

**FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Enforcement,

v.

**Ellerd Bruce Tomte
General Securities Representative
(CRD No. 3195759)**

Respondent.

Disciplinary Proceeding No. E0420040478-01

Hearing Officer - SW

**ORDER ACCEPTING
OFFER OF SETTLEMENT**

February 29, 2008

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REGISTRATION & DISCLOSURE

INTRODUCTION

Disciplinary Proceeding No. E0420040478-01 was filed on November 9, 2007, by the Department of Enforcement (Enforcement) of the Financial Industry Regulatory Authority (FINRA). Ellerd B. Tomte (Tomte) submitted an Offer of Settlement (Offer) to Enforcement on February 28, 2008. Pursuant to NASD Rule 9270(e), the Enforcement and the National Adjudicatory Council (NAC), a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (ODA) have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to NASD Rule 9270(e)(3). The findings, conclusions and sanctions set forth in this Order are those stated in the Offer as accepted by the Department and approved by the NAC.

Under the terms of the Offer, Tomte has 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 FINRA, or to which FINRA is a party, to the entry of findings and violations consistent with the allegations of the Complaint, and to the imposition of

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the sanctions set forth below, and fully understands that this Order will become part of Tomte's permanent disciplinary record and may be considered in any future actions brought by FINRA.

BACKGROUND

From about September 20, 2000 to about September 1, 2004, Tomte was associated with FINRA member firm Moloney Securities Co., Inc. (Moloney) and registered with FINRA as a general securities representative.

From about September 1, 2004 through the present, Tomte has been associated with FINRA member firm InterSecurities, Inc. (ISI) and registered with FINRA as a general securities representative. Accordingly, FINRA retains jurisdiction over this disciplinary proceeding.

FINDINGS AND CONCLUSIONS

Tomte agreed to charge customers R.&A.J. \$65 an hour for his financial services, instead of commissions. Tomte, in bad faith, violated that agreement with R.&A.J. and charged them commissions for his financial services, in violation of NASD Conduct Rule 2110. Tomte also sent correspondence to R.&A.J. which was not approved by his firm and which, among other things, contained exaggerated or misleading claims and lacked balance, in violation of NASD Conduct Rules 2210 and 2110.

FIRST CAUSE OF COMPLAINT

Unethical Conduct **NASD Conduct Rule 2110**

In or about October 2003, Tomte began having discussions with customers R.&A.J. about servicing their securities accounts. R.&A.J. were, at that time, interviewing several registered representatives to service their securities accounts. One of R.&A.J.'s requirements was that the registered representative they chose had to agree to charge them an hourly rate instead of

commissions. R.&A.J. conveyed this requirement to Tomte, at the outset of their discussions with him.

Tomte understood from his early discussions with R.&A.J. that they wanted to pay him by the hour. For instance, in a letter dated October 24, 2003 to R.&A.J., Tomte stated: "If you are more comfortable in (sic) an hourly basis, that is fine with me." Tomte followed that letter up with another letter to R.&A.J., dated December 12, 2003, in which he stated: "We can set up a fee arrangement, \$65 per hour, so you can know exactly what you are paying me and see a direct benefit from the financial resources at my disposal."

Tomte subsequently sent another letter dated January 19, 2004 to R.&A.J. The letter stated, in part: "In summary, this agreement shows that I will bill you the hourly rate and you will not be charged any commissions on securities through the accounts with me."

The letter dated January 19, 2004, attached a document with the following headings:

"MOLONEY SEC. CO., INC. dba MOSECO ASSET MANAGEMENT ...

DISCRETIONARY INVESTMENT ADVISORY AGREEMENT" (the Agreement)

MOSECO Asset Management was the registered investment advisor affiliate of Moloney.

The Agreement set forth the terms of the relationship between R.&A.J. and Tomte. Paragraph IV of the Agreement was entitled "Fees and compensation of MOSECO," and included a commission schedule for financial services. The commission schedule was crossed out, and below it the following terms appeared: "Effective Fee at inception \$65.00 per hour. MOSECO/Client initial __/__."

On or about January 26, 2004, R.&A.J. and Tomte signed the Agreement. R.&A.J. also initialed the above-referenced provision, referencing fees.

Consistent with the terms of the Agreement, and the hourly arrangement agreed upon by Tomte and R.&A.J., Tomte submitted to Moloney a form entitled "OUTSIDE ACTIVITIES – PRIOR APPROVAL REQUIRED." In response to the entry "Describe the nature of the proposed activity," Tomte handwrote: "Agreed to charge customer (sic) hourly until transfer complete and accounts re-positioned." In response to the entry "The amount of compensation involved (if applicable)," Tomte handwrote: "\$65.00." Tomte signed this form and dated it February 2, 2004.

Moloney, however, never approved the hourly arrangement between Tomte and R.&A.J. Tomte never conveyed to R.&A.J. that Moloney had not approved of the hourly arrangement.

Believing that Tomte had obtained any necessary approvals from Moloney, R.&A.J., in or about February 2004, moved their securities accounts to Moloney.

Tomte began recommending and executing transactions in R.&A.J.'s securities accounts at Moloney in or about February 2004. Tomte recommended and executed transactions in R.&A.J.'s Moloney securities accounts through and including about July 2004.

Contrary to the hourly rate contained in the Agreement between R.&A.J. and Tomte, Tomte received commissions for the transactions he recommended and executed in R.&A.J.'s Moloney securities accounts. The transactions recommended and executed by Tomte resulted in gross commissions of about \$28,868.23. Tomte's payout on these transactions was about \$23,723.02.

Tomte terminated his association with Moloney in or about September 2004. From February 2004 until September 2004, R.&A.J. believed that Tomte was working under the hourly rate they had agreed to, and as set forth in the Agreement. In furtherance of the belief that the Agreement remained in effect, R.&A.J. sent Tomte correspondence dated September 13, 2004,

that stated: "Effective immediately, we are terminating our *Discretionary Investment Advisory Agreement* with you."

From February 2004 until Tomte left Moloney in September 2004, R.&A.J repeatedly requested that Tomte give them an accounting of the hours he had worked on their Moloney securities accounts, and the commensurate amount of money they owed him. Tomte would not, and did not, provide them with any accounting. Instead, Tomte gave them various excuses regarding why he could not provide such details or figures at the time of R.&A.J.'s requests.

Through this conduct, Tomte continued to cause R.&A.J. to believe that they were being charged \$65 an hour for his financial services, and that they were not being charged commissions.

In or about late September 2004, after Tomte had terminated his association with Moloney, R.&A.J. met with another Moloney representative. At that meeting R.&A.J. learned, for the first time, that they had been charged commissions for the transactions Tomte had recommended and purchased for their Moloney accounts.

Tomte's conduct set forth herein was in bad faith, and was unethical.

Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 by Tomte.

SECOND CAUSE OF COMPLAINT

Violative Communications with the Public **NASD Conduct Rule 2210 and NASD Conduct Rule 2110**

On October 24, 2003, and again on December 12, 2003, Tomte sent correspondence to R.&A.J. Tomte did not submit the correspondence to Moloney for approval, nor did he receive approval from Moloney to send the correspondence.

The following statements from the October 24, 2003 correspondence contain exaggerated or unwarranted statements or claims, in violation of NASD Conduct Rule 2210(d)(1)(B):

a. "Morningstar is currently re-vamping their star system as the 'One Star' ratings have out-performed their 'Four and Five Star' rated funds" is, among other things, exaggerated and unwarranted;

b. "Your mutual funds should have provided a similar gain" is, among other things, exaggerated and unwarranted;

c. "Also, 'No-Load Fund' is a very 'misleading' statement" is, among other things, an exaggerated and unwarranted claim;

d. "Many No Load funds spend huge amounts on daily advertising to locate investors. Therefore, their operating costs can be 2 to 3 times that of other funds, plus they generally tend to have investors deposit and then have second thoughts and take funds back out," is, among other things, an exaggerated and potentially misleading characterization of any number of unnamed no-load mutual funds.

The following statement from the October 24, 2003 correspondence contains, among other things, prohibited predictions or projections, in violation of NASD Conduct Rule 2210(d)(1)(D) (formerly Rule 2210(d)(2)(N)): "... your IRA/Pension accounts will double over the next 10 years even if you only assume 7% average annual growth."

The following statement from the December 12, 2003 correspondence contains, among other things, exaggerated or unwarranted statements or claims, in violation of NASD Conduct Rule 2210(d)(1)(B): "Front Load Fees are the smallest fee for most Mutual Funds, (sic) many have annual expense and management fees that exceed 5% per year," is without basis and an unwarranted claim.

The following statement from the December 12, 2003 correspondence lacks balance and does not contain all material facts, in violation of NASD Conduct Rule 2210(d)(1)(A): "... Unit Trusts can eliminate not only the Front Load Fees, but have \$-0- in annual administrative costs" is, among other things, not fair and balanced, and does not provide R.&A.J. with all material facts in deciding whether to invest in a Unit Investment Trust.

Each of the foregoing items violates NASD Conduct Rule 2210 and, by extension, NASD Conduct Rule 2110.

THIRD CAUSE OF COMPLAINT

Unethical Conduct **NASD Conduct Rule 2110**

As noted above, Tomte did not submit the October 24, 2003 and December 12, 2003 correspondence to Moloney for approval. This contravened Moloney's written supervisory procedures. Additionally, Tomte sent the January 19, 2004 correspondence to R.&A.J. This, too, was not submitted to Moloney for approval, and also contravened Moloney's written supervisory procedures.

Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 by Tomte.

Based on the foregoing, Respondent violated NASD Conduct Rules 2210 and 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 Tomte from any future misconduct, and represent a proper discharge by FINRA, of its regulatory responsibility under the Securities Exchange Act of 1934.

SANCTIONS

It is ordered that Respondent be suspended for four months from association with any FINRA member in any capacity and fined \$5,000.

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

SO ORDERED.

FINRA

**Signed on behalf of the Director of ODA,
by delegated authority**



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