

**NASD
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

**DAVID LERNER ASSOCIATES, INC.
B/D NO. 5397**

**SSH SECURITIES, INC.
B/D NO. 43593**

**JOHN G. DEMPSEY, JR.
CRD NO. 869304**

AND

**DAVID LERNER
CRD NO. 307120**

Respondents.

**DISCIPLINARY PROCEEDING
NO. CAF040070**

**HEARING OFFICER
SARA NELSON BLOOM**

**ORDER ACCEPTING OFFER
OF SETTLEMENT**

AUGUST 25, 2005

Disciplinary Proceeding No. CAF-040070 was filed on September 28, 2004, by the Department of Enforcement of NASD ("Complainant"). Respondents David Lerner Associates, Inc. ("DLA"), SSH Securities, Inc. ("SSH"), John G. Dempsey, Jr. and David Lerner (collectively "Respondents") submitted an Offer of Settlement ("Offer") to Complainant on August 24, 2005. 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, Respondents have consented, without admitting or denying the allegations of the 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 Complaint as set forth in this Order, and to the imposition of the sanctions set forth below, and fully understand that this Order will become part of Respondents' permanent disciplinary records and may be considered in any future actions brought by NASD.

BACKGROUND

David Lerner Associates has been an NASD member since 1976. Headquartered in Syosset, New York, it employs approximately 250 registered representatives and 150 associated persons. It has six branch offices, with locations in New York, New Jersey, Connecticut, and Florida. Founded by President David Lerner, the firm is a full service broker dealer.

DLA's disciplinary history includes the following three matters. The SEC, in a May 19, 2004 Order issued pursuant to an Offer of Settlement, censured DLA and fined it \$50,000. DLA was to cease and desist from committing or causing any violations and any future violations of Section 17(a)(1) of the Exchange Act and Rule 17a-3 thereunder. The Commission found that DLA, from December 1996 through August 1999, failed reasonably to supervise its registered representatives, who on three occasions during the period, recommended, offered, and caused to be purchased on margin for customer accounts, illiquid DLA-underwritten REIT securities that were unsuitable for the

customers, given the customers' investment objectives, financial situation, and need for liquidity.

On April 12, 2004, the firm signed a Letter of Acceptance, Waiver and Consent ("AWC"), consenting to findings that it conducted sales contests in which it directly or indirectly made payments or offers of payments of non-cash compensation to its registered representatives and associated persons, failed to establish and maintain a system to supervise the activities of each registered representative and associated person reasonably designed to achieve compliance with the investment company securities and variable contracts non-cash compensation provisions of NASD Rules 2820 and 2830, and failed to reasonably supervise the firm's registered representatives and associated persons to prevent violations of the investment company securities and variable contracts non-cash compensation provisions of NASD Rules 2820 and 2830, in violation of NASD Rules 2110, 2820, 2830, and 3010. DLA was censured and fined \$100,000.

In a February 12, 2004 AWC, DLA consented to findings that in 2001 and 2002, it failed to provide eligible mutual fund customers breakpoint discounts as described in the funds' prospectuses, in violation of NASD Rule 2110. These discounts would have reduced the customers' front-end load charges by at least \$32,711. DLA was censured and fined \$32,711.

An affiliate of DLA, SSH Securities, Inc., was formed in 1997 to act as the distributor for the Spirit of America Fund mutual fund. It is wholly owned by David Lerner. It shares offices and some officers with DLA. SSH Securities has no relevant disciplinary history.

John Dempsey is, and was during the relevant time period, DLA's Senior Vice President of Sales and was registered as a General Securities Representative and a General Securities Principal. Dempsey was also registered in these same capacities with SSH Securities. He entered the securities industry in 1979, when he began his employment with DLA.

In an April 12, 2004 AWC, Dempsey consented to findings that he failed to reasonably supervise the firm's registered representatives and associated persons to prevent violations of the investment company securities and variable contracts non-cash compensation provisions of NASD Rules 2820 and 2830, in violation of NASD Rules 2110 and 3010. Dempsey was censured and fined \$10,000.

David Lerner is, and was during the relevant time period, DLA's president, and was registered as a General Securities Representative, a General Securities Principal and a Financial Operations Principal. Lerner entered the securities industry in 1960, and founded DLA in 1976. Lerner was also registered in the same capacities with SSH and is its president and CEO. He has no disciplinary history in the past ten years.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows. The findings herein are pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity named as a respondent in this or any other proceeding.

1. DLA communicates with the public in a variety of ways. The firm utilized radio and print advertisements, newsletters and brochures, a website, and

investment seminar presentations. In addition, the firm distributed materials concerning the Spirit of America mutual funds produced by SSH.

2. Radio advertising represented DLA's most significant form of public communications and the largest portion of its promotional budget during the review period. The firm's total expenditures for radio advertising during the period May 1, 2001 to March 31, 2003 were \$2.3 million, 71 percent of its total marketing expenditures.
3. David Lerner developed the ideas for the radio advertisements. He narrated all of the radio spots and was the "voice" of the firm.
4. All of DLA's radio ads were sixty-second spots that ran on New York metropolitan area radio stations. The ads ran several times a week, frequently throughout the day.
5. At issue are 11 radio advertisements. They were titled: "Stop The Bleeding," "An Offer You Can't Refuse," "Hocus Pocus," "Remedy," "Value & Reality," "Car Service," "Get Smart," "Green Grass Grows," "Abandoned," "Dimitri," and "Roller Coaster."
6. The ads contained repeating themes. They occasionally contained a story about someone Lerner met, suggesting the person's investments would have performed well or better than they had if the person had invested with DLA or followed the firm's investment philosophy. The ads suggested that investments recommended by DLA give favorable returns, even if the market goes down.

7. A recurring theme was the concept of investments “pay[ing] over 10%” and “providing returns of 10% and more” to “tens of thousands” of customers. Specifically, the ads said:

For 25 years, we at David Lerner Associates have provided tens of thousands of people with investments that even in these turbulent times, continue to pay over 10%.

We are currently providing returns of 10% and more in investments that have nothing to do with the stock market.

In spite of the gyrations of the stock market, our clients continue to enjoy high dividend returns – in many cases 10% and more.

8. The firm did not have factual support for the statements or omitted information necessary to evaluate the claims made, making the statements or claims exaggerated, unwarranted or misleading.
9. The ads also suggested that investors working with DLA retain the value of their assets regardless of market conditions. Appealing to potential customers who had lost money in stocks, the ads suggested that investing with DLA would allow customers to regain the prior losses. The ads stated:

While past performance can never be a guarantee of future results, we at David Lerner Associates are proud and pleased that for 26 years, tens of thousands of our investors have been receiving high income and solid returns regardless of whether interest rates or the stock market went up or down.

By counseling them to select value-oriented investments, our clients have not only weathered the financial storm, they have actually **seen** their income grow and their assets more than hold their value.

These investors have **seen** their portfolios dramatically decline and hoped **we** could provide some kind of remedy to ease their suffering. We have shown them how to reposition their portfolios to regain their assets and to put their investments **back** on track.

Investors who followed our advice have actually seen their income grow and **their** assets more than hold their value.

As a result of our **conservative** investment philosophy, tens of thousands of **investors** have been spared the agony of the financial markets, and every day new investors are coming to David **Lerner** Associates to repair the damage.

We were able to **get** their investments back on firm ground, and they are now **experiencing** peace of mind, confident they will achieve **their** financial objectives.

10. The firm did not have **factual** support for the statements or omitted information necessary to **evaluate** the claims made, making the statements or claims exaggerated, **unwarranted** or misleading. The claims were also promissory without any **statistical** support.
11. Second to the radio ads in **importance** to the firm were investment seminars. These were **held frequently**, a total of approximately 70 to 80 during the relevant period.
12. As with the radio ads, **Lerner** was the spokesman for the firm, and the principal speaker at each **seminar**.

13. The seminars typically took place at a hotel or conference center. During the seminar, Lerner generally provided an overview of DLA's services and then discussed certain investment products offered by the firm.
14. Lerner utilized a PowerPoint presentation at the investment seminars that was created by DLA's Marketing Department. The PowerPoint presentation was projected on a screen, where Lerner would refer to particular points.
15. The PowerPoint presentations contained statements and claims, similar to claims made in the radio advertisements. As with the radio advertisements, the firm did not have factual support for the statements or omitted information necessary to evaluate the claims made, making the statements or claims exaggerated, unwarranted or misleading.
16. With the PowerPoint presentations, Lerner and the firm promoted the Apple Hospitality REIT programs at the seminars, but failed to adequately disclose the limitations of the redemption program of the REIT and the lack of a secondary market.
17. The discussions of REIT programs at the seminars also omitted information necessary to evaluate the claims made and failed to disclose risks associated with the investment.
18. The firm ran four versions of print advertisements in newspapers in New York and Connecticut. The print ads contained some of the same language as the radio advertisements.

19. One print ad, which appeared multiple times between August 2001 and March 2003, was titled, “Has *Your* 401k Become a 201k? We Can Help” (emphasis in original). The ad’s opening sentence, “For over 25 years, we at David Lerner Associates have provided tens of thousands of people with conservative investments that even in these turbulent times continue to provide high returns,” repeats language from the radio advertisements for which the firm did not have *factual support, or omitted information* necessary to evaluate the *claims* made.
20. The same language is used in another print ad titled, “David Lerner Associates is Proud to be Named Co-Manager of the Upcoming State of Connecticut General Obligation Bond Issue.”
21. DLA maintained a website at www.davidlerner.com, which contained information about the *firm and products it offered*.
22. The site contained promissory language similar to that in the radio advertisements.
23. During the relevant period, *the firm published two newsletters dated Summer 2001 and Summer/Fall 2002, and produced two corporate brochures. The newsletters are both titled “The Asset Builder.” All four documents contain language similar to that used in the radio and print advertisements and on the website.*
24. The two corporate brochures contained promissory language similar or identical to language used on the website. For example, one brochure, a

bi-fold glossy, contained the statement, "That's why, even in market debacles, our investors' results have been very gratifying."

25. The Summer/Fall 2002 newsletter also omitted information necessary to evaluate the claims made. For example, under the heading "Spirit of America Gets Top Rating From Standard & Poor's," the ranking identified did not give the investment category the ranking relates to, the number of investment companies in the category, and various other disclosures called for by IM-2210-3(c).
26. The Summer 2001 newsletter contained a chart comparing one-year total returns of the Spirit of America Fund and the Dow Jones and Nasdaq indices. The chart did not include disclosures necessary when such charts are used. For example, the chart used non-standardized performance without providing standardized average annual total returns for the one, five and ten years (or "since inception," if this period is shorter) time periods and failed to disclose the material differences between the fund and the Dow Jones and Nasdaq indices.
27. SSH produced and DLA distributed various fact sheets for the Spirit of America funds. The Spirit of America Investment Fund fact sheets are dated June 29, 2001; September 28, 2001; December 31, 2001; March 29, 2002; and June 28, 2002. The Spirit of America Real Estate Fund fact sheets included are dated October 1, 2002; January 6, 2003; and March 25, 2003.

28. The fact sheets contained inaccurate information. The “Portfolio Strategy” section for each of the eight fund fact sheets stated the incorrect number of equity REITs held in the fund’s portfolio as of the date of the fact sheet. The “Portfolio Diversification” section of the fund fact sheets included two sub-sections, a listing of the fund’s top five portfolio sectors and a pie chart illustrating all nine of the portfolio sectors, each of which contained incorrect data in six of the fact sheets.
29. The “Top 10 Holdings” section of the fact sheets included a listing of the fund’s top ten portfolio holdings of REITs and the total percent of the portfolio that they represent. The information and data contained in each were inaccurate, both in terms of the rankings and the overall percent of the portfolio.
30. Each of the fund fact sheets contained a chart comparing the total return of the Spirit of America fund, the Dow Jones Industrial Average and the Nasdaq Composite Index. As with the Summer 2001 newsletter, the chart did not include disclosures necessary when such charts are used. For example, the chart used non-standardized performance without providing standardized average annual total returns for the one, five and ten years (or “since inception,” if this period is shorter) time periods and failed to disclose the material differences between the fund and the Dow Jones and Nasdaq indices.
31. John Dempsey is identified in the firm’s written supervisory procedures as the designated principal responsible for communications with the public.

32. Dempsey approved the use of the radio advertisements discussed above.
33. Except for the radio advertisements, DLA communications with the public did not receive written principal approval during the review period. From May 2001 to May 2003, Dempsey failed to provide written approval of print advertisements, newsletters, the firm's website, seminar presentations, and brochures.
34. DLA did not file a June 29, 2001 SOA Fund fact sheet and an investment seminar presentation dated December 2002.
35. DLA did not maintain a complete separate file for all of the firm's advertisements and sales literature. The file maintained by DLA did not contain all of the advertising material utilized by the firm, and certain materials were maintained in different locations. Dempsey was responsible for ensuring that the file was maintained properly.
36. The recurring claims and statements in the radio and print advertisements, the newsletters and brochures, the website, and the investment seminar presentations failed to provide essential information necessary to evaluate the claims made or were not adequately supported by facts.
37. The statements and claims in the radio and print advertisements, the newsletters and brochures, the website, the investment seminar presentations and the Spirit of America Fund materials as presented were exaggerated, unwarranted or misleading.
38. The statements in the radio advertisements and investment seminars were made by David Lerner.

39. The Summer 2001 newsletter and the Spirit of America Fund fact sheets presented comparisons of the Spirit of America Fund performance to the Dow Jones Industrial Average and the Nasdaq Composite Index, but failed to disclose the material differences between the fund and the Dow Jones and Nasdaq indices and failed to provide a fair and balanced presentation.
40. The Spirit of America Fund materials were created by SSH Securities and distributed by DLA.
41. DLA, acting through John Dempsey, failed to provide written approval before use for all advertising and sales literature used by the firm, other than radio advertisements.
42. DLA failed to file the June 29, 2001 Spirit of America Fund fact sheet and an investment seminar presentations dated December 2002.
43. DLA failed to maintain a separate complete file of all advertising and sales literature. Dempsey was responsible for ensuring that the file was maintained properly.
44. DLA, acting through Dempsey, failed to implement and enforce written procedures reasonably designed to ensure compliance with the requirements of Rule 2210. In particular, DLA, acting through Dempsey, failed to implement and enforce procedures requiring that written approval be obtained for communications with the public, particularly the non-radio communications, prior to use.

45. Dempsey had the responsibility of reviewing individual communications with the public to ensure that they complied with the requirements of Rule 2210.
46. Dempsey reviewed the radio advertisements utilized by DLA described above and approved them for use.
47. Dempsey failed reasonably to discharge his supervisory duties by approving radio advertisements used by the firm which contained exaggerated, unwarranted or misleading statements and claims.

Based on the foregoing, DLA violated NASD Conduct Rules 2110, 2210(b)(1), 2210(b)(2), 2210(c)(1), 2210(d)(1)(A), 2210(d)(1)(B), 2210(d)(2)(M) and 3010. SSH violated NASD Conduct Rules 2110, 2210(d)(1)(B) and 2210(d)(2)(M). David Lerner violated NASD Conduct Rules 2110, 2210(d)(1)(A) and 2210(d)(1)(B). John Dempsey violated NASD Conduct Rules 2110, 2210(b)(1), 2210(b)(2) and 3010.

Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondents 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 David Lerner Associates, Inc. be censured. It is further ordered that David Lerner Associates, Inc. be **fin**ed One Hundred Fifteen Thousand (\$115,000) Dollars, Twenty-Five Thousand (\$25,000) Dollars of which shall be joint and several with David Lerner and Twenty-Five Thousand (\$25,000) Dollars of which shall be joint and several with John Dempsey. It is further ordered that DLA undertake to file with

NASD's Advertising Regulation Department all sales literature and advertisements, except for PowerPoint presentations used by DLA in public seminars, at least ten days prior to their first use for six months from the date of this Order. The ten-day period shall commence on the date of transmission with respect to advertisements or sales literature that DLA sends by facsimile and on the day following shipment with respect to advertisements or sales literature that DLA sends by overnight delivery. After ten days, these advertisements or sales literature may be used in the absence of comments from NASD. However, at any time, upon receipt of comments from NASD on the advertisements or sales literature filed prior to use, unless notified otherwise by NASD, DLA shall take all reasonable steps to withhold or cause to be withheld the material from further publication until the changes specified by NASD have been made, and such material will be revised and re-filed ten days prior to any use, unless otherwise agreed to by NASD staff at its sole discretion.

With respect to PowerPoint presentations to be used by DLA in public seminars, for six months from the date of this Order, DLA shall undertake to provide a copy of its proposed PowerPoint to the NASD Advertising Regulation Department at least thirty days prior to conducting any such seminar, so as to allow the NASD Advertising Department sufficient time to review and approve the proposed public communication. In that regard, DLA agrees to not conduct any public seminar for thirty days from the date of this Order. However, at any time, upon receipt of comments from NASD on the proposed PowerPoint filed prior to use, unless notified otherwise by NASD, DLA shall take all reasonable steps to refrain from using such PowerPoint at any seminar until the changes specified by NASD have been made, and such PowerPoint will be revised and

re-filed ten days prior to any use, unless otherwise agreed to by NASD staff at its sole discretion.

It is ordered that David Lerner be censured and fined Twenty-Five Thousand (\$25,000) Dollars, which shall be joint and several with DLA.

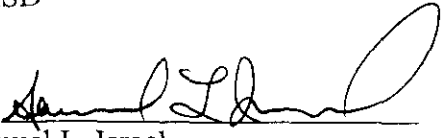
It is ordered that John Dempsey be fined Twenty-Five Thousand (\$25,000) Dollars, which shall be joint and several with DLA. It is further ordered that Dempsey be suspended for Thirty (30) Days from associating with any NASD member in a principal or supervisory capacity, except that this suspension shall not prohibit Dempsey from training registered representatives of DLA.

It is ordered that SSH Securities, Inc. be censured and fined Ten Thousand (\$10,000) Dollars.

The sanctions imposed herein shall be effective on a date set by NASD staff.

SO ORDERED.

NASD

By: 
Samuel L. Israel
Director and Chief Counsel
Enforcement Department
on behalf of the Director of ODA, pursuant
to delegated authority