

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

PAUL ANDREW NIESS
(CRD No. 2157145),

Respondent.

Disciplinary Proceeding
No. 20050033320

Hearing Officer – AWH

DEFAULT DECISION

May 13, 2008

Respondent is barred from associating with any FINRA member in any capacity for participating in private securities transactions, in violation of NASD Rules 3040 and 2110, and borrowing from customers, in violation of NASD Rules 2370 and 2110.

Appearances

Kevin G. Kulling, Esq., for the Department of Enforcement.

No appearance by or for Paul Andrew Niess.

DECISION

I. Background

On December 27, 2007, the Department of Enforcement filed the Complaint in this proceeding, alleging that Respondent Paul Andrew Niess (1) participated in private securities transactions without giving written notice to, or receiving written approval from, his member firm, in violation of NASD Rules 3040 and 2110, and (2) borrowed funds from customers, in violation of his firm's written supervisory procedures, and, accordingly, NASD Rules 2370 and 2110. Respondent did not file an Answer to the Complaint. On March 25, 2008, Enforcement filed a motion for a default decision. Niess did not respond to that motion.

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on December 27, 2007, by certified and first class mail to his residential address listed in the Central Registration Depository (the "CRD address"). The certified mailing was returned to Enforcement, marked "Unclaimed." The first class mailing was not returned. Respondent did not file an Answer to the Complaint.

On January 29, 2008, Enforcement sent the Complaint and Second Notice of Complaint by certified and first class mail to Respondent at his CRD address. The certified mailing receipt was signed by Respondent and returned to FINRA staff. Respondent did not file an Answer to the Complaint.

Enforcement served the Complaint and Notices of Complaint on Niess in accordance with Rule 9134, giving him constructive notice of this proceeding. By signing the return receipt for the January 29, 2008 mailing, he received actual notice of the Complaint. By failing to respond, he defaulted. Pursuant to NASD Procedural Rules 9215(f) and 9269, Enforcement's motion for a default decision will be granted, and the allegations in the Complaint, which is attached to this decision, will be deemed admitted.¹

III. Jurisdiction

Niess entered the securities industry in 1991 and was registered with FINRA member 1717 Capital Management (the "firm") from 1991 to November 21, 2005. As a result of various customer complaints related to the investments at issue in the Complaint, the firm filed Form U5 amendments on behalf of Niess from January 25, 2006, through June 7, 2007. Niess is not currently associated with a member firm. Because the

¹ The factual determinations in this decision are based on the admitted allegations in the Complaint, the Declaration Supporting a Motion for the Entry of Default Decision, and the exhibits attached thereto.

Complaint charges him with misconduct while he was associated with a member firm, and the Complaint was filed during the two-year period following the last amendment² to his notice of termination of association, he remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of the FINRA By-Laws.

IV. Violations

Private Securities Transactions

Cause One of the Complaint

The first cause of the Complaint alleges that from 2003 through 2005, Niess participated in the sales of securities in the form of investment contracts involving “internet access kiosks” and service agreements. Niess introduced at least ten customers to K&G Marketing (“K&G”), which arranged for the sales of the kiosks and service agreements through two entities known as Network Service Depot (“NSD”) and Bikini Vending. Bikini Vending was responsible for the service and management agreements related to the NSD internet kiosks. Under the agreements, purchasers of the kiosks were to receive a monthly fee plus a percentage of the gross revenue when total revenue exceeded a certain dollar amount. Niess provided written marketing materials to the customers, explained the investments, assisted in completing the application forms, forwarded the completed forms to the issuer, and submitted checks to the issuer from the customers. Niess’s ten customers invested almost \$5 million in the investment contracts. Niess failed to give written notice to his firm of his intention to participate in those transactions. There is no allegation or evidence that he received, or may receive, selling compensation as a result of the transactions, and that he therefore was required to obtain written *approval* from the firm to engage in the transactions. However, even if he has not

² The amendment was filed within two years of the original notice of termination.

and will not receive selling compensation, he did not first (1) send a notice to his firm, describing the proposed transactions and his role therein, and stating whether he has received or may receive selling compensation; and (2) receive written *acknowledgment* that the firm received such notice.

The internet access kiosk sales and service agreements are “securities” for purposes of Section 2(a)(1) of the Securities Act of 1933 because the investment scheme involves customer investment of money in a common enterprise with profits to come solely from the efforts of others.³ The customers expected a fixed return on their investments, and they never possessed, operated, managed, or maintained any of the kiosks.⁴ The admitted facts demonstrate that Niess participated in those investment transactions, without prior notice to, and written approval or acknowledgment from, his member firm. Accordingly, he violated NASD Conduct Rules 3040 and 2110.

Cause Two of the Complaint

The second cause of the Complaint alleges that in 2005, Niess participated in the sale of interests in a private placement for Patel LLC, an entity engaged in developing and placing ATM kiosks that issued money orders and provided other financial services in public locations. The Subscription Agreement for the sale of interests in Patel LLC states that the issuance of equity is made in reliance on an exemption from the registration requirement of the Securities Act of 1933, and that “these securities have not been registered” with the SEC or any state agency.

Niess introduced the private placement to at least six customers who invested approximately \$1.375 million. He provided the customers with written materials,

³ *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

⁴ *See, e.g., SEC v. Edwards*, 2004 U.S. LEXIS 659 (Jan. 13, 2004) (sale of payphones under sales and leaseback agreements were investment contracts subject to the securities laws).

explained the investment, assisted in the completion of forms, forwarded completed forms to the issuer, and submitted checks from the customers to the issuer. He failed to give written notice to his firm of his intention to participate in these securities transactions, and failed to obtain written approval to do so from his member firm prior to engaging in such participation. By failing to do so, he violated NASD Conduct Rules 3040 and 2110.

Borrowing from Customers

In 2004 and 2005, Niess borrowed approximately \$405,000 from at least five customers and provided the customers with signed promissory notes to evidence the loans. The firm's written supervisory procedures prohibited "making loans to or accepting loans from customers." NASD Conduct Rule 2370 prohibits associated persons from borrowing from customers unless the member firm has written procedures allowing such borrowing, and certain other conditions are met. By borrowing funds from customers when the firm's written procedures prohibited such conduct, Niess violated NASD Conduct Rules 2370 and 2110.

V. Sanctions

For private securities transactions, the FINRA Sanction Guidelines recommend a fine of \$5,000 to \$50,000, and, where the dollar amount of sales exceeds \$1 million, a suspension of 12 months to a bar. The presence of one or more aggravating factors may raise the recommended sanctions.⁵ There are no sanction guidelines for borrowing from customers. However, in this case, the violation was serious in light of the amount of the loans and the fact that Niess knew or should have known that the firm specifically prohibited him from borrowing from customers.

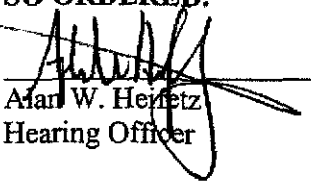
⁵ FINRA SANCTION GUIDELINES, 15-16 (2007 ed.).

Over a two-year period, Niess engaged in private securities transactions with more than 16 customers of his firm, who invested more than \$6 million. Accordingly, his misconduct was egregious. Likewise, his improper borrowing of a significant amount of money from his customers was an egregious violation of his firm's written procedures and NASD Rules of Conduct. The totality of his actions displays a callous disregard for the high standards of commercial honor and principles of trade required of associated persons, and warrants no less than a bar, as recommended by Enforcement.⁶

VI. Conclusion

Paul Andrew Niess is barred from associating with any FINRA member in any capacity for participating in private securities transactions, in violation of NASD Rules 3040 and 2110, and borrowing from customers, in violation of NASD Rules 2370 and 2110. The bar will become effective immediately if this decision becomes FINRA's final disciplinary action.

SO ORDERED.


Alan W. Herfetz
Hearing Officer

Copies to:

Paul Andrew Niess (*via first class mail & overnight courier*)
Kevin G. Kulling, Esq. (*via first class & electronic mail*)
Mark P. Dauer, Esq. (*via first class & electronic mail*)
David R. Sonnenberg, Esq. (*via first class & electronic mail*)

⁶ Enforcement does not seek disgorgement of ill-gotten gains because there is no evidence that Niess received any commissions or other gains from his participation in the securities transactions, and there is no indication that the loans he received from customers were ever in default.

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
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Department of Enforcement,

Complainant,

V.

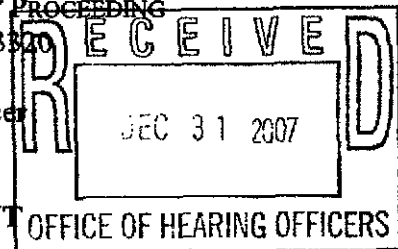
Paul Andrew Niess
CRD No. 2157145

Respondent.

DISCIPLINARY PROCEEDING
No. 20050033320

Hearing Officer

COMPLAINT



The Department of Enforcement alleges:

SUMMARY

1. Between 2003 and 2006, Paul Niess participated in private securities transactions by assisting in the sale of "internet access kiosks" and related service agreements and the sale of interests in a private placement to approximately 16 customers for total sales of approximately \$6 million, without providing written notice to, and receiving prior approval from, his Member firm, in violation of NASD Conduct Rules 3040 and 2110. Additionally, Niess borrowed money from several customers although the firm's written procedures prohibited it, in violation of NASD Conduct Rules 2370 and 2110.

RESPONDENT

2. Paul Niess entered the securities industry in 1991 as an Investment Company and Variable Contracts Representative for a member of FINRA (formerly NASD). In 1999, he became registered as a General Securities Representative for 1717 Capital Management, a

member of FINRA (Member). Niess remained registered with the Member until November 2005. Several customer complaints were received between January 25, 2006 and June 2007 and amended Form U5s were filed, which extended FINRA's jurisdiction over Niess until 2009. Niess is not currently registered and he has no prior disciplinary history.

**FIRST CAUSE OF ACTION
Private Securities Transactions
NASD Conduct Rules 3040 and 2110**

3. The Department realleges and incorporates by reference paragraphs 1 and 2 above.

4. Between 2003 and 2005, Paul Niess engaged in private securities transactions by participating in the sale of securities in the form of investment contracts involving "internet access kiosks" and service agreements.

5. Niess introduced at least ten customers to an entity called K&G Marketing, which arranged for the sale of the internet access kiosks and service agreements through at least two other entities, known as Network Services Depot (NSD) and Bikini Vending.

6. The internet access kiosks and service agreements were "securities" pursuant to the Exchange Act. NSD and Bikini Vending, through K & G Marketing, sold the kiosks which included a site location and a management agreement. NSD and Bikini Vending were a common enterprise because the success of the investment was dependent upon the efforts and success of NSD and Bikini Vending, who selected the site, installed the kiosks, arranged for the kiosks to be connected, and collected and distributed revenue from the individual kiosks. Having no hand in operating or servicing the kiosks themselves, investors obtained expected profits from the efforts of others at NSD and Bikini Vending.

7. In addition to introducing customers to the products, Niess also provided written marketing materials to the customers, explained the investments, assisted in completing the application forms, forwarded the completed forms to the issuer and submitted checks to the issuer from the customers.

8. From 2003 through 2005, ten customers invested a total of almost \$5 million. A list of the customers and the amounts they invested are attached to the Complaint as Exhibit A.

9. Niess failed to give written notice of his intention to participate in the sale of the internet access kiosks and service agreements to, and failed to obtain written approval from, the Member prior to engaging in such activities.

10. The above acts, practices and conduct constitute a violation of NASD Conduct Rules 3040 and 2110.

**SECOND CAUSE OF ACTION
Private Securities Transactions
NASD Conduct Rules 3040 and 2110**

11. The Department realleges and incorporates by reference paragraphs 1 and 2 above.

12. In 2005, Niess engaged in private securities transactions when he participated in the sale of interests in a private placement for an entity called Pantel LLC. Pantel LLC was allegedly engaged in the business of developing and placing ATM type kiosks that issued money orders and other financial services in public locations.

13. Niess introduced the private placement to at least six customers who invested approximately \$1.375 million, providing written materials to the customers, explaining the investment, assisting in the completion of forms, forwarding completed forms to the issuer and

submitting checks from the customers to the issuer. A list of the customers and the amounts they invested is attached to the Complaint as Exhibit B.

14. Niess failed to give written notice of his intention to participate in the sale of the private placement to, and failed to obtain written approval from, the Member prior to engaging in such activities.

15. The above acts, practices and conduct described above constitutes a violation of NASD Conduct Rules 3040 and 2110.

**THIRD CAUSE OF ACTION
Borrowing from Customers
NASD Conduct Rules 2370 and 2110**

16. The Department realleges and incorporates by reference paragraphs 1 and 2 above.

17. In 2004 and 2005, Niess borrowed approximately \$405,000 from at least five customers and provided the customers with signed promissory notes to evidence his loans from the customers. A list of the customers and the amounts they loaned to Niess is attached to the Complaint as Exhibit C.

18. The Member's written supervisory procedures prohibited borrowing money from customers. The procedures stated that "prohibited financial arrangements include: making loans to or accepting loans from customers."

19. The acts, practices and conduct above constitute separate and distinct violations of NASD Conduct Rules 2370 and 2110 by Respondent.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under NASD Rule 8310(a), including monetary sanctions, be imposed, including that the Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- B. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: 12-27-07


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EXHIBIT A
K & G Marketing/ NSDS/ Bikini Vending

Customer	Amount Invested	Date Invested
CA	\$104,000	2004
CH H Enterprises, Inc.	\$250,800	2004
BJ	\$350,000	2004
FJ	\$175,000	2003
FJ	\$100,000	2005
MK	\$700,000	2003
W and S K	\$2,100,000	2003
KO	\$261,250	2004
DS	\$175,000	2003
TCF	\$525,000	2004
SW	\$209,000	2004
TOTAL	\$4,950,050	

EXHIBIT B
Pantel LLC

<u>Customer:</u>	<u>Amount Invested</u>	<u>Date Purchased</u>
DP	\$125,000	2005
CJ	\$125,000	2005
A and RP	\$125,000	2005
G and C C	\$250,000	2005
G and C C	\$250,000	2005
RR	\$250,000	2005
DS	\$250,000	2005
TOTAL	\$1,375,000	

EXHIBIT C
Borrowing From Customers

<u>Customer:</u>	<u>Amount Borrowed</u>	<u>Date Borrowed</u>
WK	\$20,000	3/22/05
DP	\$40,000	4/14/05
DP	\$45,000	5/11/05
DP	\$40,000	6/13/05
CA	\$80,000	9/15/04
GC	\$30,000	10/27/05
CH	\$150,000	11/24/04
TOTAL	\$405,000	