 26, 2001, Glodek told customer PK, "we're basically qualifying for the AMEX here by Memorial Day weekend." (Call 32)
- On April 30, 2001, after the price of MDPA rose above $3 per share, Glodek told PK, "Now we're waiting for the numbers to do out and they do qualify for the AMEX under my understanding. So, they get the ok to

get on the AMEX, we're going to get a whole 'nother run of the stock." (Call 34) [10]

The Complaint alleged that Glodek "told WSC customers AA, PK and two customers who cannot be fully identified that MDPA 'has no debt' or is 'debt free'." In that regard, the recordings showed:

- On March 27, 2001, Glodek told customer AA, "They [MDPA] have no debt." (Call 5)
- On April 4, 2001, Glodek told customer Joe, last name unknown, "And the company has no debt." (Call 11)
- On April 5, 2001, Glodek told customer Mike, last name unknown, "The company [MDPA] went from astronomical amounts of debt in '99 to a debt-free company in 2000." (Call 14)
- On April 12, 2001, Glodek told customer PK, "We've got a company with no debt." (Call 21)

The Complaint alleged that Glodek "told WSC customers PK, KC and AA that, as a health care company, MDPA was 'basically recession-free' or 'pretty much recession-free," and that he "also stated to WSC customer AA and a customer that cannot be fully identified that MDPA was the 'fastest growing company in the health care industry.'" In that regard, the recordings showed:

- On March 22, 2001, during a conversation with customer PK, Glodek referred to MDPA as "a healthcare company that's pretty much recession-free." (Call 1)

[10] The evidence did not establish that Glodek made similar price predictions to customer PN or to "two customers that cannot be fully identified," as alleged in the Complaint.

- On March 22, 2001, Glodek told customer KC, "the healthcare companies are basically, I think, recession-free in this bad market." (Call 2)
- On March 27, 2001, Glodek described MDPA to customer AA as "the fastest growing company in the healthcare industry" and subsequently described it as a "recession free company, which every company still needs healthcare regardless what the economy does." (Call 5)
- On April 4, 2001, in a conversation with customer Joe, last name unknown, Glodek stated, "Right now they're all saying that [MDPA is] the fastest growing company in the healthcare industry." (Call 11)

Finally, the Complaint alleged that Glodek "also made quarterly earnings projections regarding MDPA to customer MR and a customer that cannot be fully identified." In that regard, the recordings showed:

- On March 26, 2001, Glodek told customer MR, "What they earned already in the first quarter of 2001, they earned enough in the year, the first quarter now, to cover all of last year. … Yeah, they earned like $6 million already supposedly in the first quarter, that's what I'm hearing." (Call 3)

III. Discussion

The circumstances of this case are highly unusual. All of the customers cited in the Complaint already owned MDPA stock at the time of the calls on which Enforcement relies, although they had not necessarily purchased their MDPA stock through Glodek. The recordings indicate that the conversations between Glodek and the customers were part of a continuing course of communications regarding MDPA, and that the customers were experienced and relatively sophisticated investors. In addition, some of the

customers had direct contact with MDPA management. For example, two of the customers testified at the hearing (on Glodek's behalf) that they met with MDPA's management; another testified (also on Glodek's behalf) that he participated in a telephone conference call that MDPA management conducted for MDPA shareholders; and another customer was identified as an executive in the healthcare industry who also had direct dealings with MDPA's management. (Tr. 98-99, 219-20, 318, 421-22, 502, 506; CX 37.)

None of the customers complained, and none was willing to cooperate with Enforcement or to testify on Enforcement's behalf at the hearing. (Tr. 143-44.) On the contrary, several of the customers testified or offered written statements on Glodek's behalf, indicating that they did not feel he had misled them, that they had other sources of information about MDPA and that they had no complaint about their MDPA investments. Among other things, the customers who testified confirmed that they were aware of Glodek's relationship with MDPA and knew or assumed he was being compensated by the company. (Tr. 103-19 (Customer KC), 308-22 (customer LW), 416-30 (customer MR), 500-11 (customer PK), RX 75 (customer MO).) There is no allegation or evidence that any customer of Glodek lost any money on an investment in MDPA. Finally, it was apparent to the Hearing Panel, based on its review of the evidence and its assessment of Glodek's testimony, that he genuinely believed in MDPA and its prospects.

Enforcement has not cited, and the Panel has not found, any prior cases alleging fraudulent sales practices in which, as here, there are no customer complaints, all the customer evidence in the record was offered in favor of Respondent and there is no evidence of any customer injury. Nevertheless, this is a disciplinary proceeding, not a

damage action, and the issue here is whether Glodek violated the securities laws and regulations, and NASD rules, as alleged, not whether his customers suffered losses as a result of those violations. "Proceedings instituted by the NASD . . . are instituted to protect the public interest, not to redress private wrongs. Thus it was unnecessary for the NASD to show that customers were in fact misled." Wall Street West, Inc., 47 S.E.C. 677, 679 (1981), aff'd, 718 F.2d 973 (10th Cir. 1983).

Furthermore, "[a] salesman's honest belief in an issuer's prospects does not warrant his making exaggerated and unfounded representations and predictions to others. Nor do the facts that customers initiated a transaction or are sophisticated or aware of speculative risks justify making misstatements to them." James E. Cavallo, 49 S.E.C. 1099, 1102 (1989). And even without customer complaints or supporting testimony, because Glodek's conversations with the customers were recorded, his statements during those conversations can be judged against established standards.[11]

To prove that Glodek violated Section 10(b) of the Exchange Act, Rule 10b-5 and NASD Rule 2120, Enforcement was required to demonstrate by a preponderance of the evidence that Glodek (1) made material misrepresentations, (2) in connection with the purchase or sale of MDPA stock, (3) with scienter. Dane S. Faber, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277 at **13-14 (Feb. 10, 2004); DBCC v. Euripides, No.

[11] At the hearing, Glodek's counsel argued that the proceeding was unfair because she did not have the ability and time to review all of the recordings, in order to search for exculpatory conversations. The Hearing Panel rejects this contention. For each call in which it alleged Glodek made misrepresentations, Enforcement provided, and the Panel considered, the full recorded conversation between Glodek and the customer. While Glodek may well have had other conversations with the customers, as he himself acknowledged, each of his conversations with a customer must stand on its own (Tr. 526-27); truthful representations in one conversation would not obviate misrepresentations in another. In addition, there is no evidence that Enforcement failed to fulfill its disclosure obligations under NASD's Code of Procedure, and although there were technical issues that affected Glodek's counsel's ability to play the recordings, Enforcement made timely and reasonable efforts to assist her, and she did not request a postponement of the hearing to provide additional time to review the recordings.

C9B950014, 1997 NASD Discip. LEXIS 45, at **17-18 (July 28, 1997). To show that he violated Rule 2110, however, Enforcement was required to show only that he failed to "observe high standards of commercial honor and just and equitable principles of trade."[12]

A. Material Misrepresentations

In general, "misrepresentations" are misstatements of facts. It is well established, however, that:

> A broker-dealer in his dealings with customers impliedly represents that his opinions and predictions respecting a stock which he had undertaken to recommend are responsibly made on the basis of actual knowledge and careful consideration. Without such basis the opinions and predictions are fraudulent, and where as here they are highly optimistic, enthusiastic and unrestrained, their deceptive quality is intensified since the investor is entitled to assume that there is a particularly strong foundation for them.

Alexander Reid & Co., 40 S.E.C. 986, 990 (1962) (footnote omitted).

A misrepresentation is material "if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available." Dane S. Faber, 2004 SEC LEXIS 277 at *14 (footnote omitted). Moreover, "the standard for materiality is objective, not subjective." Robert Tretiak, Exchange Act Rel. No. 47534, 2003 SEC LEXIS 653, at *24 n. 26 (March 19, 2003).

1. Price Predictions

The evidence supported the Complaint's allegations that Glodek predicted to customers KC, AA, LW, PK and MO that the price of MDPA would increase substantially in the near or fairly near term. At various times, for example, he predicted

[12] The Complaint also cited IM-2310-2, which very broadly addresses "Fair Dealing with Customers," but Enforcement did not address that provision in its pre-hearing brief or closing argument, and, accordingly, the Hearing Panel declines to rest its decision on that provision.

that the stock would increase to $2 per share within two weeks; that it would increase to $3 within two weeks; that it would increase to $3.50 to $4 during May; and that it would increase to $5 within two to three months. In fact, the price of MDPA did reach $2 and then $3, as Glodek predicted, but the stock did not reach the higher prices he forecast—the highest inter-day price for the stock was $3.40 per share on May 8. (CX 37A.)

The SEC has long held that "predictions of specific and substantial increases in the price of a speculative and unseasoned security are inherently fraudulent and cannot be justified." Richard J. Buck & Co., 43 S.E.C. 998, 1006 (1968). It is also misleading to predict substantial price increases for any stock without a reasonable basis. SEC v. Hasho, 784 F. Supp. 1059, 1109 (S.D.N.Y. 1992). And it is irrelevant whether some of Glodek's more modest predictions may have come to pass, because "whether a representation or prediction is fraudulent depends on the facts and circumstances at the time it is made and not upon subsequent assertedly successful developments." Richard J. Buck & Co., 43 S.E.C. at 1008. Price predictions are plainly material, because they go to the heart of the reasons for investing. "The investing public invests its money primarily to receive some kind of a return on its investment. Information related to what that rate of return may be therefore is information that a reasonable investor would find material." Department of Enforcement v. Apgar, No.C9B020046, 2004 NASD Discip. LEXIS 9, at *14 (N.A.C. May 18, 2004).

MDPA stock was a speculative and unseasoned security. Although the company had been in business for several years, until it changed its management and business model in 2000, it had a history of losses. And while it reported a profit of $5.1 million for 2000, it also disclosed that $4 million of that amount was attributable to "one-time

gains." (CX 9 at 4.) Glodek, himself, agreed that MDPA was a speculative investment, given that (1) it was a penny stock; (2) it was listed on the OTCBB; and (3) virtually all of its revenue came from a single source. (Tr. 447.)

Moreover, Glodek was unable to articulate any reasonable basis for his price predictions. During his testimony, he claimed that a variety of information supported his price predictions. For example, he cited a research report on MDPA issued by National Securities Corporation on April 26, 2001, but that was after all of his price predictions described above. Moreover, the National Securities report set out "a twelve-month price target of $6.60," while Glodek was predicting substantial increases in the price of MDPA within two or three weeks, or by May first, or by sometime in May, or within the next two or three months. (CX 26; RX 2; Tr. 333.)

Glodek also cited a research report issued by Hornblower & Weeks, Inc. on April 30, 2001, which included a "12-18 Month Price Target: $12.00." Once again, however, this was issued after Glodek made the price predictions cited above, and Glodek's predictions were for the very short term, not 12-18 months. (RX 5; Tr. 334.)

Although he cited these reports in his direct testimony, Glodek subsequently testified that "my multiple and my basis didn't come from the research reports …. My analysis came from more of the S&P multiple, the industry multiple, along with who we were contracted with. We were contracted with one of the biggest health care HMOs in the [country], which is Humana." (Tr. 472.) But Glodek was unable to articulate in any coherent manner how a price/earnings multiple for the companies making up the S&P 500, or for the healthcare industry as a whole, provided a reasonable basis for his predictions regarding the price of MDPA, an OTCBB stock with a history of losses prior

to 2000. Cf. James F. Glaza, Initial Decision Rel. No. 293, 2005 SEC LEXIS 1798 (July 21, 2005) (final Commission decision) ("Glaza recklessly used a P/E ratio for companies listed on national stock exchanges" in making price predictions for an OTCBB-listed stock).[13] Similarly, Glodek did not explain how the fact that MDPA obtained more than 90% of its revenue from a single source—which he acknowledged was a factor making the stock a speculative investment—provided a reasonable basis for his price predictions.

Glodek also cited a number of press releases issued by MDPA (many of them either well before or after the relevant time) as supporting his price predictions. (RX 15, 20, 24-26, 31, 34, 36, 38, 40, 42; Tr. 336-39, 344-49.) But again Glodek failed to explain how these optimistic statements by MDPA, indicating that it hoped its business would continue to develop in various ways, reasonably supported the specific, short-term price projections that he offered his customers. Moreover, it is well established that "reliance on [an issuer's] self-serving statements [is] patently unwarranted." Nassar & Co., 47 S.E.C. 20, 22 (1978).

Accordingly, the Hearing Panel finds that Glodek made material misrepresentations in the form of price predictions to customers KC, AA, LW, PK and MO.

[13] Glodek testified that in calculating his price target, he "took the multiple that was conveyed in [the Hornblower & Weeks] research report and I discounted it" to reflect that "[t]he health care industry traded in roughly a 34 time multiple at the current time this was given." (Tr. 334.) The Hornblower & Weeks report, however, asserted that "[t]he average P/E ratio for MDPA's competitors is 18." Similarly, the National Securities report cited "an 18x multiple." The Hearing Panel notes that there are a number of reasons for discounting the reliability of these research reports, but finds no need to address those because in making his price predictions Glodek could not have relied upon these subsequent reports. Glodek also cited certain market reports to support his contentions about the price/earnings ratios at which MDPA, the healthcare industry and the S&P 500 traded. (RX 4, 11.) These reports were not from the same period during which he made the predictions that are the subject of this proceeding, but in any event, for the reasons set forth above, price/earnings ratios by themselves would not have provided a reasonable basis for Glodek's predictions.

2. AMEX Listing

As alleged in the Complaint, Glodek told customers AA, MO and PK that MDPA would shortly qualify for, or had already qualified for, listing on the AMEX. These statements were clearly material, since Glodek advised the customers that the AMEX listing would lead directly to an increase in the price of the stock.

Enforcement contends that Glodek had no basis for predicting that MDPA would even apply for, much less be listed on the AMEX, relying on a recorded call between Glodek and the president of MDPA on April 10, 2001. During the call, in response to a question from Glodek about MDPA's plans to list on the AMEX, MDPA's president responded that Glodek was asking "an awkward question that you don't want to talk over the telephone" and that he had not yet received final board approval for a listing application, but also stated that, while "we don't know if it's national NASDAQ or American," a listing application decision was "in the pipeline and we expect to do it soon." (Call 18.)

At the hearing, however, Glodek testified that MDPA held a conference call with investors on April 2, 2001, during which MDPA's president indicated that the company intended to seek a listing on the AMEX. One of the customers who testified on Glodek's behalf also recalled participating in a call during which the company's intention to seek an AMEX listing was discussed, but he was unsure about the date. Another customer testified that he had lunch with Glodek and MDPA's president, during which MDPA's president indicated that the company's goal was to obtain an AMEX listing, but he, too, was uncertain about the date. Glodek also testified, without contradiction, that MDPA

retained a consultant in January 2001 to help MDPA obtain an AMEX listing and that MDPA and AMEX staff met in March 2001 to discuss the requirements for MDPA to obtain an AMEX listing. (Tr. 318, 351-52, 356-58, 421-22, 428.)

Based on this evidence, Glodek might have had a reasonable basis to represent that MDPA was considering, or was likely to, or even intended to seek an AMEX listing. But Glodek went well beyond that—he represented that MDPA would qualify for such a listing once its stock reached $3 per share, and coupled that with predictions of further increases in the price of the stock once it was listed. Thus, he told AA that after the price of MDPA increased, "you'll see it approved for the AMEX and then stock will be off from there" (Call 5); he told MO that once MDPA's price reached $3, "the company qualifies for the AMEX [after which] you're going to get another run out of it" (Call 31); he told PK, "we're basically qualifying for the AMEX here by Memorial Day weekend" (Call 32); and after the stock's price rose above $3 (briefly), he told PK, "they just qualified for the AMEX … we're going to get another whole run of the stock" (Call 34).

Glodek lacked a reasonable basis for these statements. He focused on AMEX's listing requirement that a stock trade over $3, apparently assuming that once MDPA attained that level, listing would be automatic and immediate. But MDPA did not even apply for an AMEX listing until June 2001, by which time its stock had fallen below $3. And after it applied, with the price of the stock remaining below $3, instead of approving the application AMEX requested additional information, and eventually, MDPA withdrew its listing application. (CX 18, 37A.)

All of this was reasonably foreseeable, but in his enthusiastic optimism, Glodek assured his customers that an AMEX listing was a foregone conclusion, which was not

the case. That is, "the fraud in this case consisted of … optimistic representations … without disclosure of known or reasonably ascertainable adverse information which rendered them materially misleading." Richard J. Buck & Co., 43 S.E.C. at 1005.

Accordingly, the Hearing Panel finds that Glodek made material misrepresentations to customers AA, MO and PK concerning MDPA's prospects for becoming listed on the AMEX.[14]

3. Debt-Free

Similarly, the evidence showed that, as alleged in the Complaint, Glodek told customers AA, PK, Joe and Mike that MDPA was "debt-free" or had "no debt." In fact, MDPA's 2000 year-end financial statements showed, among other things, that MDPA had long-term debt of approximately $1.2 million, more than $1 million of which would mature in 2001, and that the company owed the Internal Revenue Service approximately $2.5 million for unpaid payroll taxes. A company's indebtedness is plainly material to reasonable investors, because it can affect the company's short and long term prospects.

Glodek testified that when he referred to MDPA as "debt-free," he did not mean that literally; rather, he meant to convey that the company had a positive net worth. (Tr. 363-65.) As Glodek stated, "We all have debt. We wake up, we turn our lights on, we generate a bill. We are always going to have a payable or a liability." (Tr. 377-78.) Customer PK also testified that he did not understand Glodek to mean that MDPA had literally no indebtedness. (Tr. 509-10.)

The Hearing Panel agrees that Glodek's customers would not reasonably have understood "debt-free" to mean that the company had no indebtedness whatsoever. But

[14] Because Glodek's statements to customer KC were somewhat ambiguous, the Hearing Panel did not find that they amounted to misrepresentations.

in this case, MDPA's financial statements showed that it had very substantial short and long term liabilities, including long-term debt that would mature in 2001 and unpaid obligations to the IRS. Without disclosing these facts, Glodek's blanket representations that the company had no debt were false and misleading. See Richard J. Buck & Co., 43 S.E.C. at 1005.

Accordingly, the Panel found that Glodek made material misrepresentations to customers AA, PK, Joe and Mike concerning MDPA's indebtedness.

4. Fastest Growing Company and Recession-Proof Industry

The evidence showed that, as alleged in the Complaint, in conversations with several customers Glodek suggested that the healthcare industry in general and MDPA in particular were "recession-proof," and that MDPA was the fastest growing company in the healthcare industry. Enforcement did not, however, prove that either statement was false or misleading.

With regard to whether MDPA was the fastest growing company in the industry, the evidence established that MDPA's revenues grew from $20 million in 1999 to $120 million in 2000, which could well have made it at least one of the fastest growing firms in the healthcare industry. In its closing argument, Enforcement conceded that "we did not put into evidence that it was or wasn't [the fastest growing company]. We do not have evidence. I acknowledge that." (Tr. 10/26/06 at 13.) Accordingly, the allegation that Glodek misrepresented MDPA in that regard is unproven.

Enforcement also conceded that it offered no evidence to demonstrate that the healthcare industry as a whole and MDPA in particular were not "recession-proof," but argued "it's an impossible statement for it to be true … it is not a plausible statement."

(Tr. 10/26/06 at 14-15.) The Hearing Panel agrees that the bald statement "recession-proof" is implausible on its face, but that simply suggests that the customers to whom Glodek made the statements would have understood that Glodek did not mean the statement literally. In fact, in one un-charged recorded call in which he referred to healthcare as recession-proof, Glodek explained at greater length his view that "whatever the market does, we always need healthcare. … The healthcare sector is what gets hot when the market gets sour." (Call 14.) The Panel finds that the other customers to whom Glodek made "recession-proof" statements would likely have understood those statements to mean that healthcare stocks tended to outperform the market during recessionary periods. Because Enforcement offered no evidence regarding the performance of healthcare stocks in such times, the Panel finds that it failed to prove, by a preponderance of the evidence, that Glodek's "recession-proof" statements amounted to material misrepresentations.

5. <u>Earnings Projections</u>

Finally, the evidence substantiated the Complaint's allegation that Glodek made an unreasonable quarterly earnings projection to customer MR. Specifically, on March 26, before MDPA issued its quarterly earnings report, Glodek told MR that the company had "earned like $6 million already supposedly in the first quarter, that's what I'm hearing." In fact, while MDPA's first quarter results were positive, the company had net income of just $1.2 million, far below the results that Glodek had predicted. At the hearing, Glodek sought to justify his earnings representation by referring to a variety of materials (many of which were not contemporaneous with his representation) suggesting that MDPA's prospects were favorable. (Tr. 392-403.) But Glodek made a specific

representation to MR that MDPA had earned "like $6 million" in its first quarter, and nothing in the materials cited by Glodek supported such a specific representation.

"[P]redictions of a sharp increase in earnings with respect to [a speculative and unseasoned] security without full disclosure of both the facts on which they are based and the attendant uncertainties are inherently misleading." Richard J. Buck & Co., 43 S.E.C. at 1006. Plainly, projections regarding a company's earnings are highly material to investors, because they have a direct bearing on stock price. And it is not significant that Glodek qualified his statement about the earnings with the words "that's what I'm hearing," because a "broker-dealer cannot avoid responsibility for unfounded statements of a deceptive nature, recklessly made, merely by characterizing them as opinions or predictions or by presenting them in the guise of a probability or possibility." Alexander Reid & Co., 40 S.E.C. at 990. Accordingly, the Panel finds that Glodek made a material misrepresentation regarding MDPA's earnings for the first quarter of 2001 to customer MR.[15]

B. In Connection with the Purchase or Sale of Securities

Section 10(b) of the Exchange Act and Rule 10b-5 prohibit misrepresentations "in connection with the purchase or sale of any security." NASD Rule 2120 similarly prohibits member firms and associated persons from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

[15] The Complaint also alleged that Glodek stated to an unidentified customer prior to MDPA issuing its first quarter earnings report that "from what we're hearing it's reading very well." (Complaint ¶41.) The evidence showed that he did make such a statement to customer George, last name unknown. (Call 26.) The Hearing Panel, however, did not find that this very general statement, which proved true, amounted to a misrepresentation.

In the Complaint, Enforcement alleged that Glodek made his misrepresentations "in connection with the sale of MDPA to the firm's customers and/or to convince current MDPA shareholders not to sell their MDPA holdings." In that regard, the evidence showed that two of the customers identified in the Complaint, MO and MR, purchased additional MDPA stock after the cited conversations.[16] The evidence also showed that Glodek made misrepresentations during calls in which customers AA, Mike and PK indicated that they were considering selling some or all of their MDPA stock. (Calls 5, 14 and 17.) None of the other customers cited in the Complaint expressly indicated during the recorded conversations that they were considering selling their MDPA stock, but Glodek's representations in all the calls would have tended to reassure the customers about their MDPA investments, and thereby deter them from selling their stock.

"The 'in connection with' requirement is construed broadly and flexibly to effectuate the remedial purposes of the federal securities laws." SEC v. Terry's Tips, Inc., 409 F. Supp. 2d 526, 533 (D. Vt. 2006), citing SEC v. Zandford, 535 U.S. 813, 819 (2002). It has been held, for example, that "the phrase 'in connection with the purchase or sale of any security' [means] only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969). Therefore, the Panel finds that Glodek's misrepresentations to customers MO and MR were in connection with their subsequent purchases of MDPA stock.

[16] MO purchased 3000 shares of MDPA on May 11, 2001, after a conversation during which Glodek made misleading price predictions and misrepresented MDPA's impending listing on the AMEX. (Call 31; CX 45 (account statements).) MR purchased 5,000 shares of MDPA on May 2, 2001, after a conversation during which Glodek misrepresented MDPA's expected first quarter earnings and before MDPA publicly released its actual earnings. (Call 3; CX 39 (account statements).)

On the other hand, in private litigation, "[i]t is clear … that an allegation that the plaintiff retained his securities in reliance on the defendant's representations or advice, without more, is insufficient to satisfy the requirement the violation be 'in connection with the purchase or sale of a security.'" Lowe v. Salomon Smith Barney, Inc. 206 F. Supp.2d 442, 447 (W.D.N.Y. 2002). If that standard were applied here, there would be no violation of Section 10(b), Rule 10b-5 or Rule 2120, except as to MO and MR. The "in connection with" requirement, however, is not applied in the same restrictive manner in SEC enforcement actions, which are designed to protect the investing public, as it is in private damage suits. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38 and n. 14 (1975). And, for the same reasons, logically it should not be applied restrictively in NASD enforcement actions.

In that regard, Enforcement relies on Department of Enforcement v. Apgar, 2004 NASD Discip. LEXIS 9, at *15-16, where the respondent had sent a customer who had expressed concern about the return rate on a mutual fund he had purchased from Apgar a letter falsely representing that the fund would provide a specific guaranteed rate of return. Although the respondent "[did] not dispute that his misrepresentations … were made in connection with the purchase or sale of a security," the NAC addressed the issue, finding that the respondent's "post-investment misrepresentations were designed to convince [the customer] that he should not be concerned about his investment choice and therefore were made in connection with the purchase or sale of a security."

The only supporting authority cited by the NAC was Douglas J. Hopwood, Exch. Act. Rel. No. 43353, 2000 SEC LEXIS 2041 (Sept. 26, 2000), an SEC consent order. There the respondent had raised money from investors based on the representation that he

would invest the funds in listed securities, but in fact he deposited the funds in a bank account he controlled and spent the funds or used them over time to make "Ponzi-type" disbursements to investors. The SEC explained, "To hide his scheme and lull his investors, Hopwood sent them fictitious account statements and other documents … falsely reflect[ing] profitable purchases and sales of specific, mainstream securities, together with substantial growth in account balances." Based on these facts, the SEC summarily held that the respondent had violated Section 10(b) of the Exchange Act and Rule 10b-5, as well as Section 17(a) of the Securities Act of 1933, without expressly addressing the "in connection with" issue.

Accordingly, Apgar and Hopgood offer limited support for a finding that Glodek's misrepresentations to customers other than MO and MR satisfied the "in connection with" element. Moreover, Enforcement has not cited, and the Hearing Panel has been unable to find, any decision squarely holding that in an SEC or NASD enforcement proceeding, the "in connection with" requirement is satisfied by statements that did, or could have, induced customers to retain their existing stock. Nevertheless, because the cases emphasize that the language should be broadly interpreted to effectuate the remedial purposes of the securities laws, the Hearing Panel finds that all of Glodek's misrepresentations to customers, as set out above, satisfy the "in connection with" requirement.

Moreover, it is well-established that misrepresentations to customers "are inconsistent with just and equitable principles of trade and violate NASD Conduct Rule 2110" even if they do not satisfy all of the technical requirements for a violation of Section 10(b) of the Exchange Act, SEC Rule 10(b)(5) and Rule 2120. Dane S. Faber,

2004 SEC LEXIS 277, at *14, 18. In particular, it has been held that misrepresentations made without scienter violate Rule 2110. See, e.g., DOE v. Reynolds, No. CAF99018, 2001 NASD Discip. LEXIS 17 (June 25, 2001). The Hearing Panel concludes that this principle is equally applicable to misrepresentations made to customers who already own securities in order to encourage them to retain the securities, as in this case. Thus, even assuming Glodek's misrepresentations were not "in connection with the purchase or sale of any security," and thus did not violate Section 10(b), Rule 10b-5 or NASD Rule 2120, the Panel finds that they violated Rule 2110.

C. Scienter

Scienter is generally defined as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). This requirement may be satisfied by a showing of recklessness, which is defined as "a highly unreasonable misrepresentation or omission, 'involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'… Further, 'the danger of misleading buyers must be actually known or so obvious that any reasonable man would be legally bound as knowing.'" DOE v. Abbondante, No. C10020090, 2005 NASD Discip. LEXIS 43 at *28 (N.A.C. Apr. 5, 2005), aff'd Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23 (Jan. 6, 2006).

The Hearing Panel found that Glodek was reckless in making his misrepresentations. The Panel accepts his testimony that he did not intend to deceive his customers. The company had become profitable and the price of its stock had been

increasing; it had taken steps to prepare for an AMEX listing application; it had a positive net worth; and first quarter earnings were up significantly from the prior year. In short, there was reason for measured optimism. But MDPA remained a speculative investment, and as explained above, Glodek had no reasonable basis for projecting substantial short-term increases in the price of the stock, assuring his customers that MDPA would shortly be listed on the AMEX, advising them that the company had no debt or forecasting that MDPA's first quarter earnings would far exceed its actual results. By making these misrepresentations, Glodek departed significantly from the standards applicable to registered representatives, and the risk that he would mislead his customers was obvious. The Hearing Panel, therefore, finds that Glodek was reckless in making these misrepresentations.

D. Conclusion

For the reasons set forth above, the Hearing Panel finds that Glodek made material misrepresentations to customers in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110.

IV. Sanctions

For intentional or reckless misrepresentations of material facts, NASD's Sanction Guidelines recommend a fine of $10,000 to $100,000 and a suspension for 10 business days to two years, or in egregious cases a bar. NASD Sanction Guidelines at 93 (2006). In setting specific sanctions, Adjudicators must take into consideration the general considerations applicable to all violations set forth in the Guidelines. NASD Sanction Guidelines at 6-7.

Enforcement argued that Glodek's misconduct was egregious and warrants a bar. The Hearing Panel, however, disagrees. Enforcement rested its case exclusively on a

very small number of overly enthusiastic statements by Glodek to customers who already owned MDPA stock regarding MDPA's prospects. While, as explained above, Glodek was reckless in making the statements, it is noteworthy that all of the customers who testified said that they felt they had not been misled, and that they were well satisfied with the outcome of their MDPA investments. And Enforcement failed to offer any evidence that any of the affected customers who did not testify suffered any losses as a result of Glodek's statements.[17]

Looking to the considerations in the Guidelines, the Panel notes: (1) Glodek's misrepresentations reflected reckless optimism, in light of favorable signs about the company, not an intent to deceive. (2) Although the staff reviewed some 600 of his calls, Enforcement's allegations cited only a small subset of the calls, and the Panel found misrepresentations in an even smaller number. There is, therefore, no pattern of misconduct shown. (3) The customers were relatively sophisticated; no customer complained; there is no evidence of any customer injury and the only evidence from customers was offered in support of Glodek. All of these factors support sanctions at the lower end of the recommended ranges for intentional or reckless misrepresentations.

On the other hand, the Hearing Panel noted that the recorded conversations, considered as a whole, demonstrated a disturbing and unjustified lack of objectivity on Glodek's part in his communications with his customers. Even though Glodek acknowledged at the hearing that MDPA stock was a highly speculative investment and that the company had a very limited history of success, in none of the recorded calls did he temper his optimistic statements about the company and its prospects with cautionary

[17] Indeed, the record shows that customer AA, who postponed selling his MDPA stock after hearing Glodek's optimistic predictions, subsequently sold at least 7,000 of his 10,000 MDPA shares at a higher price than he would have received if he had not listened to Glodek. (CX 44.)

warnings. And at no time, up to and including the hearing, has Glodek ever acknowledged or accepted responsibility for his misconduct.

Considering the highly unusual circumstances of this case, therefore, the Hearing Panel concludes that sanctions in the lower range of the Guidelines, but by no means at the bottom, are appropriate. Accordingly, Glodek will be suspended in all capacities for 60 days and fined $25,000.

V. Conclusion

Respondent Kevin M. Glodek is suspended from association with any NASD member in any capacity for 60 days and fined $25,000 for violating Section 10(b) of the Securities Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110. In addition, he is ordered to pay costs in the amount of $5,525.56, which includes a $750 administrative fee and the cost of the hearing transcript. The fine and costs shall be payable on a date set by NASD, but not less than 30 days after this decision becomes NASD's final disciplinary action in this matter. If this decision becomes NASD's final disciplinary action, the suspension shall begin at the opening of business on June 18, 2007, and end at the close of business on August 16, 2007. [18]

HEARING PANEL

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Hearing Officer

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[18] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.