FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SAM AUBREY FOREMAN, JR. (CRD No. 833002), Respondent.	Disciplinary Proceeding No. 20070094454 Hearing Officer – AWH **HEARING PANEL DECISION** October 31, 2008

Registered representative settled a customer complaint away from his member employer and guaranteed that customer against loss. Respondent is fined $10,000 and suspended from associating with any FINRA member in any capacity for 30 business days for violating NASD Conduct Rules 2330(e) and 2110. Respondent is also assessed costs.

Appearances:

Mark J. Fernandez, Esq., and Keith A. Alt, Esq., for the Department of Enforcement.

Lloyd R. Schwed, Esq., for Sam Aubrey Foreman, Jr.

DECISION

I. Background

On January 29, 2008, the Department of Enforcement filed a two-cause Complaint against Respondent Sam Aubrey Foreman, Jr., alleging that he settled a customer complaint away from his firm, in violation of NASD Rule 2110, and guaranteed that customer against loss, in violation of NASD Rules 2330(e) and 2110. On March 10, 2008, Respondent filed an Answer to the Complaint, admitting that he settled a customer complaint away from his firm, but asserting that his misconduct was the result of negligence, not intent; it resulted from a "single mistake in judgment"; and it occurred under stress in the aftermath of Hurricane Ivan, which struck the location of his home and branch office on September 16, 2004. By agreement of the parties, a hearing was held on August 26, 2008, in Atlanta, Georgia, before a hearing panel composed of the hearing officer and two current members of the District 7 Committee.

II. The Respondent[1]

Sam Aubrey Foreman, Jr., entered the securities industry in 1976 and became registered through Merrill Lynch, Pierce, Fenner & Smith in January 1977. He served for 20 years with Merrill Lynch in the positions of financial advisor, operations manager, and branch manager. For nine years, beginning in September 1996, he was registered through Dean Witter/Morgan Stanley and served as a financial advisor, assistant branch manager, and, from September 1999 until June 2001, branch manager of the firm's Pensacola, Florida, branch office. Since September 2005, he has been registered through Smith Barney where he is a financial advisor. He has no disciplinary history.[2]

III. The Violations

JD, who in September 2004 was a 64-year-old retiree, became Foreman's customer when Foreman was with Merrill Lynch. JD moved with Foreman to Morgan Stanley, where, in November 2003, he purchased from Foreman a Hartford Select variable annuity. In September 2004, a few weeks after Hurricane Ivan hit Pensacola, JD contacted Foreman by telephone to complain about the performance of the variable

[1] References to the Department of Enforcement's exhibits are designated CX-; the Respondent's exhibits, as RX-; the Stipulations, as Stip.-; and the transcript of the hearing, as Tr.-.
[2] Answer, pp. 2-3; CX-2; Tr. 13-15.

annuity. During their conversation, JD accused Foreman of misrepresenting to him that the variable annuity would pay a guaranteed annual return of seven percent.[3]

After a series of additional phone conversations, JD spoke to Foreman on November 2, 2004, again complaining about the variable annuity and the alleged misrepresentation of a guaranteed minimum annual return. JD told Foreman that he would sue him and the firm if he did not get his complaint resolved. Foreman asked JD if there was anything he could do to convince him to stay in the annuity. JD said he wanted $10,000 and a written note, along with a check. JD then dictated a letter which he insisted be put on Morgan Stanley letterhead. Foreman thereupon used his own personal computer to prepare the letter which was put on Morgan Stanley letterhead and stated:

> As we discussed on the phone today, I will change the investments in your Hartford annuity worth $247,580 to pay 7% for four years. The fund to be used in the Hartford annuity to generate the 7% is called the Franklin Strategic Income Fund. If for any reason the annuity fails to return 7% I, Sam A. Foreman, Jr., will make up the difference.
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> At the end of four years you will receive both principal plus interest. Enclosed and in good faith is $10,000 to rectify my misrepresentation of this Hartford annuity.

He mailed the letter to JD and enclosed a personal check in the amount of $10,000, made payable to JD and written on Foreman's account at the Firm. At JD's insistence, Foreman wrote the word "gift" on the front of the check. Foreman never informed Morgan Stanley of JD's complaint, the letter, or the check.[4]

On January 9, 2006, JD contacted Morgan Stanley, alleging that Foreman had made a misrepresentation to him about the Hartford annuity. On the same day, JD sent Morgan Stanley copies of the November 2, 2004 letter and the enclosed check. As a

[3] Tr. 15-18, 30. Foreman denies any misrepresentation of the annuity to JD. The Complaint does not allege that Foreman made any misrepresentation; accordingly, the Hearing Panel need not reach the issue.
[4] CX-3; CX-4; CX-5, pp. 104-05; Stip. ¶ 2; Tr. 20-23, 25-26, 52-53, 56-57.

result, Morgan Stanley opened an investigation into the matter and, on or about March 29, 2006, entered into a settlement with JD in the amount of $20,000. Foreman never contacted Morgan Stanley, and Morgan Stanley never contacted Foreman about the settlement with JD.[5]

The parties stipulate that Foreman violated NASD Rule 2110 by settling a customer complaint away from his member firm, as alleged in the Complaint.[6] Foreman also violated NASD Conduct Rule 2330(e) which states that no associated person shall guarantee a customer against loss in connection with any securities transaction or account of such customer. The promise of a particular rate of return on an investment constitutes a guarantee against loss.[7]

IV. Sanctions

The FINRA Sanction Guideline for settling customer complaints away from a firm recommends a fine in the range of $2,500 to $50,000, and consideration of a suspension in any or all capacities for up to two years and, in egregious cases, a bar.[8] Enforcement considers Foreman's misconduct to be serious, but not egregious. It seeks a fine of $5,000 to $10,000, giving Foreman credit for the $10,000 he has already paid JD, and a suspension in all capacities for 30 days. Foreman admits and apologizes for his misconduct, but asserts that, in light of the stress he was under during the impact of Hurricane Ivan and his testimony that he will be fired by his present employer if he is suspended for even one day, he should be fined, but not suspended at all.

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[5] RX-5, RX-7; Stip. ¶¶ 4, 5; Tr. 79-80.
[6] Stip. ¶ 1.
[7] *David A. Gringas*, Exchange Act Release 31,206, 1992 SEC LEXIS 2537, *12 (Sept. 21, 1992).
[8] FINRA SANCTION GUIDELINES, at 36.

FINRA has held that settling a customer loss or complaint without the knowledge or authorization of the employer firm is a serious offense.[9] It is "the type of clandestine activity that harms customers whose interests are not properly served; it also harms member firms by preventing them from properly supervising their brokers."[10] In this case, it caused a member firm to pay $20,000 to settle a claim for misrepresentation when, with proper early disclosure, it may have contested the customer's claims and denied the complaint.

The principal consideration in determining sanctions for settling away is whether the respondent provided the employer with verbal notice of settlement and the employer acquiesced, or whether the respondent deceived his employer. Here, there was no notice at all to the employer. The member firm was blindsided when, months after Foreman left the firm, the customer presented it with the letter Foreman prepared on Morgan Stanley letterhead and the check Foreman had enclosed.

The Sanction Guideline for guaranteeing a customer against loss recommends a fine in the range of $2,500 to $25,000, and consideration of a suspension in any or all capacities for up to 30 business days. The principal considerations in determining sanctions for the violation are (1) the purpose and timing of the guarantee, and (2) whether the respondent received a financial benefit from the guaranteed transactions. Here, JD's forbearance from pursuing his complaint and suing Foreman and the firm constituted both the purpose of the guarantee and Foreman's intended benefit from the guarantee. However, because the guarantee against loss was part of the settlement of the

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[9] *Dep't. of Enforcement v. Paul Douglas Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, *20, (NAC March 7, 2008) (citing *Dist. Business Conduct Comm. v. DiAngelo*, No. C10960003, 1996 NASD Discip. LEXIS 34 (NBCC Oct. 16, 1996)).
[10] *Id.*, at *22.

customer complaint, Enforcement does not seek a separate sanction for the violation. Rather, it requests a single sanction for the misconduct which arose out of a common underlying cause.

There are several Principal Considerations in Determining Sanctions that the Hearing Panel must weigh. One factor is whether Foreman accepted responsibility for and acknowledged the misconduct to his employer or a regulator prior to detection and intervention by the firm or a regulator.[11] Foreman did not. Nor did he, prior or subsequent to detection, attempt to remedy the misconduct.[12] Moreover, he attempted to conceal his misconduct by circumventing the requirement that he submit the November 2, 2004, letter for review and approval by the branch manager of the firm.[13] Finally, his misconduct was intentional, and not the result of recklessness or negligence.[14] As a former branch manager himself, Foreman knew that he could not settle a customer complaint away from the firm, knew that he could not issue a letter on firm letterhead without the review and approval of a principal of the firm, and knew that correspondence in which he admitted to a sales practice violation was akin to composing a ransom note that could be presented to the firm at any time in the future.

Foreman asks the Hearing Panel to take into consideration his 32 years in the securities industry without any disciplinary history. However, his lack of previous disciplinary history cannot be considered as a mitigating factor. FINRA has consistently

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[11] GUIDELINES, at 6 (Principal Considerations in Determining Sanctions, No. 2).
[12] *Id*. (No. 4).
[13] *Id.* (No. 10).
[14] *Id.* (No. 13).

held that "[while] the existence of a disciplinary history is an aggravating factor when determining appropriate sanctions, its absence is not mitigating."[15]

Foreman also asks the Hearing Panel to take into consideration his testimony that he was told that he would lose his job with his current firm if he were to be suspended for even one day. However, FINRA does not consider discipline that has already been imposed by a firm to be a mitigating factor in determining sanctions: "As a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case. We consider the disciplinary sanctions we impose to be independent of a firm's decisions to terminate or retain an employee."[16] The same rationale applies to any prospective action a firm may or may not take against an employee as a result of sanctions imposed in a disciplinary proceeding before FINRA. Whether the firm takes any adverse action as a result of FINRA's decision is a matter wholly within the discretion of the firm.

Foreman asserts, as a mitigating circumstance, the stress he was under when coping with the damage and disruption that resulted from Hurricane Ivan which formed on September 2, 2004. On September 16, 2004, Ivan made landfall, with high winds and a storm surge that caused severe damage in the Pensacola area. Foreman's house had roof damage and water incursion. He was without electricity for about two and a half weeks. His elderly mother's house was also damaged. As treasurer of his homeowners' association, he was in contact with insurance companies and contractors to repair

[15] *Dep't of Enforcement v. Cuozzo*, No C9B050011, 2007 NASD Discip. LEXIS 12, *39 (NAC Feb. 27, 2007).

[16] *Dep't of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, *11 (NAC Dec. 18, 2000).

commonly owned property. Because of the damage to Morgan Stanley's Pensacola office, Foreman commuted to the Mobile, Alabama, office for a week and a half.

The Hearing Panel has considered the evidence Foreman offered concerning his emotional condition at the time of, and in the aftermath of, the hurricane. And while the Hearing Panel can sympathize with the cumulative effects of that experience, it notes that the letter and check he gave JD were written some six weeks after the storm came through Pensacola. At no time, over a period of two years and two months, did he inform Morgan Stanley of the events that led to its $20,000 settlement with JD. Accordingly, the Hearing Panel cannot conclude that Foreman's misconduct resulted from, or was exacerbated by, his emotional condition at the time of Hurricane Ivan.[17]

Finally, in his pre-hearing brief, Foreman cites a 1995 NASD decision to support his request that no suspension be imposed for his misconduct. In *District Business Conduct Committee No. 1 v. Hsieh,*[18] the respondent admitted to settling two separate customer complaints on two separate occasions away from his firm by paying customers in an effort to placate them. He was charged with settling claims away from the firm and guaranteeing customers against loss. The National Business Conduct Committee declined to impose a suspension in addition to a fine, asserting that a suspension would be "harsh" under the circumstances of the case. Those circumstances included facts such as (1) the respondent was relatively inexperienced at the time of the misconduct; (2) he was motivated by a mistaken belief that the settlement of the complaints would be proper; and (3) the customers and firm were fully reimbursed by his prompt payment of all sums.

[17] *See, e.g., Dist. Business Conduct Comm. v.Tammy K. Kwikkel-Elliot*, 1998 NASD Discip. LEXIS 4, *14 (Jan. 16, 1998) (conduct not shown to have been caused or exacerbated by personal or work-related circumstances).
[18] No. C01940022, 1995 NASD Discip. LEXIS 227 (NBCC June 20, 1995).

The decision noted that, at that time, the NASD Sanction Guideline for guarantees against loss "indicates that no suspension is warranted in 'typical' cases."[19]

The SEC has repeatedly rejected attempts by respondents to compare the sanctions imposed against them to the sanctions imposed against others. "The appropriate sanction . . . depends on the facts and circumstances of each particular case."[20] In any event, the facts here differ from those in *Hsieh.* Foreman was an experienced securities professional who had served in supervisory capacities; he knew that his conduct was improper at the time he settled the complaint, and he did not reimburse the firm for the amount it paid to the customer as a result of his conduct. Moreover, this case involves more than a guarantee against loss; it concerns the settlement of an alleged sales practice violation: misrepresentation of a material fact.

After considering the misconduct at issue, and to impose sanctions that are remedial in nature and designed to deter future misconduct and improve overall business standards in the securities industry, the Hearing Panel will fine Foreman $10,000 and suspend him in any capacity for 30 business days. He will also be assessed costs.

V. Conclusion

Sam Aubrey Foreman, Jr. is fined $10,000 and suspended from associating with any FINRA member in any capacity for 30 business days for violating NASD Conduct Rules 2330(e) and 2110 as set forth above. He is also assessed costs in the total amount of $1,385, consisting of a $750 administrative fee and a $635 transcript fee.

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[19] The 1995 Sanction Guidelines were later amended to delete the suggestion that a suspension would not be warranted in the typical case.

[20] *Raghavan Sathianathan*, Exchange Act Release No. 54,722, 2006 SEC LEXIS 2572, at *44 (Nov. 8, 2006), *appeal pending*, No. 07-1002 (D.C. Cir., filed Jan. 3, 2007). Foreman also cites several settled cases in which suspensions were not imposed. However, the Commission has "repeatedly stated that pragmatic considerations may justify lesser sanctions in negotiated settlements." *Id*. at *44-45.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this decision becomes FINRA's final disciplinary action in this matter, except that if this decision becomes FINRA's final disciplinary action, Foreman's suspension shall begin at the opening of business on Monday, January 5, 2009, and end at the close of business on Friday, February 13, 2009.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

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