

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Todd M. Eberhard,
CRD No. 1636538

Respondent.

Disciplinary Proceeding
No. C10020072

Hearing Officer Andrew H. Perkins

**ORDER ACCEPTING OFFER OF
SETTLEMENT**

Date: January 7, 2005

INTRODUCTION

Disciplinary Proceeding No. C10020072 was filed on July 23, 2002, by the Department of Enforcement of NASD ("Complainant"), and amended on October 25, 2002. Respondent Todd M. Eberhard submitted an Offer of Settlement ("Offer") to Complainant on December 23, 2004. Pursuant to Code of Procedure Rule 9270(e), the Complainant and the National Adjudicatory Council ("NAC") Review Subcommittee or the Office of Disciplinary Affairs ("ODA") have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to Code of Procedure Rule 9270(e)(3). *The findings, conclusions and sanctions set forth in this Order are those stated in the Offer as accepted by the Complainant and approved by the NAC.*

Under the terms of the Offer, Respondent has consented, without admitting or denying the allegations of the Amended Complaint, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or to which NASD is a party, to the entry of findings and violations consistent with the allegations of the Amended Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become

part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD.

BACKGROUND

Eberhard first became registered as a General Securities Representative ("GSR") with NASD on March 24, 1987 through a member firm and remained registered with that firm until October 17, 1989. Respondent was registered with NASD as a GSR from October 6, 1989 to October 17, 1994 through member firm Nathan and Lewis Securities, Inc. ("Nathan and Lewis") (BD No. 8503). Respondent was registered with NASD as a GSR from October 18, 1994 to March 18, 1998 through member firm Linsco/Private Ledger Corp. ("Linsco") (BD No. 6413). Respondent was registered with NASD as a GSR and General Securities Principal ("GSP") from April 6, 1998 to October 26, 1998 through member firm Royal Alliance Associates, Inc. ("Royal Alliance") (BD No. 23131). Respondent was registered with NASD as a GSR and GSP from November 2, 1998 to December 6, 2001 through member firm Clearing Services of America, Inc. ("CSA") (BD No. 23623). Respondent was registered with NASD as a GSR and GSP from July 24, 2000 to February 4, 2003 through member firm Park South Securities, LLC ("Park South") (BD No. 103520).

Respondent is not currently registered with NASD. At the time of the filing of the Complaint and the Amended Complaint, Respondent was registered with NASD through Park South. Thus, NASD retains jurisdiction over Respondent.

On or about February 4, 2003, the United States Attorney's Office for the Southern District of New York filed a Complaint (No. 03MAG. 0279) in the United States District Court, Southern District of New York, charging Respondent with one count of securities fraud and one count of mail fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18

U.S.C. §§2, 1341, and 1346. The charges were predicated, in part, on certain misconduct alleged in the instant case.

In addition, on February 5, 2003, the United States Securities and Exchange Commission filed a complaint in the United States District Court for the Southern District of New York against Respondent. The Commission charged Respondent with violating Section 17(a) of the Securities Act of 1933 15 U.S.C. § 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

On or about May 6, 2003, United States Attorney's Office for the Southern District of New York filed an Information in the United States District Court for the Southern District of New York charging Respondent with one count of conspiracy to commit investment adviser fraud in violation of 15 U.S.C. §§ 80b-6 and 80b-17 and conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343 1346 and 371. The Information also charged Respondent with one count of investment adviser fraud in violation of 15 U.S.C. §§ 80b-6 and 80b-17, and 18 U.S.C. § 2, and three counts of wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 2.

On August 12, 2004, the United States Attorney's Office for the Southern District of New York filed a Superseding Indictment in the United States District Court for the Southern District of New York charging Respondent with one count of conspiracy to commit investment adviser fraud in violation of 15 U.S.C. §§ 80b-6 and 80b-17 and conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343 1346 and 371. The Superseding Indictment also charged Respondent with seven counts of investment adviser fraud in violation of 15 U.S.C. §§ 80b-6 and 80b-17, and 18 U.S.C. § 2, three counts of wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 2, three counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2, one

count of witness tampering in violation of 18 U.S.C. §§ 1512(b) and 2, and one count of obstruction of justice in violation of 18 U.S.C. §§ 1512(c) and 2. On September 14, 2004, Respondent pled guilty to the charges set forth in the Superseding Indictment.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:

Settling Away and Failure to Report Settlements to Member Firms

- As set forth in the First Cause of the Amended Complaint, during the period of in or around June 1997 through in or around December 2001, Respondent settled 14 complaints made by 11 customers against him in amounts totaling more than \$3.6 million. These settlements were made without the knowledge and consent of Respondent's then-employer member firms, Linsco, Royal Alliance, and/or CSA.
- By reason of the foregoing, in each and every instance, Respondent violated NASD Conduct Rule 2110.
- In addition, Respondent failed to report nine of those settlements that exceeded \$15,000 to his then-employer CSA.
- By reason of the foregoing, in each and every instance, Respondent violated NASD Conduct Rules 2110 and 3070.

Improper Confidentiality Provisions

- As set forth in the Second Cause of the Amended Complaint, Respondent settled customers' complaints and entered into ten written agreements with the customers that included improper confidentiality provisions. These provisions were improper because they effectively prohibited the customers from cooperating with NASD investigations and disclosing the underlying facts of their complaints and the settlement terms to NASD. By

reason of the foregoing, in each and every instance. Respondent violated NASD Conduct Rule 2110.

Willful Failure to Disclose Material Information on Uniform
Applications for Securities Industry Registration or Transfer (Forms U-4)

- As set forth in the Third Cause of the Amended Complaint, during the period from in or around March 1998, through in or around July 2000, Respondent willfully failed to disclose material information on Forms U-4.
- In particular, on his Park South Form U-4, Respondent willfully failed to disclose that he had settled the complaints of several customers, who complained that Respondent had effected excessive transactions in mutual funds, in amounts of \$10,000 or more (customers LP, AP, WMGT, and NP). Respondent also willfully failed to disclose on his Park South Form U-4 that he had been discharged from his former employer Royal Alliance for violating investment-related statutes, regulations, rules or industry standards of conduct.
- On his Royal Alliance, CSA, and Park South Forms U-4, Respondent willfully failed to disclose that he had been named as a defendant in an investment-related, consumer-initiated civil litigation (by customer PZ), which alleged that he was involved in one or more sales practice violations, that was settled for an amount of \$10,000 or more.
- By reason of the foregoing, in each and every instance, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and violated NASD Interpretive Memorandum 1000-1 and NASD Conduct Rule 2110.

Willful Failure to Amend Forms U-4

- As set forth in the Fourth Cause of the Amended Complaint, during the period of in or around June 1996 through in or around November 2001, on sixteen separate occasions, Respondent willfully failed to amend his Linsco, CSA, or Park South Forms U-4 to disclose material information.
- By reason of the foregoing, in each and every instance, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and violated NASD Interpretive Memorandum 1000-1 and NASD Conduct Rule 2110.

Willful Failure to Timely Amend Forms U-4

- As set forth in the Fifth Cause of the Amended Complaint, Respondent willfully failed to timely submit an amendment to his Form U-4 to disclose to NASD within 30 days of learning the facts and circumstances about six customer settlements and one customer arbitration. The period by which each of these amendments was late ranged from 49 to 380 days.
- By reason of the foregoing, in each and every instance, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and violated NASD Interpretive Memorandum 1000-1 and NASD Conduct Rule 2110.

Willful Failure to Disclose and/or Misrepresentation of Material Information in Amendments to Form U-4

- As set forth in the Sixth Cause of the Amended Complaint, in or around March and April 2002, Respondent filed, or caused to be filed, three amendments to his Park South Form U-4, which included Disclosure Reporting Pages ("DRPs"). In each of those three Form

U-4 amendments, Respondent willfully failed to disclose and/or misrepresented material information, including the nature of the customers' complaints.

- Additionally, during the time period of in or around August 2001 through in or around June 2002, Respondent signed and filed, or caused to be filed, 19 amendments to his Park South Form U-4, which included DRPs. In each of these Form U-4 amendments, Respondent willfully failed to disclose and/or misrepresented material information, including settlements with customers and his discharge from Royal Alliance.
- By reason of the foregoing, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and violated NASD Interpretive Memorandum 1000-1 and NASD Conduct Rule 2110.
- As set forth in the Third, Fourth, Fifth and Sixth Causes of the Amended Complaint on or about March 18, 1998, October 23, 1998, July 21, 2000, August 28, 2001, September 17, 2001, September 19, 2001, September 20, 2001, October 1, 2001, October 10, 2001, January 2, 2002, January 29, 2002, March 6, 2002, March 25, 2002, March 27, 2002, March 28, 2002, April 3, 2002, April 16, 2002, April 19, 2002, April 24, 2002, June 10, 2002, and June 12, 2002, Respondent willfully failed to disclose material facts and/or willfully misrepresented material facts on Forms U-4, and Respondent willfully failed to amend Forms U-4 to disclose material facts, and under Section 15(b)(4)(A) of the Securities Exchange Act of 1934 and Article III, Section 4(f) of the NASD By-Laws, these willful omissions/misrepresentations make Respondent subject to a statutory disqualification with respect to association with a member.

Unauthorized Transactions

- As set forth in the Seventh Cause of the Amended Complaint, Respondent effected, or caused to be effected, transactions in the accounts of customers JT, EK, and PD, without the customers' prior knowledge, authorization or consent.
- In particular, on or about April 25, 2001, Respondent effected, or caused to be effected, 25 transactions in JT's individual account without JT's prior knowledge, authorization or consent, and 12 transactions in EK's individual account without EK's prior knowledge, authorization or consent.
- On or about September 20, 2001, Respondent effected, or caused to be effected, two transactions in PD's trust account without PD's prior knowledge, authorization or consent.
- By reason of the foregoing, in each and every instance, Respondent violated NASD Conduct Rule 2110.

Discretionary Transactions Without Written Authorization

- As set forth in the Eighth Cause of the Amended Complaint, during the period from in or around December 1998 through in or around September 2001, Respondent exercised discretion in the accounts of customers EM, PD and JT, held at CSA, and effected, or caused to be effected, numerous transactions without having a written agreement with the customers authorizing Respondent to exercise discretion and without having obtained CSA's prior written acceptance of the account as discretionary.
- In particular, Respondent exercised discretion and effected transactions in the following accounts held at CSA, during the following time periods:

Time Period	Account Name	No. of Transactions
May 1999 – August 2000	EM's Individual Account	11
May 1999 – October 2000	EM's IRA Account	172
December 1998 – April 1999	PD's Individual Account	7
May 1999 – September 2001	PD's Trust Account	134
October 2000 – September 2001	PD's IRA Account 1	18
December 2000 – September 2001	PD's IRA Account 2	151
January 2001 – July 2001	PD's IRA Account 3	30
May 2001 – September 2001	JT's Individual Account	55
May 2001 – September 2001	JT's IRA Account	32

- By reason of the foregoing, in each and every instance, Respondent violated NASD Conduct Rules 2510 and 2110.

Fraudulent and Unsuitable Mutual Fund Transactions

- As set forth in the Ninth Cause of the Amended Complaint, during the period from in or around December 1998 through in or around October 2001, while registered with NASD through CSA, Respondent engaged in fraudulent and unsuitable sales practices in connection with numerous mutual fund transactions in the accounts of CSA customers EM, JT, JW and PD. In addition, Respondent failed to observe high standards of commercial honor and just and equitable principles of trade.
- In particular, in connection with the purchases and sales of shares of mutual funds identified in the Amended Complaint, Respondent intentionally and/or recklessly:
 - Failed to disclose to the customers material information.
 - Engaged in a course of business that operated as a fraud or deceit on customers EM, JT, JW and PD by purchasing, or causing the purchase of, large volumes of Class B shares in mutual funds that deprived the customers of volume discounts available through class A shares, and/or deprived the customers of the lower and

shorter-term CDSCs available through Class C shares, and had the effect of increasing Respondent's commission revenue.

- Engaged in a course of business that operated as a fraud or deceit on customers EM, JT and PD by employing a pattern of short-term trading of mutual funds.
- By reason of the foregoing, Respondent, in each and every instance, violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and contravened the principles of NASD Interpretive Memorandum 2830-1 and violated NASD Conduct Rules 2310, 2120 and 2110.

Issuance of Account Statements with False Valuations

- As set forth in the Tenth Cause of the Amended Complaint, on or about December 19, 2000, January 3, 2001, April 2, 2001, June 8, 2001, July 8, 2001, and August 9, 2001, Respondent created, or caused to be created, account statements concerning PD's accounts held at CSA and issued, or caused to be issued, the account statements to PD, directly and/or through PD's accountant.
- These statements contained false valuations in that the prices or net asset values of many securities were incorrect. In particular, many of the valuations were inflated to reflect a greater portfolio value than the true value of the account(s). Respondent intentionally and/or recklessly created these false account statements with inflated valuations to induce PD to continue to maintain accounts with Respondent.
- By reason of the foregoing, Respondent, in each and every instance, violated NASD Conduct Rule 2110.

Failure to Provide Truthful and Non-Misleading
Information During an On-the-Record Interview

- As set forth in the Eleventh Cause of the Amended Complaint, on September 29, 2000, March 29, 2001, August 14, 2001 and August 17, 2001, NASD staff conducted an on-the-record interview of Respondent pursuant to NASD Procedural Rule 8210.
- During the on-the-record interview, Respondent provided false, misleading and/or evasive testimony. In particular, Respondent testified:
 - a. That he could not recall receiving any customer complaints while employed by CSA, other than the complaints of customers IS and BP.
 - b. That he could not recall receiving any written or electronic correspondence containing a customer complaint, other than those of customers IS and BP.
 - c. That he loaned a total amount of approximately \$200,000 to customer SL.
 - d. That SL repaid the alleged \$200,000 "loan."
 - e. That customer EM did not assert and/or allege sales practice violations in her complaints.
- Respondent intentionally and/or recklessly made these false and/or misleading statements.
- By reason of the foregoing, Respondent, in each and every instance, violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

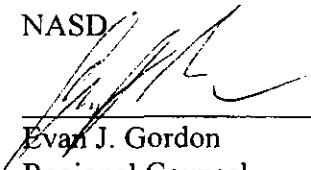
Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondent from any future misconduct, and represent a proper discharge by NASD, of its regulatory responsibility under the Securities Exchange Act of 1934.

SANCTIONS

It is ordered that Respondent be barred from associating with any NASD member firm in any capacity.¹

The sanctions imposed herein shall be effective on a date set by NASD staff. Pursuant to IM-8310-2(f), a bar or expulsion shall become effective upon approval or acceptance of this Order by the NAC.

SO ORDERED.

NASD
By: 

Evan J. Gordon
Regional Counsel
on behalf of the Director of ODA,
pursuant to delegated authority

¹ The Respondent will be sentenced on March 25, 2005. As part of his sentence, and as mandated by 18 U.S.C. § 3663A, the Respondent must pay restitution to the customers. The Court will determine the amount of restitution after reviewing the probation officer's pre-sentence investigation report. Because the Respondent will pay restitution as part of his sentence, this Order does not seek restitution.