FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. JERRY WILLIAM BURCH (CRD No. 1450138), Respondent.	Disciplinary Proceeding No. 2005000324301 **HEARING PANEL DECISION** Hearing Officer – SNB June 2, 2009

Respondent is barred for (1) making recommendations to customers to purchase stock without disclosing that his wife's account was simultaneously selling the same stock, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and NASD Rules 2120 and 2110; (2) failing to notify his firm of his wife's outside account, in violation of NASD Rules 3050(c) and 2110; and, (3) falsely representing to his firm that customer purchases were unsolicited, resulting in false firm records, in violation of NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4. In addition, Respondent is fined $28,000 for his violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and NASD Rules 2120 and 2110. In light of the bar, no further sanctions are imposed for Respondent's failure to update his Form U4 to disclose a Wells Notice from FINRA, in violation of IM-1000-1, NASD Rule 2110, and Article III, Section 4(f) and Article V, Section 2(c) of the By-Laws.

Appearances

Michael J. Dixon, Esq., Lora W. Alexander, Esq., and James J. Nixon, Esq., the Department of Market Regulation, for Complainant.

John L. Erikson, Jr., Esq., for Respondent.

DECISION

I. Procedural History

On September 27, 2007, the Department of Market Regulation ("Market Regulation") filed a four-count Complaint. The first count alleges that Jerry William Burch ("Respondent") failed to disclose to customers that an account opened by his wife was selling shares of Dogs International, a thinly-traded, development-stage company traded on the OTC Bulletin Board ("OTCBB"), at the same time that he recommended that his customers buy it, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, and NASD Rules 2120 and 2110. The second count alleges that Respondent failed to notify his firm of an outside account opened by his wife, which she used to sell Dogs International shares, in violation of NASD Rules 3050(c) and 2110. The third count alleges that Respondent falsely represented to his firm that customer purchases of Dogs International shares were unsolicited, resulting in false firm records, in violation of NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4. The fourth count alleges that Respondent failed to update his Form U4 to disclose FINRA's Wells Notice regarding the activities alleged in counts one through three, in violation of IM-1000-1, NASD Rule 2110, and Article III, Section 4(f) and Article V, Section 2(c) of FINRA's By-Laws.

On November 19, 2007, Respondent filed an answer admitting that he recommended Dogs International stock to some customers, denying the remaining allegations and requesting a hearing. On April 29 and 30, 2008, a hearing was held before a Hearing Panel comprised of a Hearing Officer, a former member of the District 2

Committee and a current member of the District 1 Committee. On July 10, 2008, the parties filed post-hearing briefs.[1]

II. Respondent

Respondent entered the securities industry in 1986. He has been registered as a general securities principal with his present firm, WBB Securities LLC ("WBB"), since February 2002. He was previously registered with four other firms. CX-41.

III. Facts

The charges in this matter largely focus on the events of March 28, 2003, the day that Dogs International shares began trading on the OTCBB. On that day, Respondent and his wife both worked from home and used the same telephone and facsimile line to buy and sell shares of Dogs International. Specifically, Respondent's wife opened a brokerage account away from Respondent's firm and sold Dogs International shares, while Respondent recommended and executed purchases of the same stock on behalf of his customers without telling them about his wife's sales.[2]

Respondent does not dispute that he recommended Dogs International to his customers while his wife sold the same shares from her account at another brokerage firm. He also does not dispute that he recommended those purchases without disclosing that his wife was simultaneously selling Dogs International shares from a brokerage account she controlled. At the hearing, he explained this by asserting that he knew nothing about his wife's sales of Dogs International stock, so he was unable to inform his

[1] References to the testimony at the hearing are designated as "Tr._," with the appropriate page number. References to the exhibits provided by Market Regulation are designated as "CX-___." References to the exhibits provided by Respondent are designated as "RX-___." CX-1-57 and RX-1-15 were admitted into the record.

[2] The Complaint also alleges that Respondent marked customer orders unsolicited when that was not the case, and failed to update his Form U4 to reflect the Staff's investigation when he received a Wells Notice.

customers. He also asserted that even if he had known about his wife's sales, he did not need to disclose this information because his wife did not own the stock. However, as discussed in greater detail below, the Panel did not find these assertions credible.

A. Dogs International

Dogs International, a development-stage or "public shell" company, was originally incorporated in Nevada in January 2002 under the name Juris Travel. CX-4 p. 3. Juris Travel, with essentially no business operations, initiated quotation on the OTCBB under the symbol JTVL on September 20, 2002.[3] It traded only a few days in the six months leading up to its eventual name change to Bed and Biscuit Inns of America, Inc. on March 17, 2003, and its subsequent name change to Dogs International on March 24, 2003. CX-1 pp. 1-6, CX-4 p. 27; Tr. 245, 276-79. A non-salaried, part-time employee served as its sole officer, director and shareholder. CX-4 pp. 8, 16. On March 28, 2003, the same day as many of the transactions at issue in this case, Dogs International began trading on the OTCBB under its new symbol DOGN. CX-56 p. 1.

B. Respondent's Introduction to Dogs International

Respondent first learned about Dogs International in early 2003 from his friends DA and RS,[4] who told him that the company planned to own and operate upscale pet facilities. Tr. 30-35, 295, 347-49. Respondent's wife, Teri Denise Burch ("Respondent's wife" or "Teri Burch"), was also aware of Dogs International; DA and

[3] Its Form 10K for the year ended December 31, 2002, disclosed current assets of $24,340, revenue from sales of $740 and a net loss of $8,160. CX-4 at pp. 20-22. Its Form 10Q for the quarter ended March 31, 2003, disclosed assets of $22,340, no sales and a net loss of $27,000. CX-5 pp. 3-4. Its Form 10K for the year ended December 31, 2003, disclosed sales of $83,000 and operating expenses of $197,633 from a single pet care facility that it purchased after the activity at issue in this case. RX-3 p. 25.

[4] Respondent became friends with DA during the four years they worked together at Merrill Lynch. Tr. 30-32. Respondent also played golf and softball with RS. Tr. 468-70. RS and DA operated a company called Elite Capital Partners that assisted start-up companies in raising funds, services that it provided to Dogs International and its predecessors. Tr. 30-32.

RS discussed it with Respondent and his wife during social gatherings. Tr. 33-34. When DA and RS told Respondent that they were looking for investors, Respondent began recommending the stock to his clients. The only information he had about this potential investment came from his conversations with DA and RS, a call to a pet facility in Flagler, Florida owned by RS's mother,[5] and his general view of the pet care industry. Tr. 32-33, 62-63, 473-75.

In February and early March 2003, Respondent's clients made private investments totaling $200,000, in what they understood was Dogs International. CX-27 pp. 24-25, CX-29; Tr. 35-43, 48-51. Later, on March 17, 2003, Respondent handled another customer's 3,000 share purchase of Dogs International's predecessor, Juris Travel, over the OTCBB.[6] CX-17 p. 25.

C. Teri Burch Forms TDB Capital

Two days later, on March 19, 2003, Respondent's wife organized a Nevada corporation named after her initials, TDB Capital ("TDB"), a corporation that she would later use to sell Dogs International shares. CX-8 p. 6. This was the first corporation that she had ever formed; she had been a flight attendant for over 20 years.[7] Although she had never been a corporate officer, Teri Burch served as TDB's President, Secretary, and Treasurer - she was the only person authorized to act on its behalf. CX-8 pp. 4-5; Tr. 79,

[5] Months later, on April 7, 2003, Dogs International acquired this facility from RS's mother for $500,000. , RX-2 p. 1.

[6] PW appeared at the hearing and testified that Respondent told him that Juris Travel was going to become Dogs International, which is the reason PW purchased it. Based upon PW's demeanor and the fact that he had no motive to be untruthful, the Panel credited PW's testimony over Respondent's claim that he did not know that Juris Travel was connected with Dogs International when PW purchased it. Tr. 43, 56-58, 449-50.

[7] Over her years serving as a flight attendant, Teri Burch held other part-time jobs, generally involving administrative services. Tr. 333.

333, 339. A Las Vegas firm, the Securities Law Institute ("SLI"), handled the documentation for TDB's formation.[8] CX-8 p. 6, CX-46 p. 115; Tr. 81.

Teri Burch testified that she was unfamiliar with the Articles of Incorporation for TDB, and she could not explain why she held the offices of President, Secretary and Treasurer, despite her signature on numerous corporate documents.[9] CX-8 pp. 5-12; Tr. 337-40, 351-52. Respondent asserted that he did not know that his wife had formed TDB until months later, after June 2003. Tr. 84-85, 100. As discussed more fully below, the Panel did not find the Burches' testimony to be credible.

D. March 28, 2003 Purchases and Sales of Dogs International

On March 28, 2003, the day that Dogs International shares began trading on the OTCBB, Respondent and his wife used the same home telephone and facsimile line to conduct the transactions that are largely the focus of this matter. Tr. 97-98, 353. Because Respondent and his wife claimed to recall little or nothing about the events of the day, the Panel considered telephone records and contemporaneous documents to help reconstruct what happened.

Telephone activity began before dawn. Telephone records show that Respondent's home line was used to call Dogs International promoter, DA, five times between 5:43 a.m. and 6:58 a.m., for an aggregate of 24 minutes. CX-34 p. 50. Respondent had no recollection of the calls. However, he testified that the calls were to DA's telephone number, so he assumed he made them. Tr. 93-94.

[8] SLI also handled legal documentation for Juris Travel. CX-1 p. 17.

[9] She initially claimed that she did not recall that TDB ever held Dogs International shares. Tr. 342-44. She also could not remember directing wire transfers to a bank account that she controlled. Tr. 344. However, in her later testimony, she admitted that she opened a brokerage account away from Respondent's firm, at member firm ACAP Financial ("ACAP"), and wired money out of the ACAP account to her bank account. Tr. 352-57. She alternatively denied, or claimed not to recall, discussing TDB with her husband. Tr. 349-53.

Telephone records also indicate that at 7:39 a.m., Respondent's home fax line was used to send a new account form to ACAP, a Utah brokerage firm, to establish Teri Burch's first and only brokerage account apart from her husband. CX-8 p. 2, Tr. 353-54. The account was named TDB, and Teri Burch signed the account documentation as TDB's authorized signatory. Id.

About an hour later, at 8:45 a.m., telephone records show a three minute call from the Burches' to SLI, the Las Vegas firm that organized TDB and handled the legal documentation for Juris Travel. Another call was placed to the same telephone number at 10:29 a.m. CX-34 p. 53. Again, neither Respondent nor his wife recall these calls and neither offered an explanation for them. Tr. 94-95, 363.

Telephone records also reveal that Respondent called three of his clients that morning. Specifically, at 9:09 a.m., Respondent called CZ, his client of ten years, and spoke with him for 19 minutes. CX-34 p. 53. At 12:11 p.m., Respondent again called CZ and spoke with him for eight minutes. Id. Later that day, Respondent executed CZ's order to purchase 6,000 shares of Dogs International at $5.82 per share, for approximately $35,000. Tr. 44-46; CX-30 p. 36. At 10:38 a.m., Respondent had a three-minute call with CG, a client who was introduced by RS. Tr. 58; CX-34 p. 53. CG opened an account that day and Respondent executed his order to purchase 800 shares of Dogs International at $5.82 per share, for approximately $4,700. Tr. 58-60, 96; CX-19 p. 6. Less than an hour later, at 11:27 a.m., Respondent had a one-minute call with a third client, VT, who had previously made a $50,000 private investment in Dogs International. VT purchased 1,000 shares of Dogs International at $5.895 per share on the following day for $5,900. CX-27 p. 6, CX-34 p. 53; Tr. 96.

Minutes after Respondent concluded these customer calls, his wife began selling Dogs International stock. At 11:29 a.m., following the deposit of 50,000 shares of Dogs International into the TDB account,[10] ACAP executed an order to sell 800 shares of Dogs International for the TDB account at $5.75 per share, for proceeds of $4,600.[11] CX-7 p. 1, CX-8 p. 13-14, CX-56 p. 1; Tr. 129. Teri Burch testified that she did not recall requesting this sale. Tr. 391. However, when she opened her account at ACAP, she signed documentation specifically indicating that she would be trading Dogs International securities, and she was the only person authorized to place orders for the account. Tr. 142; CX-8 pp. 2, 5. Moreover, the broker at ACAP testified that Teri Burch did place the sell order. Tr. 126-27. For these reasons, the Panel found that Teri Burch ordered the sale of the shares.

That same afternoon, Respondent's firm, WBB, executed Respondent's buy orders for two of the customers who Respondent had spoken to earlier that day, along with five more of his customers, for an aggregate of 16,100 shares of Dogs International. The orders were consolidated on one order ticket. CX-31 p. 2, CX-32.

On March 31, 2003, the next business day following March 28, 2003, TDB sold 1,000 shares of Dogs International for $5.70 per share, for proceeds of $5,700.[12] CX-8 p. 15. From March through June 2003, the TDB account at ACAP sold 6,800 shares of Dogs International, for total proceeds of almost $35,000. Teri Burch did not recall ordering the sales, but her broker at ACAP did. Tr. 128, 391. During that period, Teri

[10] The March 27, 2003 receipt from the transfer agent for the 50,000 share certificate to TDB reflects a signature with RS's name. RX-11 p. 1. The shares were transferred from a "BW" to TDB. RX-11 p. 2.

[11] ACAP deducted $214 in commissions and miscellaneous charges from these proceeds. CX-8 p. 14.

[12] ACAP deducted $258 in commissions and miscellaneous charges from these proceeds. Id.

Burch instructed ACAP to wire $28,000 of these proceeds to her account at Bank of America.[13] CX-8 pp. 16-19, CX-10; Tr. 357-63.

During the same period, Respondent's customers purchased a total of 46,220 shares of Dogs International, at prices ranging from $4.45 to $8.75. CX-32. It is undisputed that Respondent did not disclose his wife's sales of Dogs International stock to any of these customers.

E. FINRA Opens an Investigation into Trading in Dogs International Stock

On March 28, 2003, Dogs International's stock price rose from $2.50 to over $6, closing at $5.82, despite the fact that it still had no business operations or material assets. The daily trading volume on that day rose to over 60,000 shares. Based upon this significant rise in price and trading activity, FINRA Staff opened an investigation.[14] Tr. 244-45.

During its investigation, FINRA Staff learned that ACAP had the highest retail selling volume of Dogs International on March 28. Tr. 246. In addition to the TDB account sales, Staff learned that two accounts owned by relatives of DA and RS also sold Dogs International shares. Accordingly, the Staff began investigating these sales.

[13] At the hearing, Teri Burch admitted that she recalled wiring funds from the TDB account to her account at Bank of America. Tr. 355-57. She testified that she opened the Bank of America account at a branch office close to her house, using her home address, and she was the sole signatory on the account. Tr. 345, 355-56, 382. She also admitted that she had an ATM card and likely used it to withdraw funds. Tr. 357.

[14] Dogs International's predecessor, Juris Travel, only traded on a few days in the six months leading up to the reverse merger and name change to Dogs International; the most recent trade in mid-March was at a price of $2.50 per share. CX-54-56; Tr. 245, 276-79, 323.

F. Teri Burch Releases Her Interest in TDB after FINRA Investigates

After the Staff initiated its investigation, Teri Burch ceased sales of Dogs International stock and took steps to disassociate herself from TDB.[15] On September 15, 2003, she sent a letter to ACAP directing that it send duplicate confirmation statements to Respondent's firm, WBB. CX-9 p. 1. On October 2, 2003, she sent a letter to SLI resigning from TDB, transferring her authority to RS's girlfriend, KD, and requesting that SLI prepare all necessary documentation to effect the change. CX-9 p. 2. She received and signed the requested documentation effective the same day.[16] CX-9 p. 3.

G. Respondent Receives a Wells Notice from FINRA but Does Not Report it on His Form U4.

On July 18, 2006, FINRA Staff sent Respondent a Wells Notice, indicating that it was recommending disciplinary action against him. The letter stated that Respondent should treat the letter as written notification that he was the subject of an investigation for the purpose of triggering an obligation to update his Form U4. CX-42; Tr. 112.

Respondent gave the Wells Notice to his supervisor at WBB, and expected that he would update the Form U4. Respondent did not follow up with him, and his supervisor did not update the Form U4 until October 8, 2007, when he was prompted by a FINRA deficiency letter. CX-41 p. 48; Tr. 242-43. The supervisor appeared at the hearing and acknowledged that he had planned to update the U4, but did not do so. Tr. 242-43.

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[15] After June 25, 2003, there were no further sales of Dogs International from the ACAP account until over a year later in July 2004, when Teri Burch was no longer associated with the account. CX-10; Tr. 263-65. In 2004, KD sold 91,400 shares of Dogs International from the TDB account at ACAP for total proceeds of $171,677, and she wired $166,412 out of the account. CX-10 pp. 2-3; Tr. 264-66.

[16] Fax headers on the corporate authority documents indicate that they may have been sent from SLI on October 10, 2003, and returned by Teri Burch on October 12, 2003. CX-9 pp. 3-4. It also appears that KD took control of the ACAP account between November 24 and December 1, 2003. CX-9 pp. 6-8.

IV. Violations

A. Respondent's Failure to Disclose that His Wife Was Selling Dogs International Shares (Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and NASD Rules 2120 and 2110).

Count one of the Complaint charges that Respondent made recommendations to customers to purchase Dogs International stock without disclosing that his wife's account was selling the same stock, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and NASD Rules 2120 and 2110.

Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Rule 2120 prohibit fraudulent and deceptive practices in connection with the offer, purchase, or sale of a security. Alvin W. Gebhart, Exch. Act Rel. 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). Misrepresentations and omissions are also inconsistent with just and equitable principles of trade and therefore are a violation of Rule 2110. "The [SEC's] and [FINRA's] antifraud 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." Department of Enforcement v. Donner Corp. Int'l, No. CAF020048, 2006 NASD Discip. LEXIS 4, at *50 (NAC Mar. 9, 2006) (quoting District Bus. Conduct Comm. v. Euripides, No. C9B950014, 1997).

A finding of an anti-fraud rule violation requires a showing that a person, acting with scienter, misrepresented or omitted material facts in connection with securities transactions. Donner Corp., 2006 NASD Discip. LEXIS 4, at *50. In addition, a violation 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 because Respondent, among other things, made telephone calls in connection with the subject sales.

Scienter is the "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S.986, at 193. 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 or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.'" The Rockies Fund, Inc. v. SEC, No. 04-1255 (D.C. Cir. Nov. 15, 2005), 2005 U.S. App. LEXIS 24521, at *12 (citing SECv. Steadman, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977))). Proof of scienter is not required to establish that a misrepresentation or omission violates Conduct Rule 2110. Scienter can be established through circumstantial evidence. See, e.g., Meyer Blinder, Exch. Act Rel. No. 31095, 1992 SEC LEXIS 2019 at *33 (Aug. 26, 1992).

Here, Respondent claimed that he did not act with scienter in failing to disclose his wife's sales of Dogs International to his customers because he was unaware of the sales. The Panel rejected this claim, finding instead that Respondent was fully aware of the TDB account and its sales of Dogs International shares.

In reaching this finding, the Panel considered Respondent's inconsistent statements regarding his awareness of TDB. Specifically, Respondent admitted during his earlier on-the-record ("OTR") testimony that he saw TDB corporate documents addressed to Teri Burch as they came across his home office fax line in March 2003. CX-46 pp. 115-19. He also testified that his wife told him she was "going to" form TDB.

CX-46 p. 27. However, at the hearing, Respondent claimed that he was unaware of TDB in March 2003, and only learned about it following FINRA's investigation. Tr. 80, 84-86. Respondent offered no explanation for this inconsistency. The Panel, therefore, found Respondent's later, self-serving claim of ignorance not to be credible.

Moreover, considering Teri Burch's lack of familiarity with securities accounts and corporate structure, the Panel concluded that she must have discussed with her husband the opening of a brokerage account and forming a corporation and its sales of stock, particularly given that they had previously discussed Dogs International with DA and RS. Tr. 33-55, 295. Indeed, evidence suggests that she did consult with Respondent. The TDB ACAP account opening form contained information about the Burches' financial situation that Teri Burch admitted that she would not have known. Tr. 374-75. In addition, the information was generally consistent with financial information that he had included in a WBB new account form for their joint account a opened year earlier. Compare CX-8 p. 1 with CX-15 p. 1. Given these facts, the Hearing Panel concluded that Teri Burch consulted with Respondent in preparing the TDB ACAP new account application.

In addition, the Panel considered that the ACAP account opening form included false information that hid the fact that Respondent was a broker at WBB. Specifically, the form falsely represented that Respondent was self-employed and worked from home. CX-8 p. 1. The form also listed Teri Burch's broker dealer as Merrill, and failed to disclose that she had a joint account with her husband at his firm, WBB. CX-8 p. 1, Tr. 124-25. Finally, the form stated "N/A" in response to a question asking whether any member of the client's immediate family was employed by a broker-dealer. CX-8 p. 1. These facts further indicated to the Panel that Respondent was involved with completing

the TDB account opening form; he was uniquely sensitive to the implications of his affiliation with another broker.

Finally, the Panel considered that Respondent and his wife were home together on March 28, using the same telephone and facsimile line to carry out purchases and sales of Dogs International, which led the Panel to conclude that Respondent was aware of his wife's activities. The Respondent offered no reasonable explanation of how he and his wife could have used the same facilities to conduct business on March 28, yet be unaware of each other's activities.

For the foregoing reasons, the Panel found that Respondent knew of his wife's sales and acted with scienter when he failed to disclose this fact to his customers.

Enforcement must also establish that the undisclosed information was material. 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. Basic, 485 U.S. at 231-32.

Respondent claimed that his wife's sales of Dogs International shares were not material because his wife had no financial interest in the shares because they were owned by RS's girlfriend, KD. Tr. 100-01.

However, the Panel rejected this claim, instead finding that Respondent's wife had an interest in the shares. In reaching this finding, the Panel considered that the stock transfer instructions, signed by RS, show that the TDB shares came from someone other than KD. RX-11 p. 2. In addition, Respondent offered no evidence to explain why KD's name did not appear on any of the account documentation if she was the true owner. If KD really viewed the TDB account as hers, it would make no sense to name the account

with Teri Burch's initials and appoint Teri Burch as the sole officer and person authorized to act on its behalf. Moreover, the Panel found it unlikely that KD would deposit 50,000 shares of Dogs International stock worth more than $250,000 into an account over which she had no documented ownership or control. Finally, the Panel noted that Teri Burch only relinquished control of the account after questions arose regarding her husband's involvement with, and awareness of, her activity. For these reasons, the Panel concluded that Respondent, his wife, and KD fabricated the claim that KD owned the shares deposited in the TDB account in an after-the-fact attempt to explain this activity.

Respondent additionally claimed that, even assuming his wife had an interest in the TDB account at ACAP, it was not material because none of his customers complained or asked for rescission of their purchases. However, the standard for materiality is an objective one, and is determined by whether a "reasonable [investor] would consider [a fact] important" in making an investment decision, or, whether disclosure would significantly alter…the 'total mix' of information made available. See Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988); DOE v. Abbondante, 2005 NASD Discip. LEXIS 43 *24 (NAC April 5, 2005). The fact that a broker has a financial interest in, and is contemporaneously selling a stock while recommending its purchase to customers, is the type of adverse interest that must be disclosed. Richmark Capital Corp., 2003 SEC LEXIS 2680 (Nov. 3, 2003) (finding violations of Section 10(b) of the Exchange Act for failing to disclose to investor that a firm was selling shares at the same time it was recommending that customers purchase them); Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (2d Cir. 1970) ("The investor…must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is

economic self interest.").[17] Here, the fact that Respondent's wife was selling stock while he was contemporaneously recommending its purchase by his customers was a material fact that he was obligated to disclose. By failing to disclose her activities, Respondent deprived his customers of the opportunity to evaluate whether his recommendations to purchase shares of Dogs International were influenced by economic self interest.

Accordingly, the Panel finds that Respondent made recommendations to customers to purchase stock without disclosing that his wife's account was selling the same stock, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and NASD Rules 2120 and 2110.

B. Respondent's Failure to Disclose to His Firm His Wife's TDB Account at another Member Firm (NASD Rules 3050(c) and 2110).

Count two of the Complaint alleges that Respondent failed to notify his firm about the outside account opened by his wife, in violation of Rules 3050(c) and 2110.

Rule 3050(c) requires that an associated person, "prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with another member." Rule 3050(e) states that this requirement applies to "[any] account or order in which an associated person has a financial interest or with respect to which such person has discretionary authority." Here, Respondent has a community property interest in his wife's account at ACAP, because they reside in California. Firstmark Capital Corp. v. Hempel Fin. Corp., 859 F.2d 92, 94 (9th Cir. 1998)

[17] Telephone records indicate that Respondent spoke with three customers on March 28, but executed purchases for seven customers. Even if these customer orders were based upon conversations that pre-dated Respondent's awareness of his wife's sales of Dogs International stock, once he learned of her activities, he was required to disclose them before he executed his customers' purchase orders. See, e.g., Richmark Capital Corp., 2003 SEC LEXIS 2680 (Nov. 3, 2003).

(holding under California law that a wife held a community property interest in a corporation owned by her husband).

As noted above, Respondent was aware of his wife's account at ACAP. Accordingly, the Panel found that Respondent failed to notify his firm of his wife's outside account, in violation of Rule 3050(c). A violation of a FINRA rule is also a violation of Rule 2110. See, Chris Dinh Hartley, Exch. Act Rel. No. 50031, 2004 SEC LEXIS 1507, at *9 (July 16, 2004).

C. Respondent's False Representations to His Firm that Customer Purchases Were Unsolicited Resulting in False Firm Records (NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4).

Count three of the Complaint alleges that Respondent made false representations to his firm that customer purchases were unsolicited, resulting in false firm records, in violation of NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4.

Rule 3110(a) provides that "each member shall make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules regulations . . . as prescribed by SEC Rule 17a-3 [and Rule 17a-4]."

It is undisputed that Respondent called the WBB trader and placed orders to purchase Dogs International on behalf of his customers. As part of the process, Respondent was required to inform the WBB trader whether to mark the order solicited or unsolicited. Tr. 212. Based upon Respondent's instruction, the trader marked as "unsolicited", Respondent's orders to buy Dogs International on March 28, 2003. Many other Dogs International orders in for Respondent's customers' in the months that followed were also marked "unsolicited." CX-31 pp. 2-3, 6-9,13, 16, 19, 30-63, Tr. 70-71, 76-77, 224-32, 239.

Initially, Respondent maintained that the "unsolicited" designation was correct. Following FINRA's initial inquiry, the WBB trader spoke with Respondent to confirm that the tickets were marked correctly. According to the trader, Respondent "was adamant that he was not soliciting orders or promoting the stock." RX-28 p. 44. At the hearing, however, Respondent acknowledged that he did in fact solicit purchases in Dogs International, including some of the customers who purchased Dogs International on March 28, 2003. CX-32; Tr. 44-57, 61-62, 71-72, 75. However, he also did not dispute the WBB trader's account that Respondent had earlier claimed the orders were unsolicited, claiming only that he did not recall it. RX-28 p. 44; Tr. 73-74. Respondent acknowledged "mistakes were made…I'm sure I made them… [but]…there was no forethought in me doing so." Tr. 484. He also suggested that perhaps the trader made an error on the order ticket because all orders were aggregated on the same ticket. Id.

Based upon the documentary evidence, Respondent's demeanor, the WBB trader's testimony and the unexplained inconsistency in Respondent's testimony, the Panel found that Respondent intentionally instructed the WBB trader to mark the order tickets unsolicited. Accordingly, the Panel finds that Respondent falsely represented to his firm that customer purchases were unsolicited, resulting in false firm records, in violation of NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4.

D. Respondent's Failure to Update His Form U4 to Disclose a Wells Notice from FINRA (IM-1000-1, NASD Rule 2110 and Article III, Section 4(f) and Article V, Section 2(c) of the By-Laws).

Count four of the Complaint alleges that Respondent failed to update his Form U4 to disclose FINRA's Wells Notice regarding the activities alleged in its Complaint, in violation of IM-1000-1, NASD Rule 2110 and Article III, Section 4(f) and Article V, Section 2(c) of the By-Laws.

Registered persons are required to provide updates to their Form U4 on a timely basis "whenever changes occur to answers previously reported." A Wells Notice triggers the obligation to update a Form U4. See Notice to Member 98-27 at 167 (Mar. 1998). Article V, Section 2 of FINRA's By-Laws obligates registered representatives to keep their application for registration current at all times by filing supplementary amendments with FINRA within 30 days of learning of facts or circumstances giving rise to the amendment. FINRA uses the Form U4 "to monitor and determine the fitness of securities professionals." Dep't of Enforcement v. John D. Kaweske, Complaint No. C07040042, 2007 NASD Discip. LEXIS 5, at *33 (NAC Feb. 12, 2007), citing Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996). A Form U4 that is inaccurate or incomplete so as to be misleading may be deemed conduct inconsistent with just and equitable principles of trade. See IM-1000-1; Thomas R. Alton, 52 S.E.C. 380, 382 (1995).

Respondent does not dispute that his Form U4 was not timely updated to disclose his receipt of a Wells Notice from FINRA. He presented evidence at the hearing that his supervisor agreed to handle the update, but failed to do so. However, the responsibility for maintaining the accuracy of a Form U4 lies with each individual registered representative. Kaweske at *34.

Accordingly, the Panel finds that Respondent failed to update his Form U4 to disclose a Wells Notice from FINRA, in violation of IM-1000-1, NASD Rule 2110, and Article III, Section 4(f) and Article V, Section 2(c) of FINRA's By-Laws.

V. Sanctions

A. Material Omissions in Connection with the Sale of Securities (Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and NASD Rules 2120 and 2110).

For misrepresentations or material omissions of fact, the FINRA Sanction Guidelines ("Guidelines") recommend a fine of $2,500 to $50,000 and a suspension of up to 30 business days for negligent misconduct. For intentional or reckless misconduct, the Guidelines 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. Guidelines at 93 (2007 ed.). In addition, the fine may be increased to take into consideration the respondent's financial benefit from the misconduct.

Here, Respondent's recommendation to customers to purchase stock without disclosing that his wife's account was selling the same stock was serious, but not egregious. His wife's sales were relatively modest, and there was no allegation that the purchases and sales were matched, or were part of a scheme to manipulate Dogs International stock. Nor did the sales by TDB involve particularly large blocks of stock. However, the Panel found that Respondent's attempted cover-up of his activities, both before and during the hearing, to be a strong aggravating factor, which has led it to conclude that Respondent cannot remain in the industry. Consequently, the Panel concludes that a bar is the appropriate sanction for Respondent's violations of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Rules 2120 and 2110. The Panel found no mitigating factors that would warrant a lesser sanction.

Market Regulation also asks for disgorgement for this violation in the amount of the $206,527, which represents the total value of TDB's sales of Dogs International stock in the ACAP account. However, most of these sales occurred after Respondent's wife

disclaimed any interest in the account and relinquished control. That said, while she still controlled the account, Respondent's wife transferred $28,000 from the ACAP account to a bank account that she controlled. The Panel has therefore determined to impose a fine of $28,000, which is within the Guidelines and sufficient to ensure that Respondent does not profit from his misconduct.

B. Failure to Disclose Outside Account (NASD Rules 3050(c) and 2110).

The Guidelines for failure to disclose an outside account recommend a fine ranging from $1,000 to $25,000 and, in egregious cases, a suspension for up to two years or a bar. Guidelines at 17. The Department of Market Regulation recommends a bar.

A Principal Consideration in the Guidelines is whether the violative transaction presented real or perceived conflicts of interest for the employer firm and or customers, and whether the respondent provided verbal notice of the violative transactions and the employer verbally acquiesced. Here, the fact that Respondent was recommending purchases in Dogs International at the same time his wife was selling Dogs International shares in an undisclosed account away from WBB, presents a real conflict of interest. Moreover, Respondent made no attempt to inform his firm. Instead, he intentionally withheld the information and revealed it only when repeatedly confronted.

When viewed in the context of aggravating factors, including Respondent's lack of candor about his misconduct at the hearing, the Panel concludes that a bar is the appropriate sanction for Respondent's failure to disclose an account away from his member firm, in violation of Rules 3050 and 2110. The Panel found no mitigating factors that would warrant a lesser sanction.

C. False Representations to His Firm that Customer Purchases Were Unsolicited Resulting in False Firm Records (NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4).

The Guidelines for record keeping violations suggest a fine of $1,000 to $10,000 and a suspension of up to 30 business days, or, in egregious cases, a lengthier suspension or a bar, and fine of up to $100,000. Guidelines at 30.The Department of Market Regulation recommends a bar.

Respondent asserts that his conduct was not intentional. However, as noted above, the Panel rejected this claim.

Given this, and Respondent's lack of candor at the hearing, the Panel concludes that a bar is the appropriate sanction for Respondent's false representations to his Firm that customer purchases were unsolicited resulting in false firm records in violation of NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4. The Panel found no mitigating factors that would warrant a lesser sanction.

D. Failing to Amend a Form U4 (IM-1000-1, NASD Rule 2110 and Article III, Section 4 (f)and Article V, Section 2(c) of the By-Laws).

For failing to amend a Form U4, the Guidelines suggest a fine of $2,500 to $25,000 and a suspension for five to 30 business days. Guidelines at 73. Applying the Principal Considerations, the nature of the information was significant and Respondent had a history of failing to timely update his Form U4, a history which suggested that Respondent should follow up with his supervisor to make sure that he filed the update. CX-41. Therefore, the Panel finds that a sanction at the higher end of the range would be appropriate. However, in light of the bars, no further sanctions are imposed for this violation.

VI. Conclusion

Respondent is barred for (1) making recommendations to customers to purchase stock without disclosing that his wife's account was selling the same stock, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and NASD Rules 2120 and 2110; (2) failing to notify his firm of his wife's outside account, in violation of NASD Rules 3050(c) and 2110; and (3) falsely representing to his firm that customer purchases were unsolicited resulting in false firm records, in violation of NASD Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4. In addition, Respondent is fined $28,000 for his violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and NASD Rules 2120 and 2110. In light of the bars, no further sanctions are imposed for Respondent's failure to update his Form U4 to disclose a Wells Notice from FINRA, in violation of IM-1000-1, NASD Rule 2110 and Article III, Section 4(f) and Article V, Section 2(c) of the By-Laws.[18]

These bars shall become effective immediately if this Hearing Panel Decision becomes the final disciplinary action of FINRA.

HEARING PANEL

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By: Sara Nelson Bloom
Hearing Officer

[18] 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.

Copies to:
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